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**ADDENDA**  
**TO**  
**HARRISON'S DIGEST,**  
**FORMING VOLUME IV.**







**ADDENDA**  
TO THE  
**ANALYTICAL DIGEST**  
OF  
**ALL THE REPORTED CASES**  
DETERMINED IN  
**The House of Lords,**  
**THE SEVERAL COURTS OF COMMON LAW,**  
IN BANC AND AT NISI PRIUS;  
AND  
**The Court of Bankruptcy,**  
AND ALSO  
**THE CROWN CASES RESERVED,**  
FROM  
MICH. TERM, 1834, TO EASTER TERM, 1836.  
TOGETHER WITH  
A FULL SELECTION OF EQUITY CASES,  
AND  
THE MANUSCRIPT CASES FROM THE BEST MODERN TREATISES NOT  
ELSEWHERE REPORTED.

—◆—  
BY **S. B. HARRISON, Esq.**  
OF THE MIDDLE TEMPLE, BARRISTER AT LAW.  
—◆—

**First American Edition.**

TO WHICH IS ADDED  
THE ANALYTICAL DIGEST OF ALL THE REPORTS OF CASES DECIDED IN THE  
COURTS OF COMMON LAW AND EQUITY, OF APPEAL AND NISI PRIUS,  
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1837, 1838, AND 1839.

—◆—  
BY **HENRY JEREMY, Esq.**  
BARRISTER AT LAW.  
—◆—

CAREFULLY ARRANGED BY  
A MEMBER OF THE PHILADELPHIA BAR.

—◆—  
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# ADDENDA.

\* \* The figures at the extremity of the line, refer to the page of the body of the Work where the Cases would have been placed.

## ACCIDENT.

To trespass for unmooring plaintiff's barge, the defendant, having pleaded merely the general issue, cannot give in evidence that he removed it from a situation of danger by the plaintiff's authority; or that, being frozen to the barge of a third person, which the defendant was authorized to remove, the one was inevitably unmoored with the other, and that they were brought together to a place of safety. *Millman v. Dolwell*, 2 Camp. 378—Ellenborough.

In trespass for running with a cart against plaintiff's chaise, the defendant cannot give in evidence, under not guilty, that the cart and the chaise were travelling on the high road in opposite directions, and that the collision between them happened from the negligence of the plaintiff, or from inevitable accident. *Knapp v. Salisbury*, 2 Camp. 500—Ellenborough. 1

If an injury be occasioned partly by the negligence of the plaintiff, and partly by that of the defendant, the plaintiff cannot maintain any action. *Williams v. Holland*, 6 C. & P. 23; 3 M. & Scott, 540; 10 Bing. 112. 1

## ACCORD AND SATISFACTION.

A declaration by an executrix stated, that, after the death of the testator, to wit, on the 1st of October, 1832, the defendant was indebted to the plaintiff, as executrix, in 11*l.*, for goods sold and delivered by the testator in his life time to the defendant, and in consideration thereof, and that plaintiff, as executrix, had agreed with the defendant to accept a suit of clothes, to be made by him for J. R., the plaintiff's servant, in part discharge of the debt, (the plaintiff being indebted to J. R. in a greater amount for wages, and J. R. having agreed and being willing to receive the clothes in part payment), and had also agreed to forbear and give the defendant a reasonable time for the payment of the remainder of the debt, the defendant undertook and promised the plaintiff, as executrix, to make and provide the said suit of clothes for J. R. within a reasonable time,

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and to pay her the remainder of the debt after a reasonable time for such forbearance. The declaration then averred, that, though a reasonable time had elapsed, &c., the defendant had not made or provided the clothes, or paid the residue of the debt. Plea, that the debt in consideration of which the said promise was made, did not, nor did any part thereof, accrue to the testator within six years next before the commencement of the suit, and that such promise was by words only. On special demurrer:—Held, that the agreement stated in the declaration was only an agreement for an accord, and did not extinguish the original debt, which, therefore, was barred by the statute of limitations. *Reeves v. Hearne*, 1 Mees. & Wels. 323. 1

The lapse of twenty years from the time of making a contract to be performed in future, is not of itself evidence of a new contract averred to have been performed, and pleaded as an accord and satisfaction of the original contract. *Siboni v. Kirkman*, 1 Mees. & Wels. 418. 1

In an action of assumpsit, where the defendant pleaded accord and satisfaction, and the plaintiff replied, that the defendant did not pay the sum in satisfaction, nor did the plaintiff receive the said sum in satisfaction:—Held, upon demurrer, that the replication was not bad for multifariousness. *Webb v. Weatherby*, 1 Hodges, 39; 1 Scott, 477. 2

Where, in an action of debt, an agreement to accept 5*l.* in full discharge of the debt was given in evidence upon the plea of never indebted, the plaintiff being allowed to take a verdict for nominal damages, a new trial was refused. *Wright v. Skinner*, 4 Dowl. P. C. 741. 2

A plea to an action on a bill of exchange for 43*l.* by an indorsee against the acceptor, that, after the bill became due, the drawer gave the plaintiff his promissory note for 44*l.* in full satisfaction, and that the plaintiff accepted it in satisfaction, is a good answer to the action; and a replication that the note was not paid when due, is bad on demurrer. *Sard v. Rhodes*, 4 Dowl. P. C. 743; 1 Mees. & Wels. 153. 2



## ACTION.

*By and against whom.*—A foreign sovereign prince may sue in the court of Chancery here in his political capacity: *Spain (King) v. Hullett*, 1 Clark & Fin. 333; 1 Dow & Clark, 169. 4

But where he is defendant, he stands on the same footing with ordinary suitors as to the rules and practice of the court; and is bound, like them, to answer personally and upon oath. *Id.*

He has no privilege of putting in an answer by his agent, or personally without oath or signature. *Id.*

Even to a cross bill filed against him by the defendant to his original bill. *Id.*

Notwithstanding the provisions of the foreign enlistment act, 59 Geo. 3, c. 69, a British subject, who, in the service of a foreign state at peace with Great Britain, captures a British vessel which is lawfully condemned as prize for breaking blockade, is not liable to an action at the suit of the owner of the vessel. *Dobree v. Napier*, 2 Bing. N. R. 781. 4

*On Judgments.*—A certificate for execution during vacation, under 1 Will. 4, c. 7, s. 2, need not be noticed in a declaration on a judgment signed in vacation. *Engleheart v. Eyre*, 2 Nev. & M. 849; 5 B. & Adol. 66; 2 Dowl. P. C. 193. 6

In a declaration upon such a judgment, the judgment should be stated to be of the day on which it was actually obtained, and not alleged to be of the preceding term. *Id.*

Where a judgment is obtained in vacation, the *distringas* being of the first day of the following term, the record should be so framed as to show that the verdict preceded the judgment. *Id.*

But where on *nul tiel* record pleaded to debt on recognizance of bail, the *postea* shown to the court proved to be erroneous in this respect, leave was given to amend it, the defendants also having leave to plead *de novo*. *Id.*

Semble, that the court would have allowed the error in the declaration to be amended without permitting the defendants to plead again. *Id.*

It is no answer to an action of debt on a judgment, that the defendant had been taken under a writ of *ca. sa.* issued on the judgment, and detained in custody twenty days, if it appears that the defendant was by a judge's order let out of custody on certain terms. *M'Cornish or M'Cormick v. Melton*, 3 Dowl. P. C. 215; 1 C. M. & R. 525; 5 Tyr. 147. 6

*What destroys a Right of Action.*—Whatever constitutes an answer to the demand for which an action is brought, as against the plaintiff on the record, is a bar to the action, although brought for the benefit of others who have no mode of enforcing their claim except by suing in the name of the plaintiff. *Gibson v. Winter*, 2 Nev. & M. 737. 7

Where a plaintiff has been nonpromised in replevin, and he afterwards brings trespass for the same cause, the court will set aside the proceed-

ings in the second action on motion. *Liversidge v. Goode*, 2 Dowl. P. C. 141. 7

A written agreement to secure the amount of a simple contract debt, by a mortgage on certain lands, which was to be paid with interest by certain instalments, is no extinguishment or suspension of the right of action on the simple contract. *Allies v. Probyn*, 2 C. M. & R. 408; 4 Dowl. P. C. 153; 1 Gale, 255. 7

*Assumpsit for goods sold, &c.*—Plea, as to 9l. 15s. 9½d., that, after the making of the promise, and before the commencement of the suit, the defendant, at the plaintiff's request, drew, upon a piece of paper having a bill stamp upon it of 1s. 6d., an instrument, purporting to be a bill of exchange, without a drawer's name thereto, whereby the defendant was required to pay to such person, or his order, who should place his name thereto as drawer, 20l., two months after date, as for value received; which instrument the plaintiff requested the defendant, to accept towards payment and satisfaction of the said sum of 9l. 15s. 9½d., and for the plaintiff's accommodation as to the rest; and for the plaintiff accepted and received the bill in satisfaction of the sum of 9l. 15s. 9½d., and which bill was not due at the commencement of the suit. Non assumpsit to the residue.—Replication, that the bill remained unnegotiated in the hands of the plaintiff, without any drawer's name to it, and unpaid:—Held, on demurrer, that under the circumstances alleged in the plea, the plaintiff's right to sue for the original debt was suspended until the expiration of the two months, and of the period of the instrument's becoming due and being dishonored. *Simon v. Lloyd*, 2 C. M. & R. 187. 7

*Former Recovery.*—The rule of Hil. T. 4 Will. 4, which requires the party who pleads a plea of judgment recovered, to set out its date, &c. in the margin of the plea, does not apply to a plea of judgment recovered against an executor. *Power v. Izod*, 1 Bing. N. R. 304; 1 Scott, 119. 9

*Another Suit depending.*—If a defendant nonprosses a plaintiff in a particular action, he cannot afterwards pleaded its pendency in answer to an action for the same cause in another court. *Pepper v. Whalley*, 3 Dowl. P. C. 579. 10

*Notice of Action.*—A magistrate is not entitled to notice of action under 24 Geo. 2, c. 44, s. 1, for a trespass committed by him, where, from the circumstances, the jury think he was not acting *bona fide* under an impression that what he did was within the scope of his duty as a magistrate. *James v. Saunders*, 4 M. & Scott, 316; 10 Bing. 429. 10

A disturbance took place in C. upon the liberation of a prisoner. Defendant, a magistrate,



seized plaintiff because he was going towards the prison. Plaintiff was not concerned in the disturbance, which was going on out of sight of the place where he was seized by defendant:—Held, that defendant was not entitled to notice of an action of trespass brought against him by plaintiff for the assault. *Id.*

Notice of action to officer of Southwark Court of Requests. *Cook v. Clark*, 3 M. & Scott, 371; 10 Bing. 19; 2 Dowl. P. C. 732. 12

By a local act for paving, lighting, watching, and improving the town of L., certain commissioners were appointed, and, by s. 11, were authorized to appoint, by writing, a treasurer and clerk, and also all such surveyors, scavengers, rakers, &c. &c., beadle, constables, watchmen, and other officers, deputies, or assistants, for the execution of the purposes of the act, as they should from time to time think proper. By s. 77, the commissioners were also empowered to appoint such a number of able-bodied men as they should think proper, to be employed as watchmen during the night time; and it was enacted, that it should be lawful for such watchmen, and they were thereby required in their respective stations, to apprehend and secure all malefactors, &c. &c., and all suspected persons who should be found wandering or misbehaving themselves during the hours of keeping watch. By s. 78, the watchmen were to be sworn in as constables, and were to be invested with the like powers and authorities, &c. &c., as any constables were invested with or enjoyed by law. By s. 163, it was enacted, that no action, suit, or information should be commenced against any person or persons for any thing done or to be done under or by virtue of that act, until one calendar month's notice thereof should have been first given in writing to the clerk of the commissioners of the cause of action, nor at any time whatsoever after sufficient satisfaction or tender of amends should have been made to the party aggrieved. The act contained the usual power of pleading the general issue, and giving the special matter in evidence, and the act was to be deemed a public act:—Held, first, that the section requiring notice to be given was not confined to acts done, or directed to be done, by the commissioners, but applied to acts done by constables and watchmen; secondly, that evidence of the defendants acting as constables and watchmen under the commissioners in the town, was *prima facie* sufficient to entitle them to the protection of the above section, without proof of their appointment; and, thirdly, that where the watchmen had reasonable ground of suspicion, that felony had been committed by the plaintiff, and went to the plaintiff's house to apprehend him for such felony, but beat him, and used much more violence than was necessary for effecting his apprehension, they were protected by the section requiring notice. *Butler v. Ford*, 1 C. & M. 662; 3 Tyr. 677. 12

A local act directed that the guardians, &c. of a parish should be sued in the name of their vestry clerk, and required notice to be given of any action for any thing done in pursuance of the

act. Notice is not necessary in an action for work and labor. The direction only applies to actions of tort. *Fletcher v. Greenwood*, 4 Dowl. P. C. 166; 1 Gale, 34. 12

If a person who has ill-treated a horse be apprehended by one who is neither the owner of the horse nor a peace officer, the person so apprehending is not entitled to notice of action under the 19th sect. of the stat. 5 & 6 Will. 4, c. 59. *Hopkins v. Crowe*, 7 C. & P. 373—*Denman*. 12

In a notice of action against a magistrate, an indorsement by an attorney of the place of his office is an indorsement of his "place of abode" within the meaning of the stat. 24 Geo. 2, c. 44. *Roberts v. Williams*, 4 Dowl. P. C. 483; 5 Tyr. 583; 1 Gale, 315.

Semble, also, that the place of actual residence would be sufficient. *Id.* 13

*Parties.*—Where it appears upon an instrument that a promise by two contractors is intended to be joint, it may be treated as such although the promise be in terms several only. *Lee v. Nixon*, 3 Nev. & M. 441; 1 Adol. & Ellis, 201. 13

Where A., as farmer and renter of certain tolls, and B. as his surety, severally promise, undertake and agree to and with the lessors, that A., his executors, &c., shall pay a certain yearly rent; A. and B. cannot be sued jointly upon default by A. to pay the rent. *Id.*

In an action for work and labor brought against A., B., and C. jointly, A. suffered judgment to go by default, and B. and C. pleaded non assumpsit:—Held, that on this plea it was competent to B. and C. to avail themselves of the defence that too many defendants had been joined in the action and that if they succeeded on that plea the plaintiff must fail as to all the defendants, notwithstanding that A. had admitted the joint contract on the record. *Eliot v. Morgan*, 7 C. & P. 334—*Coleridge*. 14

*Form of Action.*—Assumpsit for money lent. Pleas, non assumpsit and a bottomry bond accepted in satisfaction of the debt. Both issues having been found for the plaintiff, the court refused a new trial which was asked for, on the ground that a bond having been given, the implied promise to pay did not arise. *Weston v. Foster*, 2 Bing. N. R. 693. 11

Election of trespass or case for an injury occasioned by carelessness. *Williams v. Holland*, 3 M. & Scott, 540; 6 C. & P. 23; 10 Bing. 112. 17

Election of case or trespass for excessive distress. *Holland v. Bird*, 3 M. & Scott, 363; 10 Bing. 15. 18

An action for unreasonable and excessive distress for poor-rates, alleged and pretended to be due, is properly laid in case. *Sturch v. Clarke*, 1 Nev. & M. 671. 18

In such an action malice need not be proved. *Id.*



Case will lie against a landlord who, having distrained goods sufficient to pay his rent, abandons the distress, and afterwards makes a second distress for the same rent. *Smith v. Goodwin*, 2 Nev. & M. 114; 4 B. & Adol. 413. 18

Semble, that trespass would also lie. Id.

A declaration (in a plea of trespass on the case) stated, that the defendant, intending to injure the plaintiff in his good name, and to cause his dwelling-house to be searched for stolen goods, and to procure him to be imprisoned, went before a magistrate, and falsely, maliciously, and without probable cause, charged that certain specified goods of the defendant had been feloniously stolen, and that he suspected that the said goods were concealed in the plaintiff's dwelling-house; and upon such charge, the defendant procured the magistrate to grant a warrant authorizing a constable, with necessary assistance, to enter the plaintiff's house to search for the said goods; and the defendant, with other persons, caused and procured the dwelling-house of the plaintiff to be searched and rumaged for the said goods by such persons, and the door of such house and a pantry there to be broken to pieces, and the plaintiff and his family to be disturbed in the possession, and his goods to be carried away. The general conclusion was, that, by means of the premises, the plaintiff was injured in his good name and trade, put to expense, and hindered in his business. A count in trover was added:—Held, on general demurrer, by Taunton and Patteson, (Littledale, J., dissentiente), that the acts of violence alleged to have been committed in the house appeared sufficiently by the declaration to have been acts done in pursuance of the warrant, and in consequence of the charge made by the defendant, and that they were stated as mere matter of aggravation; and, consequently, that the whole count containing this statement was in case. *Hensworth v. Fowkes*, 4 B. & Adol. 449. 18

Defendant having charged the plaintiff with felony, the plaintiff was taken up for it under a justice's warrant. At the hearing before the justice, the plaintiff was discharged on his promise to appear again in a week, upon which the defendant said he had another charge of forgery against him. The plaintiff was stopped by an officer, and again put to the bar, but dismissed on a similar promise:—Held, that the plaintiff's remedy against the defendant was in case, and not in trespass. *Barber v. Rollinson*, 1 C. & M. 330; 3 Tyr. 267. 18

If A., having no right to apprehend B., direct a police officer to take B., and he do so, B. may maintain an action for false imprisonment against A.; but if A. merely make a statement to the officer, leaving it to him to act or not as he thinks proper, and the officer then take A., B.'s remedy against A. is (if any) by action on the case. *Hopkins v. Crowe*, 7 C. & P. 373—Denman. 18

A., being in the custody of the marshal of the King's Bench prison, was brought up to that court upon an order of court, and charged with an attachment for contempt; upon which attachment he was afterwards detained in custody:—Held,

that trespass was maintainable against the party who caused the order to be served on the marshal; diss. Lord Abinger, C. B. *Bryant v. Clutton*, 1 Mees. & Wels. 408. 18

If the light of the plaintiff's windows is obstructed by the defendant building on a party wall, half of which belongs to the plaintiff and half to the defendant, the plaintiff may maintain either trespass or case. *Wells v. Ody*, 7 C. & P. 410—Parke. 19

A., before he entered the police force, sent a certificate of his good character, signed by the colonel of the 8th Hussars, to the commissioners of police. On his dismissal from that force, the certificate was returned to the plaintiff, inclosed in a letter signed by the defendant, the certificate being stamped with the words "dismissed the police service:—Held, that for stamping these words trespass was not the proper form of action; and also that this was not evidence to go to the jury that it was done by the defendant or by his order. *Taylor v. Rowan*, 7 C. & P. 70—Abinger. 19

*Abatement by Death.*—At the Nisi Prius sittings in the term, the practice is to make up the postea as of the day on which the cause is tried. The death of the defendant after the first Nisi Prius day in the term, but before the day as of which the postea appears upon the record to be made up, abates the suit. *Halliday v. Saunderson*, 1 Alcock & Napier, 147, (*Irish*). 19

Quere whether in such a case, where the plaintiff had been in all respects ready for trial on the first Nisi Prius day, and a postponement is occasioned by the direction of the court, the postea might not be made up as of that first day? Id.

Where a consent is entered into and made a rule of court for a postponement of a trial upon payment of costs, the subsequent death of the party to whom the costs are payable does not abate the proceedings, so as to deprive his personal representative of the usual remedies by action or attachment for enforcing the payment of the costs. *Brownrigg v. Hamilton*, 1 Alcock & Napier, 170, (*Irish*). 19

There must first be an order for the payment of the costs, and a regular demand made on behalf of the personal representative, before an attachment can be issued. Id.

Where a defendant died in the course of the sittings in term, the court refused to allow the cause to be tried on the last day of term to which the sittings had been adjourned; nor would they interfere, by appointing for the trial another day out of term, and entering the verdict as of the sittings in the term. *Johnson v. Budge*, 1 C. M. & R. 647; 5 Tyr. 197; 3 Dowl. P. C. 207. 19

The court will not stay the postea in the hands of the associate, after verdict for the plaintiff, on showing a strong probability that the plaintiff was dead before the trial; such facts must be shown as would be evidence of the death before



a jury. *Johnson v. Hamilton*, 1 Mees. & Wels. 149; 4 Dowl. P. C. 762; 1 Tyr. & G. 45. 19

Where it was to be inferred from circumstances that a ship in which the plaintiff had embarked was lost at sea before the assizes at which a verdict was recovered in his name, though it did not appear positively that the plaintiff had perished: the court granted a rule for continuing the postea in the hands of the associate, with stay of execution. *Id.*

**Abatement by Marriage.**—If the plaintiff in replevin takes husband after plaint, and before the removal of it by re. fa. lo., the defendant may plead the fact in abatement, though he himself sued out the re. fa. lo. *Hollis v. Freer*, 2 Bing. N. R. 719.

### AFFIDAVIT.

**Generally.**—By the 5 & 6 Will. 4, c. 62, s. 13, justices and other persons are prohibited from receiving any affidavit touching any matter or thing whereof such justice or other person has not jurisdiction or cognizance by some statute: provided that it is not to extend to affidavits which may be required by the laws of any foreign country to give validity to instruments in writing designed to be used in such foreign countries.

Appearing to oppose a rule does not waive an objection to the form of an affidavit upon which the rule was obtained, such as the omission of the Christian name of one of the parties in the title of the cause. *Clothier v. Eas*, 4 M. & Scott, 216; 2 Dowl. P. C. 731; *S. P. Barham v. Lee*, 2 Dowl. P. C. 779; 4 M. & Scott, 327. 2

**How intitled.**—In intituling an affidavit, the parties should be described as "plaintiff" and "defendant." *Harris v. Griffiths*, 4 Dowl. P. C. 289; 1 Har. & Woll. 515. 22

The Christian names of the parties in a cause must be written at length. *Masters v. Carter*, 4 Dowl. P. C. 577. 22

In intituling an affidavit of service of a rule to compute, the Christian name of the plaintiff as well as of the defendant must be introduced. *Anderson v. Baker*, 3 Dowl. P. C. 107. 22

Affidavits must be intitled "A. v. B." and not "B. at suit of A." *Richards v. Isaac*, 2 Dowl. P. C. 710; 1 C. M. & R. 136; 4 Tyr. 863. 22

An affidavit intituled "G. S. v. W. C. the elder," sued as "W. C.," the cause being "G. S. v. W. C.," was rejected, as being badly intituled. *Shrimpton v. Carter*, 3 Dowl. P. C. 648. 22

"Phillips, assignee, &c.," is an irregular mode of describing a plaintiff. *Phillips v. Hutchinson*, 3 Dowl. P. C. 20; *S. P. Casley v. Smith*, 4 Dowl. P. C. 477. 22

The court declined to act upon an affidavit which was intituled "A. v. B.," executor, &c., without specifying the party to whom the defendant was executor. *Clarke v. Martin*, 3 Dowl. P. C. 222. 22

The addition of "widow" to the name of a party in the title of a cause is not necessary. *Miller, dem., v. Miller, ten., Scott*, 117. 22

The court cannot entertain an objection patent on a proceeding attached to the affidavit bringing that objection before the court, if from wrong intituling the affidavit cannot be read. *Harris v. Mathews*, 4 Dowl. P. C. 608. 22

Where a rule is obtained in two causes, the affidavits must be intituled in both of them, though the plaintiff and defendant be the same in both. *Corry v. Wharton*, 2 Scott, 436. 22

Where a defendant, being in custody under civil process out of an inferior court, is brought up by habeas corpus, and committed to the custody of the marshal, affidavits filed in the Court of King's Bench to ground an application to be discharged out of custody, may be intituled in the cause. *Perrin v. West*, 5 Nev. & M. 291; 1 Har. & Woll. 401; 3 Adol. & Ellis, 405. 22

If there is a defect in intituling affidavits produced on showing cause against a rule, the court will allow the rule to be enlarged, in order that the title may be amended. *Anderson v. Ell*, 3 Dowl. P. C. 73. 22

If upon an objection being taken to an affidavit, that it is not intituled in any cause, and the party does intitule it, that is not such an alteration as would make a new stamp necessary. *Prince v. Nicholson*, 1 Marsh. 70; 5 Taunt. 333. 22

**Certainty.**—An affidavit with the word "said" instead of "saith" is insufficient. *Howorth v. Hubbersty*, 3 Dowl. P. C. 455; 5 Tyr. 391; *S. P. Harwood v.*, 1 Gale, 47. 23

An affidavit in which the word "oath" was omitted was held insufficient. *Oliver v. Price*, 3 Dowl. P. C. 281. 23

An affidavit of service must swear to the service of the "rule annexed," and not merely of the "rule in this cause." *Fidlett v. Bolton*, 4 Dowl. P. C. 282. 23

**Deponent's Name and Addition.**—An affidavit made by a defendant in a cause cannot be read, unless his addition is inserted. *Lawson v. Case*, 2 Dowl. P. C. 40; 3 Tyr. 489; 1 C. & M. 481. 23

Afterwards held, that where a defendant makes an affidavit in a cause, his addition need not be given. *Jackson v. Chard*, 2 Dowl. P. C. 469. 23

A deponent complies sufficiently with Reg. Gen. H. T. 2 Will. 4, s. 5, by describing himself as "late clerk to," &c. *Simpson v. Drummond*, 2 Dowl. P. C. 473. 23

The residence of an attorney's clerk need not be given in an affidavit made by him jointly with his master, in which the residence of the latter is stated. *Bottomley v. Belchamber*, 4 Dowl. P. C. 26; 1 Har. & Woll. 362. 23

"Of Kennington, in the county of Surrey," is



not an insufficient description. *Wilton v. Chambers*, 1 Har. & Woll. 116. 23

In an affidavit used in showing cause against a rule, the deponent was described as of "Lawrence Poutney, in the city of London," without stating whether of parish, place, or lane:—Held sufficient. *Miller, dem., v. Miller, ten.*, 2 Scott, 117. 23

A prisoner defendant need not comply with 1 Reg. Gen. H. T. 2 Will. 4, s. 4, by stating his residence in an affidavit. *Sharp v. Johnson*, 4 Dowl. P. C. 324; 2 Scott, 407; 2 Bing. N. R. 246; 1 Hodges, 298. 23

It is a sufficient compliance with the rule to describe himself as having been arrested, and to be a prisoner in the sheriff's custody. *Jervis v. Jones*, 4 Dowl. P. C. 610. 23

The description of a person in an affidavit as an "assessor," is insufficient. *Nathan v. Cohen*, 3 Dowl. P. C. 370; 1 Har. & Woll. 107. 23

If an affidavit be joint, an objection to the description of one of the deponents does not render the statements of the others inadmissible. *Id.* 23

Where, in an affidavit to found a motion, the addition of a deponent is omitted, the court will not inquire whether the facts sworn to by a co-deponent are sufficient to support the application. *Rex v. Carnarvon (Justices)*, 5 Nev. & M. 364. 23

*Affidavit of Merits.*—An affidavit of merits, that the defendant has a good and sufficient defence on the merits, without words applying it to the particular action, is insufficient. *Tate v. Bodfield*, 3 Dowl. P. C. 218. 23

An affidavit, in support of a rule for setting aside a judgment signed by the plaintiff for want of a plea, alleged that the defendants had merits, and a good cause of defence to the action:—Held insufficient. *Lane v. Isaacs*, 3 Dowl. P. C. 652. 23

The affidavit must express that the defendant hath a good defence to the action on the merits thereof. *Id.*

An affidavit of merits is not sufficient, which states that both the defendant and his attorney "are advised and believe" that there is a good defence on the merits. *Worthington v. —*, 2 C. M. & R. 315. 23

Semble, that an affidavit of merits made by the defendant's attorney as to his belief from instructions received, is insufficient when the defendant himself might make the affidavit. *Brown v. Austin*, 4 Dowl. P. C. 161. 23

An affidavit to set aside a regular judgment, made by the London agent to the country attorney, and stating that the deponent believed, from the instructions received from the country attorney, that the defendant had a good defence to the action on the merits:—Held sufficient. *Schofield v. Huggins*, 3 Dowl. P. C. 427. 23

Where a motion is made by a defendant to set aside proceedings on an affidavit of merits, and

payment of costs, the plaintiff is not entitled to go into a long statement in his affidavit to show that the defendant has no merits, and, if he does, the court will order the master not to allow costs. *Heane v. Battersby*, 3 Dowl. P. C. 213. 23

Where a defendant moves to set aside proceedings on the ground of irregularity,—as for not giving notice of the execution of a writ of inquiry,—it is not necessary to swear to merits. *Williams v. Williams*, 2 C. & M. 473. 23

*Libellous Matter.*—Where libellous and impertinent matter was introduced into an affidavit in support of a rule, the court deprived the party of the costs of the rule, to which otherwise he would have been entitled. *Thompson v. Dicas*, 2 Dowl. P. C. 93. 24

*Before whom and where Sworn.*—The chief justice's clerk's list of commissioners is conclusive evidence as to whether a particular person is a commissioner of the English Court of Common Pleas, pursuant to the 3 & 4 Will. 4, c. 42, s. 42, for taking affidavits. *Sharp v. Johnson*, 2 Bing. N. R. 246; 2 Scott, 407; 4 Dowl. P. C. 324; 1 Hodges, 298. 24

If an affidavit in a cause in an English court be sworn in Ireland before one who is not a commissioner of the English courts, the signature of such person must be verified. *Id.*

Quære, whether, since 3 & 4 Will. 4, c. 42, s. 42, affidavits made in Ireland are not required to be sworn before a commissioner who is appointed by the English judges under that statute? *Id.*

Affidavits on showing cause are in time if sworn at any time before cause is shown. *Braine v. Hunt*, 2 Dowl. P. C. 391. 24

Affidavits may be used in showing cause, though sworn after the time named for showing cause in the rule. *Hicks v. Marreco*, 3 Tyr. 216. 24

It is no objection to an affidavit, that it is sworn before the attorney in the cause, unless it expressly appears that he was the attorney at the time the affidavit was sworn. *Beaumont v. Dean*, 4 Dowl. P. C. 354. 24

Upon a reference to an arbitrator, "the costs were to abide the event, and he was to say by whom and when to be paid:" he awarded a sum to the plaintiff, and divided the costs between him and the defendant. The plaintiff, treating the award as void, threatening to issue execution for the debt and costs, upon which the defendant prepared affidavits of the facts, (before judgment was signed), and after it was signed, another affidavit of that fact, and moved upon all the affidavits to set aside the judgment:—Held, that the first affidavits were good, though sworn before judgment was signed. *Read v. Massie*, 4 Dowl. P. C. 681. 24

*Jurat.*—Where the names of the deponents are omitted in the jurat through the inadvertence of the judge's clerk, it will be amended by the direction of the judge. *Ex parte Smith*, 2 Dowl. P. C. 607. 25



If the words "before me," in the jurat of an affidavit, are struck out, and the words "by the court" introduced, it is not an objection. *Austin v. Grange*, 4 Dowl. P. C. 576. 25

The court set aside a judge's order for better particulars of set off, on the ground that the plaintiff's attorney's clerk had, without authority, altered the date of the jurat of the affidavit on which the order had been obtained. *Finnerty v. Smith*, 1 Bing. N. R. 649; 1 Scott, 743; 1 Hodges, 158. 25

The alteration of a figure in the date in the jurat of an affidavit, by writing one figure over another, does not constitute an erasure or interlineation within the meaning of the rule. *Jacob v. Hunsate*, 3 Dowl. P. C. 476. 25

A line drawn through two lines in the jurat of an affidavit, leaving them, however, perfectly legible, is an erasure within the rule of court. Mich. term, 37 Geo. 3, and vitiates the affidavit, though the omission or retention of the words would not vary the sense. *Williams v. Clough*, 1 Adol. & Ellis, 376. 25

An affidavit signed by the deponent in some foreign character, which was illegible, may be read in court. *Nathan v. Cohen*, 3 Dowl. P. C. 378; 1 Har. & Woll. 107. 25

If an illiterate person is sworn in court, or before a commissioner, the fact of the affidavit being read over to him, and his understanding it, must be stated in the jurat. *Haynes v. Powell*, 3 Dowl. P. C. 599. 25

An affidavit of a marksman, which expresses in the jurat that A. B. had been first sworn to the fact that he had read over and explained the affidavit to the marksman, and that he understood it, is insufficient; the officer himself ought to explain it. *Rex v. Anthony*, 4 Dowl. P. C. 765. 25

*How filed.*—All affidavits used in court must be filed. *Ex parte Elderton*, 2 Dowl. P. C. 569. 25

Affidavits used to ground a motion ought always to be filed, whether the motion is granted or refused. *Ex parte Dicaa*, 2 Dowl. P. C. 92. 25

Affidavits to show cause against an enlarged rule must be filed a week before the term to which it is enlarged. *Gilson v. Carr*, 4 Dowl. P. C. 618. 25

Where a rule was enlarged to a subsequent term, on the usual terms of filing the affidavits a week before the term, the court refused to hear affidavits filed afterwards. *Turner v. Unwin*, 1 Har. & Woll. 186. 25

Affidavits will not be taken off the file. *Plant v. Butterworth*, 5 Tyr. 183. 25

*How used.*—Affidavits sworn in opposition to one, on which the allegations in them may be immaterial, cannot be used without re-swearing, in opposition to another rule, on which they may become material, although the same question might be intended to be raised on the first rule, which was actually raised on the second.

*Quelly v. Boucher*, 3 Dowl. P. C. 107; 1 Scott, 283. 26

An affidavit is not considered stale till it is a year old. *Ramsden v. Maugham*, 4 Dowl. P. C. 403; 2 C. M. & R. 634; 1 Tyr. & G. 40. 26

Where a rule has been obtained on an affidavit which is defective, in not having a proper jurat, the party moving cannot, when cause is shown, and the objection taken, remove the effect of it, by producing a fresh affidavit similar to the first, with a proper jurat; the proper way is to reswear the original affidavit, and the court will enlarge the rule for that purpose, or allow the new affidavit to be filed. *Goodricke v. Turley*, 4 Dowl. P. C. 392; 2 C. M. & R. 636; 1 Tyr. & G. 146. 26

### AGENT AND PRINCIPAL.

A stock broker is a broker within 6 Anne, c. 16, and must be admitted by the lord mayor and aldermen. *Clark v. Powell*, 1 Nev. & M. 432; 4 B. & Adol. 846. 27

The plaintiff, the elder brother and creditor of an intestate, being in possession of the goods of the intestate under a bill of sale, said that he should not insist on his bill of sale, but that he should divide the goods with the other creditors, and he employed the defendant as auctioneer to sell the goods. After the sale by the defendant, the widow of the deceased gave the defendant notice, through her attorney, not to pay the plaintiff, but to retain the money until all the creditors came in, that it might be divided rateably amongst them. No letters of administration were taken out:—Held, that the defendant was prima facie bound to account to the plaintiff from whom he had received the goods; and even if he would have been at liberty to set up the *ius tertii*, and show as a defence against the plaintiff that he was bound to account to a third person, still that he was liable, no title being shown by him in any third person. *Crosskey v. Mills*, 1 C. M. & R. 298. 28

The defendant, an auctioneer, was employed by the plaintiff to sell some furniture, and was desired to sell it for ready money only. The defendant, however, sold the furniture to one M. on his giving a bill of exchange for the amount, drawn by himself, upon, and accepted by one D. The plaintiff afterwards applied for payment of the amount of the sale, and the bill, though at first refused to be taken by the plaintiff, was ultimately taken by an agent of the plaintiff, in order to get it discounted. The bill never was presented, nor was any notice of dishonor given either to M. or the defendant, until ten days after the bill had become due. In an action brought against the defendant for negligence, in selling the furniture otherwise than for ready money, the jury having found that the plaintiff had not accepted the bill in satisfaction for the furniture:—Held, that the negligence of the plaintiff in not presenting the bill, and not giving notice of dishonor, by which M. was discharged from any liability on the bill, was no answer to the action. *Ferrars (Earl) v. Robins*, 2 C. M. & R. 152; 1 Gale, 70. 28



Semble, that if, by the negligence of the plaintiff, any of the parties to the bill were discharged, the defendant might maintain a cross action against the plaintiff to recover such damages as he could prove he had sustained thereby. *Id.*

A land agent or steward is not incapacitated to purchase from his employer; and the sale, though beneficial to the purchaser, will not be set aside in equity, if there was no imposition on the part of the agent, and no concealment of information as to the value. *Andrews v. Mowbray*, 1 Wils. Exch. 71. 20

The right of a factor, under 6 Geo. 4, c. 94, s. 5, to pledge the goods of his principal, depends upon the question whether, upon the face of the whole account between them, the principal is indebted to the factor. *Robertson v. Kensington*, 5 M. & R. 381. 30

A factor, by desire of his principal, kept separate accounts of sales, in some of which the principal was solely, and in others but partly interested; but he regularly posted all the items of both those accounts into one general account. The factor pledged goods consigned to him on the joint account, for the purpose of meeting a draft drawn on him by his principal to meet that account. At the time of the pledge, the factor, upon the general account, was indebted to his principal in a larger sum than the amount of the draft: but upon the separate account, against which the draft was drawn, and to which the goods pledged belonged, the principal was indebted to the factor:—Held, that the factor had no right to pledge, and that the pledgee could not retain the goods against the principal. *Id.*

Where, in such a case, the principal for some time after notice of the pledge forbore to make any demand upon the pledgee:—Held, that such forbearance was not an acquiescence in the pledge, and that in the absence of any evidence to show that the effect of such forbearance had been to alter the situation of the pledgee for the worse, or that of the principal for the better, the right of the principal against the pledgee remained entire. *Id.*

Quære, whether a factor who sells goods on credit without disclosing his principal, has authority to receive payment from the vendee before the period of credit has elapsed, so as to make such a payment without the knowledge of the principal binding on him. *Heisch v. Carrington*, 1 Har. & Woll. 306.

Semble, that there is a custom to that effect in the London corn market. *Id.* 32

A bill broker, who receives a bill from a customer merely for the purpose of procuring it to be discounted, has no right to mix it with bills of other customers, and to pledge the whole mass as a security for an advance of monies to himself; still less has he a right to deposit bills which are received merely for the purpose of discount as a security or part security for money previously due from him. *Haynes v. Foster*, 2 C. & M. 237; 4 Tyr. 65. 34

If the pledgee of bills under such circumstances receive them from the bill broker, with

knowledge or reasonable ground of suspicion, he cannot hold them as against the customer. *Id.*

W. and P., brokers in London, had in their possession bills of different customers to the amount of nearly 3000*l.*, which had been left with them to raise money upon them. They mixed these bills with others of their own to about the same amount, and deposited the whole with F., who was a merchant and capitalist, for an advance of 3000*l.*, then made, and for a preceding advance made a few days before on a promise to bring bills. Evidence was given that it was usual and customary for bill brokers in London to raise money by a deposit of their customer's bills in a mass, and that the bill broker alone was looked to by the customer who gave the bill broker dominion over his bill. In an action brought by F. on one of the bills against one of the customers who was a party to the bill, the judge left it to the jury to say whether F., the plaintiff, took the bills from W. and P., the bill brokers with due care and caution, and in the ordinary course of business; and the jury being of opinion that he had so taken the bills, found a verdict for the plaintiff:—Held, that the defendant, the customer, could not complain of such summing up, and that the court would not disturb the verdict. *Foster v. Pearson*, 1 C. M. & R. 849; 5 Tyr. 255. 34

In another action arising out of the same transaction, and which was an action of trover brought by one of the customers (who was himself also a bill broker) against F. to recover the value of some of the bills, the judge directed the jury that the principle laid down in *Haynes v. Foster*, (*supra*), that a bill broker who receives a bill from a customer to procure it to be discounted, had no right to mix it with bills of other customers, and to pledge the whole mass as a security for an advance of money to himself, and that still less had he a right to deposit such bills as a security or part security for money previously due from him, was to be taken by them as the general law; but that notwithstanding such general rule of law, the parties might contract as they thought proper; and he left it to the jury to say whether the usage set up by the defendant as to the course of dealing in such cases, was established to their satisfaction, and if so, whether they thought that the plaintiff, who was a bill broker himself, had contracted with reference to that usage; and the jury having found for the defendant, the court refused to disturb their verdict. *Id.*

A bill broker is not a person known to the law with certain duties, but his employment is one which depends entirely upon the course of dealing; his duties may vary in different parts of the country, and their extent is a question of fact to be determined by the usage and course of dealing in the particular place. *Id.*

A person having a bill to take up, applied to a friend for assistance, who, not having cash, drew and indorsed a bill, and gave it him to get discounted, that he might be able to lend him the money. The person so intrusted also indorsed the bill, and left it with a bill broker



for discount. The bill broker, being indebted to a widow who carried on business as coal merchant, took the bill to her counting house, and indorsed it, and there gave it to her son, who managed the business for her, and who entered it in the cash book as so much received on account. There was contradictory evidence as to the son's knowledge, at the time he received the bill, of the circumstances under which it had been obtained; but he, on being informed of them afterwards, refused to give the bill to the drawer, who brought an action of trover against him for it. The jury found that the bill was not taken bona fide and without notice of the circumstances; and it was held, that the action was maintainable against the son, and need not be brought against the mother. *Cranch v. White*, 6 C. & P. 767—Tindal. 34

A power of attorney is revocable, and, in ordinary cases, would not found the jurisdiction for delivering up instruments; but, when executed for valuable consideration, the court would not permit it to be revoked. *Bromley v. Holland*, 7 Ves. jun. 28. 35

A power of attorney to a creditor to receive a debt, not accompanying any assignment of it, nor making part of any security given, but with declarations that it was to enable the creditor to apply the money to his debt, is not an appropriation, and therefore fails by the death of the debtor. *Lepard v. Vernon*, 2 Ves. & B. 51. 35

Victualling bills are not assignable; but, by usage, a power of attorney given to the attorney, his substitutes and assigns, to receive the money, authorizes the attorney to assign. Such a power is called a general power, in contradistinction to a special power, which authorizes the attorney only to receive. *Tomkin v. Fuller*, 3 Dougl. 300. 35

Semble, that a power of attorney to transact any business in the courts of law, authorizes the attorney to apply for a supersedeas. *Ex parte Crowther*, 4 Deac. & Chit. 31. 35

A power of attorney giving the agent full powers as to the management of certain specified real property, with general words extending those powers to all the property of the principal of every description, and, in conclusion, authorizing the agent to do all lawful acts concerning all the principal's business and affairs of what nature or kind soever, does not authorize the agent to indorse bills of exchange in the name of his principal. *Esdale v. La Nauze*, 1 Y. & Col. 394. 35

A., B., and others, were owners of a ship in the service of the East India Company. B. was managing owner, and employed C. as his agent for general purposes, and, amongst others, to receive and pay monies on account of the ship; and C. kept a separate account in his books with B., as such managing owner. To obtain payment of a sum of money due from the East India Company on account of the ship, it was necessary that a receipt should be signed by one or more of the owners, besides the managing owner; and upon a receipt signed by B. and one

of the other owners, C. received on account of the ship 2000*l.* from the East India Company, and placed it to B.'s credit in his books, as managing owner. The part-owners having brought an action for money had and received, to recover the balance of that account:—Held, that C. had received the money as the agent of B., and was accountable to him for it; that there was no privity between the other part-owners and C., and consequently that the action was not maintainable. *Sims v. Brittain*, 2 Nev. & Man. 594; 4 B. & Adol. 375. 44

### ALE.

The statute 11 Geo. 4 & 1 Will. 4, c. 64, for permitting the general sale of beer by retail in England, does not supersede the custom of a borough, that no person shall carry on the trade of an alehouse-keeper therein who is not a burgess. *Leicester (Mayor) v. Burgess*, 2 Nev. & Man. 131; 5 B. & Adol. 246. 45

The carrying on by A. of the business of retailing beer in a public-house in the name and by the agency of B., the person licensed by the magistrates, is not a fraud on the licensing system. *Brooker v. Wood*, 3 Nev. & M. 96; 5 B. & Adol. 1052. 45

A sale to A., therefore, for the purposes of such trade, is valid. *Id.*

### AMENDMENT.

*Writs and Returns*.]—Amendment of copy of writ. *Byfield v. Street*, 3 M. & Scott, 407; 10 Bing. 227. 47

The court will not amend a defective writ of capias. *Hodgkinson v. Hodgkinson*, 3 Nev. & M. 564. 47

A writ and other proceedings against the inhabitants of the "hundred of S." were amended by inserting "borough" instead, where the time for commencing a fresh action against them for felonious injury to property by rioters under 7 & 8 Geo. 4, c. 3, had expired. *Horton v. Stamford*, 2 Dowl. P. C. 96; 3 Tyr. 869. 47

In future, no amendment of a writ of summons will be allowed except to avoid the operation of the statute of limitations. *Lakin v. Watson or Massie*, 2 Dowl. P. C. 633; 2 C. & M. 685; 4 Tyr. 839. 47

In an action of debt on bond and for money paid, the court refused to amend the writ of summons, which had been sued out on promises instead of in debt, in order to save the statute of limitations; inasmuch as the remedy on the bond would remain, notwithstanding the expiration of the six years. *Partridge v. Wallbank*, 1 Mecs. & Wels. 316. 47

The court will not amend a writ of capias in the direction. *Colston v. Berens*, 3 Dowl. P. C. 253. 47

Nor by the substitution of one form of action for another. *Mills v. Gossett*, 1 Scott, 313. 47



A plaintiff cannot alter his writ after service; and a notice not to appear to the copy of the writ first served will not cure the defect. *Glenns v. Wilks*, 4 Dowl. P. C. 322. 47

Where the sum mentioned in a ca. sa. varies from that in the judgment, but the party has sustained no damage from the error, the court will amend the writ. *M'Cormack v. Melton*, 6 Nev. & M. 881; 1 Adol. & Ellis, 331; S. P. *Arnell v. Weatherby*, 3 Dowl. P. C. 464; 1 C. M. & R. 831. 48

The court refused to allow an amendment of a writ of ca. sa. to the prejudice of the bail; but granted it on payment of all costs, and giving the bail time to render the defendant. *Bradley v. Baillie*, 1 Scott, 78. 48

The plaintiff's attorneys having ceased to act for him, and become attorneys for the defendant, fraudulently procured the sheriff to return on a fi. fa. a sum larger than that actually levied and accounted for to the plaintiff. The court (at the expense of the attorneys) ordered the return to be amended according to the fact. *Green v. Glassbroke*, 2 Scott, 261; 2 Bing. N. R. 143; 1 Hodges, 193. 48

A writ of sci. fa. may be amended in points of form, assigned as special causes of demurrer thereto, where the application to amend is made before argument of the demurrer; but the amendment will only be granted on the terms of payment of costs of the demurrer and the motion to amend. *Mackey v. Given*, 1 Alcock & Napier, 377, (*Irish*). 49

**Declarations and Pleadings**—After a lapse of seven terms, the court refused to permit an amendment by altering a count in trover for title deeds into a count in detinue, adding a count in debt. *Green v. Mitton*, 1 Nev. & M. 673; 4 B. & Adol. 369. 50

Where plaintiff had been misled by defendant as to the nature of a charter-party, the court permitted plaintiff to amend by striking out a count in covenant on the charter-party, and declaring for freight, not upon the charter-party; and this after many years had elapsed since the commencement of the action, the defendant having been the cause of the delay. *Aylwin v. Todd*, 1 Bing. N. R. 170. 50

In an action against the sheriff for taking insufficient pledges in a replevin bond, the court allowed the declaration, which was in the common form, to be amended, (upon payment of costs), by alleging, instead of a recovery in the original action, a reference by the consent of the sureties and the defendant, and the result of that reference; and also by adding a new count. *Dale v. Gordon*, 3 M. & Scott, 339. 51

Where a plaintiff amends his declaration, with liberty to the defendant to plead de novo; if the defendant do not plead de novo, the former plea will stand, if it be applicable to the amended declaration. *Fagg v. Borsley*, 1 C. & M. 770; 2 Dowl. P. C. 107; 3 Tyr. 905. 56

The court refused to allow the Christain name of a plaintiff to be amended after issue joined. *Moody v. Aslatt*, 3 Dowl. P. C. 486. 50

In debt on a recognizance of bail, the declaration stated the recognizance to have been entered into an action of debt against J. S. On the production of the record, (on a plea of nul tiel record), it appeared that the original action was on promises. The court allowed the declaration to be amended on payment of costs, but required a special application for that purpose, and would not permit it to be made to prevent the defendant from obtaining judgment. *Munkenbeck v. Bushnell*, 4 Dowl. P. C. 139. 50

Quære, whether an inferior court of record can, after verdict, amend the pleadings. *Salter v. Slade*, 3 Nev. & M. 717. 51

Whether any court can do so, quære? *Id.*

The court will not allow a plaintiff in a penal action to amend his declaration after demurrer, where the amendment would not tend to the furtherance of justice. *Matthews v. Smith*, 1 Hodges, 175. 51

A defendant against whom judgment on demurrer was given, having obtained further evidence, obtained leave from a judge at chambers to make a material amendment in one of the pleas:—Held, that the proceeding was irregular, but under the circumstances the court refused to set aside the order. *Atkinson v. Baynton*, 1 Scott, 424; 1 Bing. N. R. 740; 1 Hodges, 144. 51

Under particular circumstances, the court will, even after argument on a rule for entering a nonsuit, and after judgment pronounced, grant leave to amend the declaration on payment of costs. *Laythorp v. Bryant*, 1 Scott, 338. 51

A plaintiff cannot object to an amendment of the defendant's pleas, on the ground of a witness, who has gone abroad, having been examined with respect to the issue then joined, if the plaintiff has had notice of the proposed amendment before the examination took place. *Hollingsworth v. Briggs*, 4 Dowl. P. C. 643. 51

**At Nisi Prius.**—In general, the judge at Nisi Prius will amend any variance which does not go at all to affect the matter really in dispute between the parties, and which was not likely to mislead the opposite party. Therefore, where a general warranty of the soundness of a horse was declared on, and a warranty "except in one foot" was proved, the judge allowed the declaration to be amended, the real dispute between the parties being whether the horse was a roarer. *Hemming v. Parry*, 6 C. & P. 580—Alderson. 53

If a corporation aggregate sue for use and occupation of "standings, market-places, and sheds," and it appear that they allowed the defendant to take tolls from others who occupied sheds and standings, the judge at the trial will allow the word "tolls" to be inserted in the declaration, the defendant paying the costs of the amendment. *Carmarthen (Mayor, &c.) v. Lewis*, 6 C. & P. 608—Parke. 53



In trespass, for breaking the plaintiff's close, called Clover Hill, the defendants pleaded not guilty, and that the close was not the plaintiff's. The real name of the close appeared to be Clover Moor. The judge ordered the record to be amended by inserting the word Moor instead of Hill. *Howell v. Thomas*, 7 C. & P. 342—Cole-ridge. 53

In trespass, for taking "mirrors and handkerchiefs," the defendant justified the taking of the mirrors; but, by mistake, omitted to justify the taking of the handkerchiefs:—Held, that this omission could not be amended on the trial. *John v. Currie*, 6 C. & P. 618—Parke. 53

Where no matter in print or writing is produced in evidence, a judge at Nisi Prius has no power under 9 Geo. 4, c. 15, (see now 3 & 4 Will. 4, c. 42, s. 23), to amend the record from the oral testimony of witnesses called to speak to the contents of a written document which had been destroyed, and which contents appeared to be materially different from the statement of the document on the record. *Brooks v. Rlanahard*, 1 C. & M. 779; 3 Tyr. 844. 53

Quere if a copy had been produced in such case, as secondary evidence, whether the judge could have amended from such copy? Id.

If, on the trial of an ejectment, it appear that the parish is mis-stated in the declaration, the judge will allow it to be amended, under the stat. 3 & 4 Will. 4, c. 42, although the ejectment be for a forfeiture. *Doe d. Marriott v. Edwards*, 6 C. & P. 208; 1 M. & Rob. 319—J. Parke. 53

Amendments, under the stat. 3 & 4 Will. 4, c. 42, s. 23, will not be refused on the ground of the harshness of the action. Id.

Where, in debt on bond, there was a variance between the penalty of the bond produced in evidence, and the penalty in the bond stated in the declaration, the latter being 260*l.*, and the former being 200*l.*:—Held, that it was within the 3 & 4 Will. 4, c. 42, s. 23, and might be amended. *Hill v. Salt*, 2 C. & M. 420; 4 Tyr. 271. 53

Seemle, that the 3 & 4 Will. 4, c. 42, s. 23, applies to cases tried before the sheriff. Id.

Amendment of allegation of bill. *Parkes v. Edge*, 1 C. & M. 429; 3 Tyr. 364. 53

Amendment of allegation of contract. *Lamey v. Bishop*, 4 B. & Adol. 479; 1 Nev. & M. 332. 53

Where a contract, by which A. guaranteed to B. the amount of a debt, to be contracted with B. by C., was described in pleading as a promise to pay the debt to be so contracted, the court sanctioned an amendment ordered at Nisi Prius, by substituting "guarantie" for "pay." *Hanbury v. Ella*, 3 Nev. & M. 438; 1 Adol. & Ellis, 60. 53

Where the declaration in ejectment was in a supposed joint demise by A. and B., and it appeared in evidence that A. and B. had not such an interest that they could join in a demise to the nominal plaintiff:—*Taunton, J.*, at Nisi Prius, refused to amend the declaration under the 3 & 4 Will. 4, c. 42, s. 25, by severing the demises. *Doe d. Poole v. Errington*, 3 Nev. & M. 646; 1 Adol. & Ellis, 750; 1 M. & Rob. 343. 53

The court in banc cannot control the discretion of a judge at Nisi Prius as to directing amendments of the record. Id.

In an action on the case, against the defendants as carriers, for negligence, it appeared from the evidence that the defendants, if liable at all, were liable as wharfingers, on a contract to forward. Just before the plaintiff's counsel commenced his reply, he applied to the judge to amend the declaration, which, however, the learned judge refused to do, but left it to the jury to say, whether there was a contract to forward, or a contract to carry, and they found that there was a contract to forward. He then directed the verdict to be entered for the defendant, but the special finding to be indorsed on the postea, that the court might proceed thereon according to the 3 & 4 Will. 4, c. 42, s. 24. The court allowed the amendment on payment of costs, and granted a new trial, on payment of costs, observing that the learned judge might have allowed the amendment, and postponed the trial to a future day, pursuant to s. 23 of that stat. *Parry v. Fairhurst*, 2 C. M. & R. 190. 53

*Verdicts and Judgments.*—Where a verdict has been obtained in ejectment against A. and B., who defended for different parts of the premises in the declaration, the court, after setting aside the verdict as to A., refused to amend the postea, by confirming the verdict as against B. to those premises for which B. specifically defended. *Roe d. Blair v. Street*, 1 Nev. & M. 42; 2 Adol. & Ellis, 329. 54

Where there has been a mistake of the clerk in entering up the judgment on sci. fa. to obtain execution on a judgment in debt, by entering it in the form in assumpsit: Quere, whether the court can amend it in a subsequent term. *Kloss v. Dodd*, 1 Har. & Woll. 342. 55

The court will allow the amendment of clerical mistakes in a judgment, on payment of costs, although one term has elapsed since the judgment was entered up, and although a writ of error has been sued out, and error assigned, amongst other causes, on those clerical mistakes. *Paddon v. Bartlett*, 5 Nev. & M. 384; 1 Har. & Woll. 266. 55

In an action commenced by writ since the Uniformity of Process Act, against two defendants, a verdict was found for the defendants. Judgment was entered up for the defendant in the singular number, and that the plaintiff should take nothing by his bill, and the word "counts" was used instead of "issues." The court allowed an amendment of these mistakes. Id.

*Other Things.*—Where the christian and surname are transposed by mistake in an order of reference, the court will allow that mistake to be amended. *Price v. James*, 2 Dowl. P. C. 435. 56

A judge, sitting at Nisi Prius, has no power to order an amendment of the award of the venire facias on the Nisi Prius record. *Adams v. Power*, 7 C. & P. 76—Bolland. 56



If, in an action on a bill of exchange, where there is a plea that there was no consideration, it appear at the trial that the plaintiff has not put any replication on the record, the judge will not allow a replication to be added at the assizes without the consent of the defendant, but will order the case to be struck out of the list. *Rowlinson v. Roantree*, 6 C. & P. 551—Alderson. 56

The return day of the summons in a writ of right, may be amended before it is executed. *Miller, dem., v. Miller, ten.*, 4 Dowl. P. C. 144. 58

The court refused to amend a fine in a case of misdescription, cured by 3 & 4 Will. 4, c. 74, s. 7. *Lockington, dem; Shipley, conusor*; 1 Bing. N. R. 355; 1 Scott, 263. 60

The court allowed a recovery to be amended by inserting "Holy Trinity" before Kingston-upon-Hull, on an affidavit that the property intended to pass was situate in the parish of the Holy Trinity, at Kingston-upon-Hull. *Dansey, dem.; Lee, ten.; Crowther, vouchee*; 3 M. & Scott, 371. 62

*Time and Mode of Application.*—The decision of a judge at chambers as to amendments of pleadings, within the limits of his discretionary power over such amendments, will not be interfered with by the court, *semble*. *Rex v. York (Archbishop)*, 3 Nev. & M. 453; 1 Adol. & Ellis, 394. 68

In quare impedit by the crown, upon an alleged forfeiture by simony between the patron in fee, the grantee of the turn, and the incumbent, a judge at chambers has authority to allow an amendment, by adding counts varying the terms and the parties to the simoniacal contract. *Id.*

And it is in the discretion of such judge to allow the amendment without making the prosecutor pay the costs previously incurred. *Id.*

An order to amend, although general in its terms, will only authorize the amendment with reference to which it is obtained. *Engleheart v. Eyre*, 2 Dowl. P. C. 193; 2 Nev. & M. 849; 5 B. & Adol. 68. 69

The plaintiff, after obtaining an order to amend his declaration, with leave to defendant to plead *de novo*, may abandon that order and proceed to trial without procuring it to be rescinded. *Black v. Sangster*, 1 C. M. & R. 521; 3 Dowl. P. C. 206; 5 Tyr. 171. 69

A plaintiff a few days previously to the assizes obtained a judge's order, giving him liberty to amend, and the defendant was to have two days' time to plead anew. The plaintiff afterwards delivered the issue and took no further notice of the order, either by amending or rescinding it; and though the defendant returned the issue as irregular, the plaintiff proceeded to trial, and got a verdict. The court refused to set aside the verdict as irregular. *Id.*

#### ANIMALS.

By 5 & 6 Will. 4, c. 59, the laws relating to the cruel and improper treatment of animals, and

the mischief arising from the driving of cattle, are consolidated and amended.

Quære, under 5 & 6 Will. 4, c. 59, s. 9, whether a peace officer required by another person to take a third person into custody, should either inquire into all the particulars, or should see the animal so as to form a judgment as to what has occurred? *Hopkins v. Crowe*, 7 C. & P. 373—Denman.

#### ANNUITY.

A grant of an annuity for life, charged upon land, in which the grantor has only a chattel interest, will enure as a grant during the term, if the cestui que vie shall so long live. *Saffery v. Elgood*, 3 Nev. & M. 346; 1 Adol. & Ellis, 191. 70

The defendant and an infant covenanted that they, or one of them, would pay a certain annuity:—Held, that although the Annuity Act avoided the contract made by the infant, the covenant might be enforced against the defendant. *Gillow v. Lillie*, 1 Scott, 597; 1 Bing. N. R. 695; 1 Hodges, 160. 70

In an action of debt, on an annuity deed, it appeared that the covenant was with the plaintiff and another, to pay to them one annuity of 30*l.*, in moieties; by another deed it appeared, that the annuity was to be secured by a joint judgment, &c. The plaintiff having obtained a verdict for arrears of the annuity due to himself, the court arrested the judgment, on the ground that the other covenantee ought to have joined in the action. *Lane v. Drinkwater*, 3 Dowl. P. C. 223. 71

Quære how far in a case of fraud the provisions of the annuity Act may be dispensed with, not as against the grantor, but against his creditors? *Ex parte Wright*, 1 Rose, 308. 72

The condition of a bond (after reciting that M. M., the obligee, had contracted with S. B., the obligor, for the sale to him, S. B., of a messuage, &c., in consideration, amongst other things, of an annuity of 150*l.*, to be paid to her, M. M., during her life, by S. B. by four quarterly payments in the year; and further reciting that, on the contract of the purchase of the messuage, it was agreed, that, for better securing the payment of the said annuity, the said S. B. should execute that bond) was, for the payment of the said annuity at the times, &c. This bond was stamped with a 1*l.* 15*s.* deed stamp:—Held, that the bond was properly stamped, and that it did not require any inrollment under the Annuity Act; and if such inrollment had been necessary, the want of it could not have been taken advantage of, under the plea of non est factum. *Mestayer v. Biggs*, 1 C. M. & R. 110; 4 Dowl. P. C. 695; 4 Tyr. 466. 72

In ejectment, an annuity deed was relied on; it was not inrolled, but it contained a declaration or covenant by the grantor, that premises on which the annuity was secured, were of more than sufficient annual value to answer and pay the annuity over and above all charges:—



Held, that it was open to the grantor, notwithstanding, to give evidence that the premises were not of sufficient value to answer and pay the annuity, in order to avoid the deed. *Doe d. Chandler v. Ford*, 5 Nev. & M. 209; 1 Harr. & Woll. 378. 72

Semble, that it is incumbent upon the grantee, who relies upon an annuity deed, which has not been inrolled, to show that it is within the exemption of the statute. *Id.*

An annuity was granted by deed for the lives of the several persons named in the deed, and the lives of the survivors and survivor of them; one of the persons on whose life the annuity was granted was named W. F. W.; but, in the annuity deed, and in the memorial of the annuity, he was named W. W. only:—Held, that he was sufficiently named within the meaning of the Annuity Act, 53 Geo. 3, c. 141; and that the memorial was sufficient. *Hulton v. Sandys*, 1 Younge, 602. 76

An annuity deed, the memorial of which does not set forth with precision, the form in which the consideration was paid, is void. *Lewis v. Hooper*, 4 Nev. & M. 318; S. C. nom. *Ex parte Lewis*, 2 Adol. & Ellis, 135. 76

The inaccuracy of a statement of the memorial may be brought before the court by affidavit, as a ground for setting aside the securities. *Id.*

The inrollment of an annuity deed omitted the word "life" in the heading of one of the columns given by the form of the statute:—Held, that this omission did not invalidate the deed. *Flight v. Lake* (Lord), 2 Scott, 126; 2 Bingh. N. R. 72; 1 Hodges, 190. 76

An annuity cannot be set aside upon mere inadequacy of price, which can be applied only as evidence of fraud. *Law v. Barchard*, 8 Ves. jun. 133. 82

The statute of limitations is no bar to an action brought to recover back the consideration paid for an annuity, notwithstanding more than six years have elapsed since the date of the grant, where the grantor (having for some years paid the annuity without objection) has, within six years from the commencement of the action, elected to avoid the annuity by reason of a defective memorial. *Cowper v. Godmond*, 3 M. & Scott, 219; 9 Bing. 748. 85

Money had and received is the proper form of action in such a case. *Id.*

Payments made by the grantor on account of the annuity may be set off against the consideration money paid on the purchase, upon a record properly framed. *Id.*

Quere whether the grantee is entitled to interest upon the consideration money? Semble not. *Id.*

Lands were devised in fee, charged with an annuity; and power was given to the annuitant to distrain, if the annuity were in arrear for twenty days after the day of payment, being lawfully demanded; power was also given, if it should be in arrear for forty days, to enter and enjoy the lands, and to take the profits, until the annuitant should

be thereby paid and satisfied all the arrears, with all costs, or until the person entitled to immediate possession should pay all the arrears and costs:—Held, that upon the annuity being forty days in arrear, the annuitant might bring ejectment without making any demand. *Doe d. Blam v. Horsley*, 1 Adol. & Ellis, 766. 86

## APPRAISER.

A valuation made for the information of parties, and not binding on them, is not made liable to an appraisal stamp by 55 Geo. 3, c. 184, Sched. p. 1, tit. "Appraisement," though an agreement is afterwards founded on its data. *Jackson v. Stopherd*, 2 C. & M. 361; 4 Tyr. 330. 87

## APPRENTICE.

*Generally.*—An indenture having been prepared for binding a boy apprentice, the apprentice and his father, being unable to write, desired a third person to write their names opposite two of the seals, and he did so. The indenture was not read to them. The apprentice immediately afterwards took the indenture to the master and left it with him; and afterwards stated that when he did so he considered himself bound; and he went into the service under the indenture:—Held, that the indenture was sufficiently executed and delivered. *Rex v. Longnor*, 1 Nev. & Man. 576; 4 B. & Adol. 647. 87

Where an apprentice is bound to two partners, on the death of one he becomes in law the apprentice of the survivor. *Rex v. St. Martin's, Exeter*, 1 Harr. & Woll. 69. 87

*Consideration given.*—The trustees of a charity bound out an apprentice to R.: the consideration money expressed in the indenture was 10*l.*, paid by the trustees. Previously to the execution of the indenture, the apprentice's grandfather, who was no party to the indenture, had agreed with the mistress that the premium should be 25*l.*; and subsequently to the execution the grandfather paid to the mistress 15*l.*: of the contract, or of the payment of any sum beyond the 10*l.*, the trustees were entirely ignorant:—Held, that the agreement by the grandfather to pay the additional sum of 15*l.* was a binding agreement, and that therefore the indenture was void by 8 Anne, c. 9, s. 39, for not stating the full consideration. *Rex v. Amersham*, 6 Nev. & M. 12. 87

*Stamp.*—An indenture of apprenticeship, without premium, was executed April 27th, 1825, but not stamped till July, 1832, when a 1*l.* stamp was put on it, and a 5*l.* penalty paid. Afterwards a double duty (2*l.*) was paid. The indenture was offered in evidence to prove the settlement of a pauper by service under it:—Held, that as it was not within stat. 8 Anne, c. 9, which limits the time for stamping indentures, the court was not called upon to notice the circumstances under which stamps were affixed. *Rex v. Preston*, 3 Nev. & M. 31; 5 B. & Adol. 1029. 88



The 55 Geo. 3, c. 184, does not repeal the provision of 8 Anne, c. 9, as to the time for stamping indentures of apprenticeship; and therefore, an indenture of apprenticeship (a premium having been paid with the apprentice) must be stamped with the *advalorem* duty, within the time prescribed by the stat. 8 Anne, c. 9, ss. 36, 37, 38, and if not stamped, is wholly void. *Rex v. Church Hulme*, 5 B. & Adol. 1029. 88

The proviso in 37 Geo. 3, c. 111, exempting from the stamp duties thereby imposed, every indenture of apprenticeship "where a sum or value not exceeding 10*l.* shall be given or contracted for, with, or in relation to the apprentice," does not extend to an indenture where no consideration passes. *Rex v. Mabe*, 5 Nev. & M. 241; 1 Harr. & Woll. 460. 88

A boy was apprenticed by the trustees of a charitable fund, and a premium of 15*l.* paid out of the fund; before the expiration of the term, the master, at the request of the apprentice, verbally, and without the knowledge of the trustees, consented to his serving the remainder of his term with another person; and agreed to give that person "6*l.*, as part of the 15*l.* paid as a premium on the binding."—Held, that the 6*l.* was a valuable consideration paid to the second master, "other than what was given by any public charity," and, therefore, that the transfer was void for want of a stamped assignment. *Rex v. Fakenham*, 4 Nev. & M. 553; 2 Adol. & Ellis, 528; 1 Harr. & Woll. 222. 88

Where a boy was bound apprentice in 1827 by indenture, upon a premium of 30*l.*, which was agreed to be paid, and for which a bill was given; and the indenture had a 1*l.* stamp only impressed upon it; and the apprentice having served his master for five months, and a difference having arisen between the master and the father, and it having been discovered that the stamp was insufficient, the apprentice left his master's service:—Held, that the apprentice might have compelled him to continue that instruction and maintenance, by causing the indenture to be properly stamped, pursuant to the stat. 29 Geo. 2, c. 45, s. 5. *Mann v. Lent*, 10 B. & C. 877; M. & M. 240. 89

**Length of Term.**—Where a statute, incorporating guardians of the poor of a certain district, enacted that it should be lawful for the corporation to bind out apprentices for any number of years, "provided such child be not bound for a longer term than until he or she shall have attained the age of twenty-two, if a boy, and twenty, if a girl," it was held, that an indenture, by which a boy fifteen and a half was bound for seven years, was *voidable* only, and not *void*; and, that therefore, a settlement might be gained under it. *Rex v. St. Gregory, Canterbury*, 4 Nev. & M. 137; 2 Adol. & Ellis, 99. 89

**Rights of Parties.**—Defendant agreed with plaintiff's father to receive plaintiff (who was a minor) into his service on trial, and to take him an apprentice if he approved it. Plaintiff went

and worked for defendant nearly two years. Several applications were made during that time by the father, to take him on paying 10*l.*: this was agreed to; but defendant shortly after quarrelled with plaintiff, and told him to go home about his business. Plaintiff went home, and on the father applying to the defendant for an explanation, the latter told him to go and do his worst. The father then caused a letter to be written to defendant by his attorney, requiring him either to take plaintiff as his apprentice, or recompense him for his work, but no satisfactory answer was given, and plaintiff, by his next friend, brought an action to recover compensation for his service. The judge put it to the jury on these facts, whether or not the defendant's conduct was such as warranted the father in considering the contract for an apprenticeship as rescinded; and he further stated, that if they thought it was, they were to give plaintiff such compensation for his work as they thought proper. The jury found a verdict for the plaintiff, with damages, by way of compensation for his services:—Held, that the direction was right, and the verdict was not to be disturbed. *Phillips v. Jones*, 1 Adol. & Ellis, 333. 91

**Parish Apprentices.**—The premium for an apprenticeship was paid by the trustees of a charitable fund. On the day of the binding, the apprentice was provided with a suit of clothes by the parish officers in contemplation of the binding, but without any express stipulation to that effect:—Held, that this was not an expense within 56 Geo. 3, c. 139, s. 11, making requisite the assent of two justices to the indenture. *Rex v. Quainton*, 3 Nev. & M. 289; 1 Adol. & Ellis, 133. 95

A special authority delegated by a local act to the directors and guardians of paupers of a district, incorporated for the government of the poor, to bind out apprentices, must be executed by an indenture, to which the seals of the apprenticing directors and guardians are affixed. The corporate seal is insufficient. *Rex v. Haughley*, 1 Nev. & M. 525; 4 B. & Adol. 651. 95

An indenture, by which a person of twenty-one years of age binds himself an apprentice, does not require the approval or allowance of justices, where the premium is paid out of the public parochial funds, under 56 Geo. 3, c. 139, s. 11. *Rex v. St. John, Berwardine*, 2 Nev. & M. 61; 5 B. & Adol. 169. 95

A child of parents settled in and chargeable to a parish, might have been bound by the parish officers under 43 Eliz. c. 2, with the assent of two justices, though the child was resident in another parish at the time of the execution of the indenture. *Rex v. St. George, Exeter*, 5 Nev. & M. 61; 3 Adol. & Ellis, 373; 1 Harr. & Woll. 372. 95

Under that statute a parish apprentice might be bound to a master who was not a parishioner. *Id.*

The consent of the apprentice is not requisite in the case of a parish apprenticeship. *Id.*



No settlement is acquired by service under an indenture of apprenticeship ordered, made, and allowed under 56 Geo. 3, c. 139, unless the notice required by section 2 was duly given, and was proved to the justices before allowance. *Rex v. Whiston*, 6 Nev. & M. 63. 95

But where an indenture, whereby the overseer of A. bound a pauper apprentice to a master in B., under that statute, appears on the face of it to have been allowed by them, it will be presumed, until the contrary be shown, that such notice had been duly given, and was proved to the magistrates before allowance. *Id.*

Quere whether a parish apprentice under age is capable of assenting to the cancellation of his indenture of apprenticeship? *Rex v. Gwinear*, 3 Nev. & M. 237; 1 Adol. & Ellis, 152. 96

### ARBITRATION.

*Submission.*—Where it was one of the terms of an agreement to refer disputes to arbitration, that the submission might be made a rule of a court of law, on the application of either party, but that had not been done:—Held, on demurrer, that the Court of Chancery had jurisdiction to relieve against the award. *Nichols v. Roe*, 5 Sim. 156. 98

And that court, having once exercised its jurisdiction of the award, will retain it, although, on the coming in of the answer, it appears that the submission had then been made a rule of a court of law by the defendant. *Id.*

A judge's order for referring a cause may be made a rule of court, though the defendant gave no authority to his attorney to consent to its being made a rule of court. *Paull v. Paull*, 2 Dowl. P. C. 340; 2 C. & M. 235; 4 Tyr. 72. 98

Where, from some misconduct of the arbitrator, the original order of reference cannot be obtained, a duplicate may be made a rule of court. *Thomas v. Philby*, 2 Dowl. P. C. 145. 98

A submission to arbitration referred the amount of loss by fire on "wool in the process of wooling, carding, scribbling, and spinning," but in other parts of the submission "raw wool" was spoken of. The arbitrator, conceiving that he was not justified in taking into his consideration wool which had undergone a part of the process of manufacture, but was not, at the time of the fire, in any of the engines, refused to receive evidence applicable to that wool:—Held, that the arbitrator was justified in so doing; and the court refused to disturb an award made on that principle. *In re Hurst*, 1 Har. & Woll. 275. 98

In an action of trespass A. was plaintiff, and B. C.'s land agent, was the nominal defendant, C. being the party really interested. H., who acted as the defendant's attorney upon the employment of C., and who also acted as C.'s attorney in certain actions and suits depending between C. and A., consented to an order of Nisi Prius, on the terms that A. should give up to C. the possession of the farm on which the trespass

had been committed, and that all proceedings should be stayed in the actions and suits between A. and B. and C., and that C. should pay the taxed costs in the present action, and the further sum of 10*l.* to A. On motion to set aside the order of Nisi Prius, and a rule of court made thereon, upon the ground that H. had no authority to bind C. by any such arrangement, the court refused to interfere in a summary way. *Thomas v. Hewes*, 2 C. & M. 519; 4 Tyr. 335. 98

Where a cause was agreed to be referred, but the agreement was not made a rule of court, the court refused to compel the payment of a sum awarded against the party who proposed the reference. *Clarke v. Baker*, 1 H. & Woll. 215. 98

After a submission by deed, an arbitrator may, with the assent of both parties, be substituted in the place of one of the original arbitrators. *In re Tunno*, 2 Nev. & M. 328; 5 B. & Adol. 488. 99

Semble, that such substitution would constitute a new submission by parol, and that an award under such new submission could not be enforced by attachment. *Id.*

By order of Nisi Prius, a cause was referred to arbitration, with liberty for the arbitrator to examine the parties, but the death of either was not to operate as a revocation of the reference. The plaintiff died before he was examined, and before the arbitrator had made his award; whereupon the defendant having revoked his submission, on the ground, as he alleged, of his having lost the opportunity of examining the plaintiff, the court ordered him to pay the costs of a trial occasioned by the termination of the reference. *Smith v. Fielder*, 10 Bing. 306; 3 M. & Scott, 853; 2 Dowl. P. C. 764. 101

Where there is a clause, that if either party by affected delay or otherwise shall prevent the arbitrator from making his award, he shall be liable to costs, a plaintiff will be liable to costs where the arbitrator is prevented from making his award in consequence of the plaintiff not being prepared with proper evidence, though he is ready to be examined in support of his own case. *Morgan v. Williams*, 2 Dowl. P. C. 123. 101

The authority of an arbitrator cannot be revoked after he has made his award. *Phipps v. Ingram*, 3 Dowl. P. C. 669. 103

A judge at chambers having, under 3 & 4 Will. 4, c. 42, s. 39, revoked a submission to arbitration on an ex parte statement, the court rescinded the order of revocation. *Clark v. Stocken*, 2 Bing. N. R. 651. 103

The 3 & 4 Will. 4, c. 42, s. 39, does not apply to arbitrators appointed in pursuance of a clause in a deed, that all disputes shall be referred to the arbitration of two persons, who are directed to choose an umpire before they proceed, but which umpire has not been appointed. *Bright v. Durnell*, 4 Dowl. P. C. 756. 103

*Arbitrator.*—If a cause is referred to a barrister, and he improperly admits evidence, the court will not disturb his award. *Perryman v. Steggal*, 2 Dowl. P. C. 726. 105



An arbitrator's decision on the admissibility of evidence before him is final. *Symes v. Goodfellow*, 4 Dowl. P. C. 642. 105

If a submission to arbitration be "so that the witnesses be examined on oath," affidavits cannot be read; if they are, the award may be set aside. *Banks v. Banks*, 1 Gale, 46. 105

Where a defendant submitted all matters in difference to arbitration, and the arbitrators required him, in pursuance of a power given them for that purpose, to produce certain books and papers, and an attachment was moved for against him for not producing them:—Held, that he could not by affidavit bring before the court the question, whether those books related to matters in difference between them, or not, though it was expressly sworn that the books merely related to old accounts, which had been long since settled, and which it had been agreed between them should form no part of the reference, because, by the general terms of the submission of all matters in difference, it was left in the discretion of the arbitrator to say what were matters in difference, and what were not. *Arbuckle v. Price*, 4 Dowl. P. C. 174. 105

The refusal of an arbitrator to examine witnesses is sufficient misconduct on his part to induce the court to set aside his award, though he may think that he has sufficient evidence without them. *Phipps v. Ingram*, 3 Dowl. P. C. 660. 105

Where all matters in difference in the cause between the parties, in an action against two defendants, were referred to arbitration, and the arbitrator refused to hear evidence, or adjudicate upon the subject of four checks drawn by one of the defendants alone, on the ground that it was not a matter in difference between the parties to the reference:—Held, that the award was not final and conclusive, and that it must be set aside. *Samuel v. Cooper*, 2 Adol. & Ellis, 752; 1 Har. & Woll. 86; S. C. nom. *Samuel v. Levey*, 4 Nev. & M. 520. 105

An award will not be set aside, although the affidavits in support of the application disclose strong imputations upon the testimony of a material witness who was examined before the arbitrator; nor is the arbitrator bound to examine a party in the cause who could have contradicted the witness. *Scales v. East London Water Works Company*, 1 Hodges, 91. 105

Statement in award. *Crumphall v. Adney*, 3 Tyr. 270; 1 C. & M. 355. 106

On a cause being referred, the plaintiff attended before the arbitrator by counsel, without giving the defendant notice of his intention so to do. The defendant requested an adjournment, to give him time to instruct counsel; but the plaintiff refused to consent, unless the defendant paid the cost of the day. The arbitrator proceeded ex parte, and certified in favor of the plaintiff. The court, on motion, stayed the certificate, and referred the cause back to the arbitrator, and disallowed the plaintiff's costs of the day. *Whalley v. Morland*, 2 C. & M. 347; 2 Dowl. P. C. 249; 4 Tyr. 255. 106

A reference was made to two arbitrators, and

an umpire to be chosen by them, who was to be present and decide each reference as it might arise, and either might make an award. The umpire, in the presence of the arbitrators, disallowed the plaintiff part of his claim, which made the balance in favor of the defendant, and afterwards without notice to the arbitrator or defendant, made his award in favor of the plaintiff. The court set aside the award. *Potter v. Newman*, 4 Dowl. P. C. 504; 2 C. M. & R. 742; 1 Tyr. & G. 29. 106

An arbitrator decided in favor of plaintiff, and then stated facts on his award, ordering that if the court should differ from him in opinion, on considering those facts, a nonsuit should be entered. The court refused to set aside the award, on the ground that he had come to a wrong conclusion on the evidence, for though they did not concur in it, it did not appear that there was no evidence in support of it. *Barrett v. Wilson*, 1 C. M. & R. 586; 3 Dowl. P. C. 220; 5 Tyr. 218. 106

Order on arbitrator to proceed. *Crawshaw v. Collins*, 1 Wils. C. C. 31; 1 Swans. 40. 108

A cause (in which money had been paid into court) was referred, with all matters in difference, the costs to abide the event. The arbitrators found that the plaintiff had no cause of action, but that there was a sum of 10*l.* due from the defendant for money lent to his wife, which was paid into the court:—Held that the plaintiff was liable to pay the costs. *Dawson v. Garrett*, 2 Dowl. P. C. 624. 109

If an arbitrator to whom a cause is referred by order of *Nisi Prius*, takes no notice in his award of a power given him by the order to give the defendant his costs, on the ground of an excessive arrest, but does not dispose of the general costs of the cause, the court will not interfere to give the defendant his costs. *Greenwood v. Johnson*, 3 Dowl. P. C. 606. 109

Where a cause is referred, (the costs of the suit, and of the reference and award, to abide the event,) the arbitrator need not notice the costs in his award. *Jupp v. Grayson*, 1 C. M. & R. 523; 3 Dowl. P. C. 199; 5 Tyr. 150. 109

Matters in difference were referred to two arbitrators, one appointed by each party, and an umpire chosen before proceeding with the reference. The award was to be made by the three, or any two of them. They disagreed, and one of the arbitrators declined having anything more to do with the matter; but the other two afterwards sent to him, for his opinion, a draft of an award. He objected to this, and stated his objections to both the others:—Held, that an award made by the two, which differed from the one prepared, without considering the objections, and without consultation or discussion with the arbitrator who had objected, was bad. In re *Allen*, 5 Nev. & M. 374; nom. In re *Perring & Keymer*, 3 Adol. & Ellis, 245; S. C. nom. *Perring v. Kymer*, 1 Har. & Woll. 285. 110

Semble, that if the award had been made by the two immediately upon the third declining to act, and before they had again consulted him, it might have been good. Id.



A cause being referred, the arbitrator in 1825 received from the plaintiff's attorney 87*l.* for his fees and expenses. In 1827, the parties went before the prothonotary, when he allowed only 35*l.* The defendant now, after a lapse of eight years from the time the payment was made, (the attorney who paid the money having died in the interim), applied to the court to order the arbitrator to refund the difference:—Held, that the application was to late. *Brazier v. Bryant*, 3 M. & Scott, 844 ; 2 Dowl. P. C. 757. 110

*Umpire.*—An umpire may be appointed by lot with the assent of the parties. In *re Tuno*, 2 Nev. & M. 328 ; 5 B. & Adol. 488. 110

Such assent sufficiently appears by each party presenting three names, from which that of the umpire is to be drawn. *Id.*

Or, by the parties signing the memorandum by which the person whose name is drawn is appointed umpire. *Id.*

An umpire, being furnished by the arbitrators with the evidence taken before them, and having himself viewed the premises, the condition of which was in question, made his award without calling for further evidence, or giving any notice on that subject to the parties:—Held, that the award could not be objected to on that ground by a party who knew that the case had gone before the umpire and made no application to him to hear further evidence. *Id.*

Rule nisi to set aside an award on the ground of partiality refused, though it appeared that the umpire made the award with the assistance chiefly of one of the arbitrators, who omitted to take down part of the evidence in favor of one party, the other arbitrator interfering very little. *Waltonshaw v. Marshall*, 1 Har. & Woll. 219. 110

*Award.*—All matters in difference in a cause were referred by a judge's order to an arbitrator, so as he made his award on or before a particular day, or on or before such further or ulterior day as he should from time to time appoint by writing under his hand, to be indorsed on the order, and as the court or a baron might order. The arbitrator made an enlargement of the time, but this was not confirmed by any order. Afterwards two orders for enlarging the time were made by a baron, with the consent of the parties:—Held, that an award made before the time appointed by the last-mentioned order was valid, and that the orders by consent amounted to a fresh agreement. *Benwell v. Hinzman*, 1 C. M. & R. 935 ; 5 Tyr. 509 ; 3 Dowl. P. C. 500. 112

The arbitrator found that a sum of money was due from the defendant to the plaintiff, which he directed to be paid on or before a particular day, and that upon payment of that sum all proceedings should cease:—Held, that the award was final and not conditional ; but that the arbitrator had exceeded his authority in giving a particular day of payment. *Id.*

The power given to the court or a judge by 3 & 4 Will. 4, c. 42, s. 39, to enlarge the time for

an arbitrator to make his award, is general, and is not confined to cases where there has been a revocation of the submission. *Burley v. Stephens*, 1 Mees. & Wels. 156 ; 4 Dowl. P. C. 255, 770. 112

The time for making an award being limited to the 18th of April, with power to enlarge the time, but not stating how, the arbitrator, at a meeting on the 16th, in the presence, and with the consent of all parties, appointed the 29th of June for a further meeting:—Held to be a sufficient enlargement of the time. *Id.*

Semble, that under the 3 & 4 Will. 4, c. 42, s. 39, the court or a judge has the power to enlarge the time for an arbitrator to make his award, although the order of reference does not contain any power to enlarge the time, and there has been no revocation of the arbitrator's authority. *Potter v. Newman*, 2 C. M. & R. 742 ; 4 Dowl. P. C. 504 ; 1 Tyr. & G. 29. 112

The court will not infer that the decision of an arbitrator has proceeded solely upon certain facts set out in the award, unless the award state that the decision is founded upon these facts. *Lancaster v. Hemmington*, 5 Nev. & M. 538. 113

Construction of award. *Wood v. Griffiths*, 1 Wils. C. C. 34 ; 1 Swans. 52. 113

A. and B. having a dispute as to the liability of B. to pay money to A., agreed to submit the case to a barrister, and to be bound by his opinion. Semble, that in an action brought to enforce such payment, the opinion of a barrister upon a case so submitted is admissible in evidence without an award stamp. *Boyd v. Emerson*, 4 Nev. & M. 99 ; 2 Adol. & Ellis, 184. 113

Semble also, that supposing an award stamp to be necessary, a stamp proportioned to the number of words on the opinion alone without the case is sufficient, although the opinion be annexed to the case, and refer to the cause thus:—"Upon the facts stated, I am of opinion," &c. *Id.*

An action for a nuisance (to which a plea of the general issue only was pleaded, before the new rules of pleading) was referred to an arbitrator, who found that the plaintiff had not proved that the defendant was not the cause of the injury, and he ordered a nonsuit to be entered, but he also ordered that the defendant should remove the nuisance within a month:—Held, that this was a finding substantially in favor of the defendant, and that he was entitled to the expense of all witnesses who could be material under the general issue. *Radcliffe v. Hall*, 3 Dowl. P. C. 802. 113

An award, declared that a yard and pump were the sole and exclusive property of the plaintiff, except that the defendant had a right to take water from the pump, and to have ingress and egress to and from the yard in which it stood for that purpose ; and further, that the pump should thereafter be considered as belonging jointly to the plaintiff and defendant, and be repaired at their joint expense:—Held, that there was no objection to the award, on the ground that the direction as to the future enjoyment was in



consistent with the former part of the award; and that there was no excess of authority. *Boodle v. Davis*, 4 Nev. & M. 788; 3 Adol. & Ellis, 200; 1 Har. & Woll 420. 113

Where by an agreement of reference after action brought, but before declaration, "all the costs are to abide the event of the award," the arbitrator has no power over the costs. *Id.*

Upon a reference of partnership disputes, a direction in the award that some of the parties to the reference do pay a sum of money (which is one of the matters included in the submission) to the arbitrator, and that he apply the same to the payment of certain specified demands, (also part of the matters submitted), is bad, and vitiates the award, although the payments appear, by the tenor of the award, to be for the benefit of the parties submitting, and not of the arbitrator. *In re Mackay*, 2 Adol. & Ellis, 356. 113

If it clearly appear, from reading an award, that the arbitrator intended to leave a particular question of law open, the court will consider it, although in terms the arbitrator may in one part of his award have determined it. *Sherry v. Oke*, 3 Dowl. P. C. 349; 1 Har. & Woll. 119. 113

No precise form of words is necessary to constitute an award: it is sufficient if the arbitrator express by it a decision upon the matter submitted to him. But where an arbitrator to whom a dispute between an architect and his clerk, respecting a claim by the latter to wages was referred, stated in a letter that he had examined drawings made by the clerk, with an account of his time, which did not show experience or ability to the extent to justify a demand for remuneration under the circumstances: but in consideration of the clerk's services out of the office on some occasions, and to meet the case in a liberal manner, he proposed that the architect should pay the clerk 10*l.*:—Held, that the latter part of the letter was a mere suggestion of the arbitrator, and not a decided opinion that the clerk was or was not entitled to recover 10*l.*, and therefore not a good award. *Lock v. Vulliamy*, 2 Nev. & M. 336; 5 B. & Adol. 600. 113

A bond conditioned for the due discharge by A. M. of the duties of clerk, provided that such discharge should be ascertained by the inspection of A. M.'s accounts by J. S.; and that the amount so ascertained should be liquidated damages. A paper by which J. S. has ascertained such amount requires to be duly stamped as an award. *Jebb v. M'Kurnan*, M. & M. 340—*Parke*. 113

In an action between A., tenant of Whiteacre, and B. his landlord, all matters in dispute are referred to C., who is to determine what shall be done with respect to the land. C. awards, with respect to the land, that from the date of his award the tenancy shall cease, and that A. shall, within a month, deliver up possession to B. Possession is taken accordingly. D., a creditor of A., afterwards issues execution against A., and takes the crops growing on Whiteacre:—Held, that this award did not determine the tenancy:—

Held, also, that the award was admissible in evidence upon the trial of an issue between B. and D., upon the question, whether, at the time of the execution, the crops were the property of A. or B. *Thorp v. Eyre*, 3 Nev. & M. 214. 113

Where an action was brought by an attorney on a bill not taxable, and a verdict taken subject to a reference as to the amount of the charge, and the arbitrator awarded a certain sum:—Held, that it was competent for the court to examine whether the arbitrator had adopted a right rule. *Broadhurst v. Darlington*, 2 Dowl. P. C. 38. 114.

By the terms of a submission, a Chancery suit and all matters in difference between the parties were referred, and it was made an express matter of reference, whether an agreement between the parties should be rescinded or not. The arbitrator merely decided as to the Chancery suit, that each party should pay his own costs; and gave no directions upon the subject of rescinding the agreement, but awarded specifically on every other subject matter of the agreement:—Held, that the award was not sufficient. *Upperton v. Tribe*, 1 Har. & Woll. 280; S. C. nom. *In re Upperton an Tribe*, 3 Adol. & Ellis, 295. 114

Quere, whether the award was not sufficiently final as regarded the adjudication upon the Chancery suit. *Id.*

Orders of different judges to the number of eleven, enlarging the time for making an award, were made a rule of court by a single rule. *Id.*

An action having been brought for the recovery of a sum of money, but which had only proceeded as far as the writ and appearance, and the defendant claiming a larger sum to be due to him, it was agreed that the action, and the disputes arising out of the accounts and other matters in difference should be referred, the costs of the action, of the reference, and of the award, to abide the event of the award. The arbitrators awarded that the action should cease, and be no further prosecuted, and that on the balance of all accounts, there was a sum of 661*l.* due to the defendant from the plaintiff, which they ordered him to pay on a particular day:—Held, that the award was sufficiently final, and decided the event of the action, to prevent the plaintiff setting it aside, though perhaps the court would refuse an attachment. *Earley v. Steer*, 4 Dowl. P. C. 423; 1 C. M. & R. 327. 114

An action for trespass for taking goods was preferred principally with the view of determining the right of property in the goods, the defendants contending that the plaintiff had no property in them, but that they belonged to a third person; another complaint in the declaration was, that the defendants had committed an assault upon the plaintiff's wife per quod consortium amisit, and all other matters in difference were also referred. No evidence was given before the arbitrator to prove the per quod, but there was only one assault proved to have been committed on the wife, and the plaintiff abandoned his claim to part of the goods. The arbi-



trator made his award, merely ordering the verdict which had been entered for the plaintiff to stand, and the damages to be reduced to 35*l.*, but made no award respecting the right of property in the goods:—Held, that the award was sufficiently final. *Bird v. Cooper*, 4 Dowl. P. C. 148.

114

An arbitrator, who had authority to decide on what terms a partnership agreement should be cancelled, directed, among other things, that the agreement should be cancelled; that one of the partners should have all the debts due to the firm, and should, if necessary, sue for them in the name of his late partner:—Held, that in authorizing one of the parties to sue in the name of the other, the arbitrator had not exceeded his authority. *Burton or Burt v. Wigley or Wigmore*, 1 Scott, 610; 1 Bing. N. R. 665; 1 Hodges, 81.

114

An action of trespass to which the defendant had pleaded both a private and a public right of way, was referred at Nisi Prius to an arbitrator, together with all matters in difference in the cause between the parties. It was agreed, also, that the plea of a public right of way was to be withdrawn, but that the arbitrator was to decide as to the costs, as if it remained. The arbitrator was also to award as to the future use of the road. The arbitrator found the private right of way for the defendant, and set out the way he should in future use, and he gave him the costs of the cause, including the costs on the issue of the public right of way:—Held, that the arbitrator had not in fact found a public and private right of way over the same spot. 2. That the award could not be set aside on the ground that there was evidence to support a public but not a private right of way. That the arbitrator did not exceed his authority in giving the defendant the costs of the issue on the public right of way, having given him the verdict on the issue of the private right of way. *Allenby v. Proudlock*, 4 Dowl. P. C. 54; 1 Har. & Woll. 357.

114

By an order of reference, an action and all matters in difference were referred to arbitration, the costs of the suit and of the reference to abide the event of the award. The arbitrator directed the defendant to deliver certain goods to the plaintiff, and the plaintiff to pay a sum of money to the defendant; that all proceedings in the action should cease, and a general release be given:—Held, that the award was not uncertain as to costs, as the effect of it was that each party should pay his own. *Yates v. Knight*, 2 Scott, 470; 2 Bing. N. R. 277; 1 Hodges, 368.

114

An award recited, that, by an agreement in writing between the plaintiff and defendant, reciting that they had for some years carried on business as builders and excavators in copartnership, and that they had, in pursuance of the copartnership, become possessed of certain messuages, buildings, and premises, sum and sums of money, and other chattels and effects, and that divers disputes had arisen between them touching their accounts, reckonings, and dealings, and as to a division of the said copartnership messuages, &c., and other their estate and effects,

and that they had agreed to refer the matter to the decision, &c. of J. C. and W. B., and that the said arbitrators should have power to direct a division of messuages, buildings, and premises, and other the partnership effects between them, and that each party thereby agreed to execute to the other a conveyance of the messuages, &c. according to such division between them, as the arbitrators should award. The award further recited, that the partnership between the defendant and the plaintiff had been dissolved by mutual consent. The arbitrators then awarded that the defendant should pay to the plaintiff the sum of 223*l.* 4*s.* 6*d.* in full of all demands, in respect of his one equal moiety, half part, or share of the said copartnership property, estate, and effects; and that upon payment thereof, and upon having such conveyances as thereafter mentioned tendered to him for execution, the plaintiff should, at the defendant's request, execute a proper conveyance unto and to the use of the defendant, of, in, and to certain messuages, &c. therein mentioned, subject to certain mortgage debts charged thereon. They also awarded, that all the debts then due and owing to and from the copartnership concern, should be received and paid by the defendant and the plaintiff in equal proportions; and that, if either party should advance or pay any sum or sums of money over and above his half share or proportion of the copartnership debts, then the amount so overpaid should, on demand, be made good, and repaid to the party paying the same by the party making default. To an action upon this award, to recover the sum of 223*l.* 4*s.* 6*d.* from the defendant, he pleaded, (after setting out the award as above), that the several messuages, &c. in the said award mentioned, and directed to be conveyed to the defendant, were the whole of the said copartnership messuages, &c., and that there was not in the said award any other provision than those thereinbefore specified concerning the said copartnership property, estate, and effects, or the division thereof, or any part thereof:—Held, on demurrer to this plea, that the award was final: that it was sufficiently certain: and that it was not inconsistent. *Wood v. Wilson*, 2 C. M. & R. 241.

114

Quere, whether, upon the supposition that there had been no arrangement between the partners, by which the premises were ultimately to become the property of one partner, subject to the mortgages, the arbitrators did not exceed their authority in awarding the messuages, &c. to one of the parties, and not dividing them between both. *Id.*

Covenantor and covenantee submitted the amount of damages accruing from a breach of covenantor to an arbitrator:—Held, that in an action on the covenant, the arbitrator's award was conclusive as to the amount of damages, unless the award itself could be impeached. *Whitehead v. Tattersall*, 1 Adol. & Ellis, 491.

114

A cause and all matters in difference were referred by a rule of court to an arbitrator, who awarded that a particular balance was due from the plaintiff to the defendant, but did not order the



money to be paid by the plaintiff. He also awarded that the plaintiff should pay costs without directing to whom.—Held, that if an action would lie on this award, no attachment could be granted on it as for disobedience of the rule of court. *Scott v. Williams*, 3 Dowl. P. C. 508; 5 Tyr. 506; S. C. nom. *Hopkins v. Davis*, 1 C. M. & R. 846. 114

An action for certain commission on the purchase of land, and all matters in difference between the parties, were referred to arbitration; the costs of the suit and of the reference and award, and all other costs, to abide the event; final judgment to be entered up for the plaintiff or defendant, according to the award, for any damages or costs awarded to either of them, and execution to issue. The arbitrator awarded, that the plaintiff had no cause of action against the defendant, and that the plaintiff should pay to the defendant the sum of 36*l.* 13*s.* 4*d.*, which he found to be due and owing from the plaintiff to the defendant. The arbitrator then declared that his award was not intended to exclude the plaintiff from the receipt of his commission on certain land purchased, to which he would be entitled under a certain agreement:—Held, that the arbitrator had no power given him to order a verdict to be entered, but merely to decide whether the plaintiff had any cause of action against the defendant; and that the award was sufficiently final. *Harding v. Forshaw*, 1 Mees. & Wels. 415; 4 Dowl. P. C. 761. 114

After declaration, and before plea, a cause and all matters in difference between the parties were, by a judge's order, made by consent, referred to arbitration, the costs to abide the event of the suit. The arbitrator awarded that a verdict should be entered for the plaintiff, with 55*l.* damages, and that in all the other matters in difference between the parties, there was not any sum of money due to either of the parties:—Held, that this was not equivalent to an award that the plaintiff should pay the defendant 55*l.*; and the court therefore refused an attachment to enforce the payment, either of the 55*l.* or of the costs. *Donlan v. Brett*, 4 Nev. & M. 854; 2 Adol. & Ellis, 344. 114

By an order of Nisi Prius, three actions, and all antecedent causes of action between the parties were referred to the decision of an arbitrator. The first was an action on the case brought by D. against A. for disturbance of common; the second was an action of trespass *quare clausum fregit* by A. against D. and P.: and the third was another action of trespass by A. against P., D., and L., which had not proceeded further than the pleas. By the terms of the submission, any other persons claiming rights of common over the locus in quo, and particularly one H., under whom the defendants justified in some of the pleas in the actions of trespass, were to be at liberty to become parties to the reference; and the object of the reference was declared to be for the purpose of ascertaining, securing, and regulating the rights of the commoners, and the extent of certain woods and coppices as far as concerned the parties to the reference. In the

action on the case, not guilty was pleaded. In the first action of trespass, the defendants pleaded not guilty, and several special pleas, upon which issues were joined. In the other action of trespass, not guilty and pleas justifying the trespasses were pleaded, but upon which no issue had been joined at the time when the matter was referred. In the action on the case for disturbance of common, the arbitrator awarded, that a verdict should be entered for the plaintiff on certain counts in the declaration. In the action of trespass which was at issue, he found that the defendants were not guilty of the trespasses; and, in the other, that the plaintiff had no cause of action against the defendants. The arbitrator took no notice of the other issues; but, in pursuance of the terms of the submission, declared by his award what the rights of the parties were as to the enjoyment of the common, and the inclosing of the woods in future. He then awarded that A., who was the defendant in the first mentioned action, and the plaintiff in the other two, should pay all the costs of the reference and award:—Held, first, that the award was final, and that all the matters material to the determination of the causes were sufficiently disposed of; secondly, that the arbitrator not having been requested to decide on the other issues with reference to the costs, he was not bound to do so;—Held, also, that as H. did not become a party to the reference the arbitrator was not bound to find any thing as to the rights of H. *Dibben v. Anglesea* (Marquis), 2 C. & M. 722; 4 Tyr. 926; S. C. 10 Bing. 568. 114

A banker conveys his real estate to two trustees upon certain trusts for the payment of his debts, and subsequently enters into an agreement with them as to the sale of the property; after which he takes forcible possession of part of it and the trustees bring an action of ejectment against him, which, with another action, is referred to the decision of an arbitrator. The award finds, that the creditors were entitled to recover in the action of ejectment, and directs that a sum of money which was due to the trustees, for expenses incurred by them in the execution of the trusts, shall be paid by installments, and in default of payment, that the property shall be sold, and the proceeds applied in discharge of the debt due to the trustees:—Held, that the award was no charge upon the land, but that it did not destroy the lien thereon, which the deed had expressly given to the trustees for the expenses incurred by them in the execution of the trusts. *Ex parte Coppard*, 4 Deac. & Chit. 102. 115

In a suit instituted to enforce a pecuniary demand against the real and personal estate of the testator, an order was made by consent, referring all matters in difference between the parties in the cause to arbitration, and the arbitrators made an award, ordering the executor to pay a certain sum to the complainants in full satisfaction of all their demands on him and his testator, but directing that certain other defendants who, under the testator's will, took interests in his real estate, should be at liberty to prosecute their claims against the testator's estate, in like manner as if



no order of reference had been made :—the award was held not to be final, and was therefore set aside. *Turner v. Turner*, 3 Russ. 494. 115

A replevin suit, and all matters in difference touching the distress, were referred to arbitration, the costs of the suit to abide the event. The arbitrator awarded that the rent was 14*l.*, and that 6*l.* were due for rent at the time of the distress, that the plaintiff in replevin should pay the defendant 6*l.*, and that the action should be no further prosecuted. It did not appear for what rent the defendant had avowed :—Held, that the award did not show who ought to pay the costs, which were to abide the event of the suit; and, consequently, that it was not final. In re *Leeming*, 5 B. & Adol. 403; S. C. nom. *Leeming v. Fearnley*, 2 Nev. & M. 232. 115

An arbitrator, to whom a cause in dispute as to the amount of rent due, and an action of replevin, the merits of which are involved in that dispute, are referred, has no authority to award a *stet processus*. *Id.*

A cause, (the declaration in which contained eight counts), and all matters in difference between the plaintiff and defendant, were referred; the costs of the cause, and of the reference and award relating thereto, to abide the event. The arbitrators found that the plaintiff had good cause of action in respect of the matters charged in five of the counts, and awarded 5*l.* damages, and directed that no further proceedings should be had in the cause; but made no specific award as to the three remaining counts :—Held, that the award was not final, there being no determination as to the three last-mentioned counts, and consequently no legal event as to them to authorize the taxation of costs thereon. *Norris v. Daniel*, 4 M. & Scott, 383; 10 Bing. 507; 2 Dowl. P. C. 798. 115

Where a cause is referred to an arbitrator, it is not necessary that he should find for the plaintiff or defendant in the very words of the issue. It is sufficient if he decide substantially the question in dispute. *Wykes v. Shipton*, 3 Nev. & M. 240. 115

An award made upon a reference of a cause, and all matters in difference between the parties, is bad if it omit to assess damages upon a judgment of *nil dicit* upon a new assignment of excess. *Id.*

Where all matters in difference are referred to an arbitrator, an award directing the execution of general releases closes all accounts between the parties up to the time of the submission. *Trimingham v. Trimingham*, 4 Nev. & M. 786. 115

To a declaration on an award, the defendants pleaded that, by an agreement to which they, who were the churchwardens and overseers of a parish, were parties of one part, and the plaintiff and one E. T., farmers in the parish, of the other part, reciting that, in a rate for the relief of the poor the plaintiff and E. T., conceiving themselves to be over-rated for certain property in proportion to

other parishioners, had given notice to the defendants of their intention to appeal; that the defendants intended to defend the same, but that, as both parties had agreed to refer all matters in difference, no appeal had been entered; and that, to determine on the propriety of the rate, so far as regarded the plaintiff and E. T., they had agreed to refer the various matters in difference to three arbitrators: it was witnessed, that the defendants so far as they lawfully might or could, as churchwardens and overseers, and also the plaintiff and E. T. respectively, agreed to abide by the award of the arbitrators, who were to award upon those matters in difference, as to the expenses of that agreement, and also as to the costs of the award; the plea then set out the award verbatim, which directed the defendants to pay to T. E. T., the attorney of the plaintiff and E. T., 16*l.* 12*s.*, his bill already delivered, and also his further costs of attending the arbitration, &c.; that they should pay to Messrs. A. & L. 20*l.* 4*s.* for their costs of attending the arbitration, &c.; that they should pay to Messrs. A. & L. 57*l.* 19*s.* for the expenses of the arbitrators; and that the defendants should deduct from all future rates charged upon the plaintiff 10*s.*, and return him 10*s.* for every rate he had paid while the scheme was in operation; and as to the quantity of a lake occupied by the plaintiff, which was in dispute between them, they ordered the rate to be altered by the parish according to the schedule annexed to the award; and, as to E. T., they ordered the defendant to repay him for every past, and to deduct from every future rate 5*s.*; and the plea concluded thus :—“and the defendants in fact say, that the award is void and bad in law, and this they are ready to verify,” &c. On special demurrer to this plea, on the ground that the plea referred to the jury what ought to be decided by the court :—Held, by Lord Abinger, and Bolland, B., that the plea was good in form, but bad in substance, because the submission and award was void, as the principal matter referred could not legally be referred by the defendants, as parish officers; that the parish were not bound by the decision of the arbitrators, nor the defendants, as parish officers, nor any other of the parishioners; that the award being void with respect to the principal matter referred, it was also void as to the costs; and that the award left one of the principal matters in so much doubt that the parties could not have the benefit of it, Parke, B., held that the plea was good in form and substance, and that the award was divisible; that though the defendants could not be compelled to perform the first part of the award respecting the rate, yet that the award was good, so far as it directed the defendants to pay the costs occasioned by the appeal, &c. and of the award; that the fact of the quantity of the lake occupied by the plaintiff not being settled by the arbitrators, but directed by them to be measured by the parish, was not material; and the amount of the attorney's costs, which the plaintiff alone was liable to pay, might be fixed by evidence. *Thorp v. Cole*, 4 Dowl. P. C. 457; 2 C. M. & R. 367. 115

*Setting aside.*—It is no ground for impeaching an award that the arbitrator has been mis



taken in point of law, as to the admissibility of certain evidence. *Armstrong v. Marshall*, 4 Dowl. P. C. 593. 116

There is no distinction with regard to legal and other arbitrators; and the court will not examine an award, because it has been made by one who is not in the profession of the law. *Jupp v. Grayson*, 1 C. M. & R. 523; 3 Dowl. P. C. 199; 5 Tyr. 150. 116

The court will not inquire into the validity of the decision of an arbitrator in point of law, not even where the arbitrator had merely power to certify. *Wilson v. King*, 2 C. & M. 639; 4 Tyr. 997. 116

Quere, if an arbitrator, having only a limited power, may deliver in with his certificate a written paper stating facts proved before him, so as to raise a question of law for the opinion of the court. *Id.*

Where a cause and all matters in dispute are referred, a recital in the award that the action was referred, without mentioning other matters in difference, does not constitute an objection to the award on the face of it. *Paull v. Paull*, 2 Dowl. P. C. 340; 2 C. & M. 235; 4 Tyr. 72. 116

Such an objection should be made the ground of a separate application to set aside the award, supported by affidavits showing what were the other matters in difference. *Id.*

Where matters in difference are referred to a legal arbitrator absolutely, the court will not entertain a motion for reviewing his decision either upon the law or the facts. *Ashton v. Pointer*, 2 Dowl. P. C. 661; 3 Dowl. P. C. 201. 116

If the reference is to a non-legal arbitrator, the court will review his decision as to a point of law, but not upon the facts, unless his award appears so glaringly wrong as to induce a suspicion of misconduct. *Id.*

Where a cause was referred to an attorney and another person, the court granted a rule for setting aside the award upon a point of law. *Id.*

An award made by a barrister cannot be impeached on the ground of his having decided contrary to law. *Wade v. Malpas*, 2 Dowl. P. C. 638. 116

Arbitrators having power to appoint an umpire, nominated one accordingly, who made his award, reciting his nomination by them, but misdescribing the christian name of one of them:—Held, that, as in an action on the award the recital of the appointment of the umpire would be unnecessary, the award remained in force, and an attachment lay to enforce it. *Trew v. Burton*, 1 C. & M. 533; 3 Tyr. 559. 116

The affidavit of publication of an award should show in the body that the day on which it was so published was within the time limited for making the award, but it is sufficient if the jurat show that it was sworn before that time had run out. *Id.*

If a stranger alter an immaterial part of an award after it is published, by striking out a wrong and inserting a right name, the award is not vitiated, and stands as before the alteration was made. *Id.*

The court will not set aside an award on the ground that the arbitrator has made a mistake, where all the facts were placed before him, and he was competent from his occupation to judge of them, unless the court see clearly it was a mistake. *Hardy v. Ringrose*, 1 Har. & Woll. 185. 116

Where a submission to arbitration was made in a cause by agreement, and not by a judge's order, and after the award was published, the submission was made a rule of court; the court considered itself bound by analogy to the stat. 8 & 9 Will. 3; and refused to set aside the award after the period of limitation had expired. *Rushworth v. Barron*, 3 Dowl. P. C. 317; 1 Har. & Woll. 122. 118

A clause in a deed of submission to arbitration, "that no action or suit at law or in equity shall be commenced or prosecuted against the arbitrators concerning their award when made, nor to impeach the said award, unless some collusion or other fraud be discovered or appear therein," does not prevent a party to the deed from moving to set aside, (for illegality upon the face of it), though no fraud or collusion appear. In re Mackay, 2 Adol. & Ellis, 356. 118

Applications to set aside awards made under a judge's order of reference are now put on the same footing as to time, as if the awards were made under the 8 & 9 Will. 3; but if the party affected has not notice of the award sufficiently early to enable him to move within the time allowed by the act, he may move to set it aside in the term next after the notice. *Potter v. Newman*, 4 Dowl. P. C. 504; 2 C. M. & R. 742; 1 Tyr. & G. 29. 118

A motion to set aside an award made in the Common Pleas at Lancaster under an order of Nisi Prius cannot be made in banco, under 4 & 5 Will. 4, c. 62, s. 26, though a verdict was taken subject to the award, but must be made before a single judge. *Byrne v. Fitzhugh*, 5 Tyr. 221. 119

A rule nisi to set aside an award ought to state specifically the particular grounds of objection. *Boodlee v. Davies*, 4 Nev. & M. 788; 1 Har. & Woll. 420; S. P. *Whately v. Morland*, 2 C. & M. 347; 2 Dowl. P. C. 249; 4 Tyr. 255. 119

It is not sufficient to state generally that the arbitrator has exceeded his authority, or—that the award is uncertain and not final. *Id.*

Where the time for making an award is enlarged by agreement, there being no authority for such an enlargement in the original submission, the new agreement must be made a rule of court before an attachment can issue for non-performance of an award made during the enlarged period. *M'Arthur v. Campbell*, 2 Nev. & M. 444; 5 B. & Adol. 518. 119

An award is published when the arbitrator gives the parties notice that it may be had on payment of his charges, whether they be reasonable or not. *Id.*

The rule of E. T. 2 Geo. 4, requiring the grounds of objecting to an award to be stated upon a rule nisi to set it aside, applies to the certificate of an arbitrator empowered to ascer-



tain the amount due from the defendant to the plaintiff and to certify the same to the associate, by whom a verdict is to be entered accordingly. *Carmichael v. Houchen*, 3 Nev. & M. 203. 119.

A rule to set aside an award made after action commenced, on account of objections to the declaration, need not refer to the declaration, as it is sufficiently before the court. *Sherry v. Oke*, 3 Dowl. P. C. 349; 1 Har. & Woll. 119. 119

A rule for setting aside an award must appear on the face of it to be drawn up on reading the award itself, or a copy of it; and the court will not allow it to be amended. *Id.*

An award made in pursuance of an order of *Nisi Prius*, referring a cause and other matters in difference, may be objected to at any time before the end of the term next after the publication *Allenby v. Proudlock*, 4 Dowl. P. C. 54; 1 Har. & Woll. 357. 119

In stating the grounds on which it is sought to set aside an award, it is not sufficient to state a general head of objection as "misapprehension of the terms of the reference." *Id.*

A motion to set aside an award made under a judge's order must be made promptly after the party knows of the award being made. *Worrall v. Deane*, 2 Dowl. P. C. 261. 119

Where such a motion was made after two terms had elapsed, the court discharged it with costs, though it was alleged by the party moving that he did not believe that the other party intended to proceed upon the award, as there had been a previous revocation. *Id.*

A motion to set aside an award made under an order of *Nisi Prius*, must be made within the first four days of the next term, though it is for objections apparent on the face of the award. *Sell v. Carter*, 2 Dowl. P. C. 245. 119

A motion to set aside an award under a judge's order must be made within the term ensuing the making of the award, although the arbitrator demands an excessive fee, and a copy is not in consequence obtained by either party until a few days before the time when the application is made. *M'Arthur v. Campbell*, 2 Nev. & M. 444 5 B. & Adol. 518. 119

Where, from the misconduct of one of the parties to an award, the submission cannot be made a rule of court, so as to enable the opposite party to make it a rule of court before the last day but one of the first term after the award, the time for a motion to set it aside will be enlarged until the following term. *In re Perring*, 3 Dowl. P. C. 98. 119

A rule nisi to set aside an award under an order of *Nisi Prius* having been discharged on a mere technical objection:—Held, not too late to move for a second rule after the first four days of the term next after the award was made. *Sherry v. Oke*, 3 Dowl. P. C. 349; 1 Har. & Woll. 119. 119

The court allowed a fresh affidavit to be filed in support of rule nisi to set aside an award the day after the rule was made. *Ferrin v. Kymmer*, 1 Har. & Woll. 20. 119

Where there is a doubt about the validity of

an award, the court will neither set it aside, nor grant an attachment, but leave the party to bring an action: *secus* when a verdict has been taken. *Burley v. Stevens*, 4 Dowl. P. C. 770; 1 Mees. & Wels. 156. 119

*Enforcing.*—The defendant being taken under an attachment for non-performance of an award, went to prison, and, though he was able to pay, he refused so to do, perversely declaring that he would rather go to jail than pay. The plaintiff then commenced an action upon the award; and on motion that the plaintiff might be compelled to discontinue, or the defendant might be discharged out of custody, the court ordered him to be discharged, on giving a bond to the plaintiff, with sureties to the master's satisfaction, conditioned to the same effect as in the case of a recognizance of bail. *Lonsdale (Earl) v. Whinnay*; 1 C. M. & R. 591; 3 Dowl. P. C. 263; 5 Tyr. 203. 120

Where, in an action of trespass, the time for making an award, pursuant to an order of *Nisi Prius*, expires before the award is made, and the arbitrator has not enlarged the time, as empowered by the order, the court will, under certain circumstances, direct judgment to be signed and execution issued, for the sum for which the jury find, subject to the reference, unless the enlargement is consented to. *Wilkinson v. Time*. 4 Dowl. P. C. 37; 1 Har. & Woll. 351. 120

A cause was referred at the assizes, and by consent a verdict was entered for the plaintiff, damages 50*l.*, costs 40*s.*, subject to the award of an arbitrator. The time for making the award expired without an award being made; the time was further enlarged by consent, and the enlarged time having also expired without an award being made, the plaintiff gave notice of trial, and proceeded to the trial of the cause, and obtained a verdict. A judge's order having been previously obtained for altering the record in the distringas, the clerk of assize at the trial erased the indorsement of the previous verdict, and entered the new verdict in the usual way. The court set aside the latter verdict for irregularity. *Evans v. Davies*, 3 Dowl. P. C. 786; 1 Gale, 150. 120

Where, by order of *Nisi Prius*, a verdict was taken for the plaintiff, subject to an arbitration, which was not entered upon, through the default of a third party, the plaintiff may apply for leave to enter and try the cause *de novo*. *Bacon v. Cresswell*, 1 Hodges, 189. 120

Where it was on the terms of an agreement to refer disputes to arbitration, that the submission might be made a rule of a court of law at the option of either party, and a bill having been filed to set aside the award, it appeared by the answer of the defendant that the submission had been made a rule of the Court of King's Bench by the defendant, subsequently to the filing of the bill, the common injunction which had been obtained by the plaintiff was upon appeal dissolved, the Lord Chancellor holding that the Court of Chancery had no jurisdiction to relieve against the award. *Nichols v. Roe*, 3 Mylne & Keen, 431. 120

Where a verdict has been found subject to a



reference, and the award has not been until some terms afterward, judgment cannot be entered up as of the term next after the verdict, without a special application to the court. *Brooke v. Fearn,* 2 Dowl. P. C. 144. 121

### ARMY AND NAVY.

A writ of prohibition cannot issue to a court-martial after sentence pronounced by the court and ratified by his Majesty, and execution by dismissal from the army, in pursuance of such sentence. In *re Poe*, 2 Nev. & M. 636; 5 B. & Adol. 681. 124

It is not necessary, in order to make a man inrolled as a volunteer, an effective member of his corps, that he should have taken the oath of allegiance required by the volunteer act, 44 Geo. 3, c. 54, s. 20. *Rex v. Winesham*, 4 Nev. & M. 447; 2 Adol. & Ellis, 648; 1 Har. & Woll. 43. 124

### ARREST.

*For what cause of Action.*—Arrears of annuity. *Anerson v. Bell*, 2 C. & J. 630; 2 Tyr. 732. 127

Where an action is pending at the suit of a bankrupt, and the assignees arrest the defendant for the same cause of action, it is not vexatious. *Barnes v. Maton*, 3 Dougl. 186; 1 Tidd's Prac. 170; 15 East, 613, n. 127

*Second Arrest.*—Where a defendant, being in custody on *meine process*, was discharged on the terms of his giving bills, which he neglected to do, and the plaintiff arrested him again without a fresh affidavit or a judge's order, the second arrest was held to be regular. *Castellor v. Freeman or Trueman*, 2 Dowl. P. C. 2; 1 C. & M. 536; 3 Tyr. 579. 128

Where a defendant was arrested in Ireland for the amount of a bill of exchange, and gave bail there, which were discharged for a defect in the affidavit to hold to bail; and the plaintiff, having afterwards got judgment in Ireland, arrested the defendant a second time: in an action in this country on the judgment—Held, that the defendant was entitled to his discharge. *Gunn v. M'Clintock*, 2 Dowl. P. C. 660; 2 C. & M. 668; 4 Tyr. 988. 128

A party may arrest a defendant without discontinuing a previous action commenced by serviceable process for the same cause, though within two days of the day for which the cause was set down for trial. *Brickline v. Smallwood*, 3 Dowl. P. C. 569; S. C. nom. *Burdakin v. Smallwood*, 1 Har. & Woll. 187. 128

If a first writ is discontinued, and the costs are taxed and paid, it is not necessary that the plaintiff should give the sheriff notice of such discontinuance, or serve the rule on him before arresting the defendant on a fresh writ; and the court refused to discharge a defendant from such second arrest, on the ground that the discontinuance of the first action was incomplete on account of that

omission. But they would have relieved against any actual damage sustained by the defendant. *Price v. Day*, 3 Dowl. P. C. 463; 5 Tyr. 456. 128

A plaintiff may arrest a defendant after suing out three serviceable writs, the action commenced by which he has not discontinued. *Chapman v. Vandeveldt*, 3 Dowl. P. C. 313. 128

A defendant was arrested for the sum of 70*l.*, but it appearing that to part of that amount the defendant had a defence under the statute of limitations, it was agreed that he should be discharged out of custody on giving a bill of exchange for 30*l.* drawn by a third person, and accepted by himself. The defendant having been again arrested on the bill:—Held, that the defendant was not entitled to be discharged out of custody, as having been a second time arrested for the same debt. *Hamber v. Cooper*, 2 C. M. & R. 148; 3 Dowl. P. C. 671; 1 Gale, 103. 128

A plaintiff cannot lodge a detainer against a defendant, and then, having on the ground of a defect in the writ, treated it as a nullity, lodge a second detainer against him. *Gaddeker v. Sheppard*, 4 Dowl. P. C. 577. 128

A bailable writ having been issued against a defendant upon an affidavit of debt for the amount of several bills of exchange, the defendant's attorney gave an undertaking for the defendant, who was not arrested; an agreement was then made, by which the plaintiff forbade any one to proceed in his name without his authority and he agreed to give three months' notice before he proceeded on the bill transactions between them, and that agreement was to set aside any writ or writs then issued against the defendant. The plaintiff's attorney afterwards gave three months' notice that he should proceed, and a new writ was subsequently issued upon a fresh affidavit, upon which the defendant was arrested. Upon a motion to stay proceedings, and that the defendant might be discharged:—Held, that the second writ was regularly issued without discontinuing the first action, as nothing had been done upon the first writ, and sixteen months had elapsed since it was issued; but that the agreement meant that the defendant should have three months' notice from the plaintiff himself, and that a notice given by the attorney was insufficient; and, on the latter ground, the defendant was discharged out of custody. *Ryves v. Bunning*, 3 Dowl. P. C. 817. 128

*Affidavit of Debt.*—A party may be arrested a second time on the same affidavit, where the first action has been discontinued, and the second proceeding is with the same filacer. *Richards v. Stuart*, 10 Bing. 323; 3 M. & Scott, 778; 2 Dowl. P. C. 754. 131

A *capias* into Sussex was issued upon an affidavit filed with the filacer for Sussex, and returned non est inventus:—Held, that an alias *capias* might be issued by continuance into another county on the same affidavit. *Coppin v. Potter*, 10 Bing. 441; 2 M. & Scott, 272; 2 Dowl. P. C. 785. 131



In an affidavit to hold to bail, the deponent was described as "J. S., of Bath, in the county of Somerset, Esq.:"—Held sufficient. *Id.*

Where concurrent writs of *capias* are issued, there should be an affidavit of debt filed with the filacer of each county. *Dunne v. Harding*, 4 M. & Scott, 450. 131

An affidavit of debt, sworn before the deputy signer of bills of Middlesex, before 2 Will. 4, c. 39, was in force, was held sufficient to authorize the issuing of a writ of *capias* since that act came into operation. *Young v. Beck*, 1 C. M. & R. 448; 3 Dowl. P. C. 28; 5 Tyr. 24, overruling *Beck v. Young*, 2 Dowl. P. C. 462. 133

An affidavit of debt, sworn before a commissioner, need not be entitled in any court. *Urquhart v. Dick*, 2 Dowl. P. C. 17. 131

An affidavit of debt was filed April 9, with the filacer for Surrey, and a *capias* issued into Surrey on the 7th of May; and in November, an alias *capias* thereon issued into Middlesex, no fresh affidavit being filed, the filacer for Surrey and Middlesex being the same person:—Held regular. *Ramsden v. Maugham*, 2 C. M. & R. 634; 4 Dowl. P. C. 403; 1 Tyr. & G. 40. 132

A stale affidavit means one sworn above a year ago. *Id.*

Where an affidavit of debt was sworn in Ireland, before a commissioner of Common Pleas and Exchequer:—Held, that the title of the court need not be prefixed to the affidavit when sworn; but that the affidavit might be taken before such commissioner, to be afterwards intitled and used in either court. *Perse v. Browning*, 1 Mees. & Wels. 362. 132

Where a writ of *capias* was issued on a good affidavit of debt, and afterwards another into another county, upon a defective affidavit, on which the defendant was arrested:—Held, that the arrest was regular, as the first affidavit, being sworn before the same officer who issued both writs, would warrant the issuing of the second writ without a fresh affidavit. *Rock v. Johnson*, 4 Dowl. P. C. 405. 132

In an affidavit to hold to bail, made by a third person, it is not necessary to show any connexion between the deponent and the plaintiff. *Short v. Campbell*, 3 Dowl. P. C. 487; 1 Gale, 60. 132

An affidavit made by a person, who described himself as agent and collector to the plaintiff, an hotel-keeper:—Held sufficient. *Id.*

An affidavit to hold to bail, for a debt stated therein to be due to A. and B., is good, though the plaintiffs are partners, and are not stated to be so in the affidavit. *Bodfield v. Padmore*, 5 B. & Adol. 1095. 134

An affidavit, made by the assignee of a bankrupt, for a sum of money "for interest agreed to be paid by the defendant, as appears to this deponent by the books of account of the bankrupt, and as this deponent verily believes to be true," is sufficient. *Harrison v. Turner*, 4 Dowl. P. C. 73; 1 Har. & Woll. 346. 134

Seemle, that the allegation that the defendant was indebted to plaintiff in a sum stated will not

said an affidavit to hold to bail, which is otherwise insufficient. *Brooke v. Coleman*, 1 C. & M. 621; 2 Dowl. P. C. 7; 3 Tyr. 593. 134

An affidavit to hold to bail for debts due on several accounts, on which the defendant is arrested for the aggregate of all the sums due, is bad in toto, if bad as to any of the debts stated, and the defendant will be discharged. *Baker v. Wills*, 2 C. & M. 415; 3 Tyr. 182. 134

An affidavit that the defendant is indebted upon and by virtue of a mortgage deed in the sum of 500*l.*, by which the defendant covenanted to pay that sum at a certain day now past, is sufficient, without averring that the money was not paid at the appointed day. *Masters v. Billing*, 3 Dowl. P. C. 751. 136

An affidavit grounded on a covenant by deed to pay a certain sum at a day named, is good, if it state the defendant to be indebted to the plaintiff, upon and by virtue of the indenture in the said sum of &c., "at a day now passed," without alleging it to be due and unpaid. *Lambert v. Wray*, 1 C. M. & R. 576; 3 Dowl. P. C. 169; 5 Tyr. 195. 136

An affidavit of debt for a sum due on a bill or note, must expressly state for what sum the bill or note was drawn. *Rasket v. Gye or Guy*, 3 Dowl. P. C. 554; 1 Har. & Woll. 198; S. P. *Brooke v. Coleman*, 1 C. & M. 621; 2 Dowl. P. C. 7; 3 Tyr. 593; *Westmacott v. Cook*, 2 Dowl. P. C. 519. 137

If it does not state the amount, the bail bond will be set aside with costs. *Molineux v. Dorman*, 3 Dowl. P. C. 662. 137

A defendant, against whom a *capias* issued, and afterwards an *exigi facias*, rendered himself to the custody of the sheriff, who, for default of bail, put him in prison. The affidavit of debt was for 20*l.* and upwards, on a promissory note, but it did not state the amount for which the promissory note was drawn. The defendant brought trespass for false imprisonment against the plaintiff in this action:—Held, that such action would not lie while the writ was in existence, though, if the defendant had applied to the court, he would have been discharged out of custody. *Reddell v. Pakeman*, 3 Dowl. P. C. 714. 137

An affidavit, stating that a sum is due for principal and interest on a promissory note for a certain amount, bearing interest, is sufficient, without distinguishing how much is due for principal, and how much for interest. *Drake v. Harding*, 4 Dowl. P. C. 34; 1 Har. & Woll. 364. 137

But it must be made to appear that the amount due for principal is large enough to warrant an arrest. *Latreille v. Hoepfner*, 3 M. & Scott, 800; 10 Bing. 334; 2 Dowl. P. C. 758. 137

Seemle, that an affidavit by the indorsee of a bill need not state by whom the bill was indorsed to the plaintiff. *Mammatt v. Mathew*, 4 M. & Scott, 356; 2 Dowl. P. C. 797. 137

An affidavit on a note payable by instalments should show them to be due, and it will not be sufficient to state that the said sum has not been paid. *Hart v. Myerria*, 3 Tyr. 238. 137



An affidavit to hold the drawer of a bill, or indorser of a note, to bail, should state that the acceptor or maker had not paid the amount. *Smith v. Escudier*, 3 Tyr. 219; *S. P. Crosby v. Clarke*, 1 Mees & Wels. 266; *S. P. contra Irving v. Heaton*, 4 Dowl. P. C. 638. 137

An affidavit on a bill (by indorsee against acceptor) need not aver a presentment for payment. *Usborne v. Pennell*, 4 M. & Scott, 431. 137

In an affidavit of debt against the drawer or indorser of a bill of exchange, it is sufficient to allege a default by the acceptor, without averring a presentment or notice. *Witham v. Gompertz*, 4 Dowl. P. C. 382; 2 C. M. & R. 736; 1 Gale, 301; 1 Tyr. & G. 6. 137

The date of bills or notes need not be stated in an affidavit, if it appear in the affidavit that the day of payment of the bills is passed. *Shirley v. Jacobs*, 3 Dowl. P. C. 101; 1 Scott, 67; *S. P. Irving v. Heaton*, 4 Dowl. P. C. 638; *Weedon v. Medley*, 2 Dowl. P. C. 689. 137

In an action by the indorsee against the drawer of a bill of exchange, the affidavit of debt alleged that the defendant was indebted to the plaintiff on the bill which was over due, and that the money was still due and owing, but it omitted to aver either presentment or notice.—Held bad. *Simpson v. Dick*, 3 Dowl. P. C. 731. 137

An affidavit of debt on a bill, which states that the defendant is indebted on the bill, which was payable at a day past, is sufficient, without stating that the bill was not paid when due, or that it is still unpaid. *Phillips v. Turner*, 3 Dowl. P. C. 163; 1 C. M. & R. 597; 5 Tyr. 196. 137

In an affidavit on two acceptances of the defendant, the consideration was stated to be for goods sold by the plaintiff:—Held, that the statement of the consideration was surplusage, and might be rejected, and did not entitle the defendant to be discharged out of custody on filing common bail. *Ibbotson v. Andrew*, 1 Alcock & Napier, 189, (*Irish*). 137

An affidavit of debt, stating it to be for goods delivered by plaintiff and his late partner, is insufficient. *Edgar v. Watt*, 1 Har. & Woll. 108. 139

An affidavit of debt, for the price of goods guaranteed by the defendant, without showing on what terms, or that the time for payment had expired:—Held bad. *Angus v. Robilliard*, 2 Dowl. P. C. 91. 139

An affidavit of debt, for goods sold and delivered to, and for money paid and laid out for S., the wife of the defendant, before his intermarriage with her:—Held insufficient. *Gray v. Shepherd*, 3 Dowl. P. C. 442. 139

In an action by husband and wife against husband and wife, the affidavit to hold to bail stated the defendants to be indebted "for goods delivered and sold by the plaintiff's wife to the defendant's wife," not stating the transaction to have taken place before their respective marriages. The defendant having failed in an attempt to justify bail, moved to set aside the bail-bond, on the ground of the above irregularity. The court discharged the rule on terms. *Morgan v. Davies*, 1 Scott, 98. 139

In an action by husband and wife, administratrix, on a bond given to the intestate, it is no objection to the affidavit to hold to bail that the defendant is alleged to be indebted to the husband and wife, administratrix; or that the affidavit omits to state that the deceased died intestate, or to whom the sum mentioned in the condition is made payable; the same degree of precision not being required in an affidavit as in a declaration. *Coppin v. Potter*, 4 M. & Scott, 272; 10 Bing. 441; 2 Dowl. P. C. 785. 138

An affidavit of debt for "money lent and advanced and interest thereon," is bad. *Callum v. Leeson*, 2 C. & M. 406; 2 Dowl. P. C. 381; 4 Tyr. 266. 139

An affidavit to hold to bail for money lent was held bad, for not stating by whom the money was lent. *Smith v. Stevens*, 3 Tyr. 219. 139

A defendant may be held to bail for interest, if due by contract. *Pickman v. Collis or Collins*, 3 Dowl. P. C. 429; 1 Gale, 47. 139

An affidavit of debt for 500*l.*, for money lent, and interest thereon, and on an account stated, without noticing a contract for interest:—Held sufficient. *Id.* 139

An affidavit of debt, part of which was for interest, not stating expressly the contract on which the interest was payable.—Held good. *White v. Sowerby*, 3 Dowl. P. C. 584; 1 Har. & Woll. 213. 139

Semble, that if, in an affidavit of debt for principal and interest, a sum and date are mentioned, from which interest can be computed, it is not essential that the amount of interest claimed should be specifically mentioned. *Rogers v. Godbold*, 3 Dowl. P. C. 106. 139

An affidavit of debt for money paid, laid out, and expended, "to and for the use and on account of the defendant:—"—Held sufficient. *Harrison v. Turner*, 4 Dowl. P. C. 72; 1 Har. & Woll. 346. 139

In an affidavit to hold to bail, it was stated that a sum was due for money lent and advanced, &c., and for money due and payable for interest upon, and for the forbearance of divers sums of money due and payable, and by plaintiff forborne at the request of the defendant:—Held that the special contract to pay interest was not sufficiently stated. *Drake v. Harding*, 4 Dowl. P. C. 34; 1 Har. & Woll. 364. 139

An affidavit to hold to bail, stated the defendant to be indebted to the plaintiff in 300*l.*, for money paid, &c., to and for his use, and at his request, and for interest due and owing from and agreed to be paid by the defendant to the plaintiff for and in respect thereof:—Held sufficient. *Hutchinson v. Hargrave*, 1 Scott, 269; 1 Bing. N. R. 369. 139

An affidavit of debt which is bad in part is bad altogether. *Rackett v. Gye or Guy*, 3 Dowl. P. C. 554; 1 Har. & Woll. 198; *S. P. Drake v. Harding*, 4 Dowl. P. C. 24; 1 Har. & Woll. 364. 140



A defendant waives an objection to an affidavit of debt by inducing the plaintiff to accept of certain persons as bail, by affecting to acquiesce in the decision of a single judge as to the sufficiency of the affidavit. *Mammatt v. Mathew*, 2 Dowl. P. C. 797; 4 M. & Scott, 356; 10 Bing. 506. 140

Where the arrest was on the 22nd of May:—Held, that it was too late, on June 4, to obtain the defendant's discharge on the ground of a defect in the affidavit, the sheriff having in the meantime been ruled to return the writ, and made his return. *Firley v. Rallett*, 2 Dowl. P. C. 708. 140

After a rule nisi had been obtained for cancelling a bail bond for a defect in the affidavit to hold to bail, the plaintiff offered to consent to a judge's order to the same effect, the costs to be costs in the cause, and no action to be brought:—Held, that notwithstanding this offer, the defendant was entitled to have his rule made absolute, with costs. *Clarke v. Crockford*, 3 Dowl. P. C. 633. 140

Seemle, that where costs have been incurred by the delay of the defendant in objecting to a defect in the affidavit of debt, the court will not order the bail-bond to be delivered up to be cancelled, although the defect be in some degree one in substance and not in form. *Morgan v. Baylis*, 3 Dowl. P. C. 117. 140

Seemle, where a summons is taken out at chambers, on the eighth day after the arrest, to discharge the defendant out of custody, on account of a defect in the affidavit to hold to bail, which summons is returnable the following day, the application is not too late, unless it appears on what part of the day the defendant was arrested. *Johnson v. Kennedy*, 4 Dowl. P. C. 345; 2 Scott, 410. 140

Where a defendant is held to bail, or detained by virtue of a judge's order, he is not bound to apply either to the same or to another judge at chambers to rescind the order, or to discharge him from custody, on the ground of defects in the affidavit of debt: the application is properly delayed till the court is sitting. *Id.*

Two months' delay in taking the objection to the affidavit of debt, that it is not sworn before a proper commissioner, is not a waiver of it. *Sharpe v. Johnson*, 4 Dowl. P. C. 324; 2 Scott, 407; 1 Hodges, 298; 2 Bing. N. R. 246. 140

*Privilege from Arrest.*—A king's chaplain is privileged from arrest; and if he has been arrested and has given a bail bond, the court will, on motion, order the bail bond to be cancelled. *Byrn v. Dibdin*, 1 C. M. & R. 821; 3 Dowl. P. C. 448; 1 Gale, 58; 5 Tyr. 357. 141

A lord of the bedchamber is privileged from arrest. *Aldridge v. Barry*, 3 Dowl. P. C. 450, n. 141

The court refused to interfere, on motion, for the purpose of relieving a defendant who had been held to bail, on the ground of his being the Somerset herald, and liable to be called on to attend the king, whenever and wherever he

chose, it not appearing clearly by the affidavits what were the duties of his office, and no instance shown of the claim being allowed. *Leslie v. Disney*, 3 Dowl. P. C. 437; 1 C. M. & R. 578; 5 Tyr. 181. 141

Where there is any doubt, the rule is to leave such persons to their writ of protection. *Id.*

The privilege of freedom from arrest of an ambassador's servant, is the privilege of the ambassador, and not of the servant. *Fisher v. Begrez*, 2 C. & M. 240; 3 Tyr. 184; 2 Dowl. P. C. 279; 4 Tyr. 35. 142

Where a person alleged to be a domestic servant of an ambassador is arrested, and neither the ambassador nor any one on his behalf interferes, the court will not discharge the defendant out of custody, unless he shows a clear case of bona fide service as a domestic servant to the ambassador. *Id.*

Quære what goods of a person actually privileged would be protected from execution? *Id.*

A party taken under an irregular writ is privileged from arrest in returning from the chambers of the judge who has discharged him. *Rex v. Blake*, 2 Nev. & M. 312; 4 B. & Adol. 355. 143

So, although his attendance before the judge be voluntary: as where he is brought up under a habeas corpus obtained by himself. *Id.*

A party who has been detained upon a criminal charge, and tried, acquitted, and discharged, is not privileged from arrest during his return home from the jail in which he has been confined. *Goodwyn v. Lordon*, 3 Nev. & M. 879; 3 Dowl. P. C. 504; 1 Adol. & Ellis, 378. 143

A slight deviation will not deprive a party returning from attendance in a court of justice of his privilege from arrest. *Pitt v. Coombs*, 3 Nev. & M. 212; 5 B. & Adol. 1078. 143

A person who is subpoenaed in a criminal prosecution tried in the K. B. sittings, but who is committed for a contempt of that court, in striking the defendant, has the same privilege from arrest in returning home from the prison after his imprisonment has expired, that he would have had in returning home from the court if he had not been committed. *Rex v. Wigley*, 7 C. & P. 4—Coleridge. 143

A defendant who has been wrongfully arrested upon a Sunday, upon a charge of forgery, without any warrant, may be lawfully arrested upon civil process as he is leaving the police-office after he has been ordered by the magistrate to be discharged. *Jacobs v. Jacobs*, 3 Dowl. P. C. 675. 143

A witness attending, at the request of a party, an arbitrator under a submission to be made a rule of court, is privileged from arrest. *Riahton v. Nisbett*, 1 M. & Rob. 347—Alderson. 143

The defendant, an attorney, was arrested at the Auction Mart Coffee-house, between two and three o'clock p. m. The statement in his affidavit, in support of a motion for his discharge, on the ground that he was privileged *eundo*, was, that having professional business in several cases to transact in the Exch., he was proceeding through



the city of London, on his way to Westminster Hall for that purpose, and on arriving at the Bank of England recollected that he had business with a client, whom it was probable he should find at the Auction Mart; that he therefore called there in his way to Westminster Hall, and saw his client, and just as he was about to leave him for the purpose of proceeding to Westminster, he was arrested in this cause:—Held, that on this statement he was not entitled to the privilege. *Strong v. Dickenson*, 1 Mees. & Wels. 488. 143

A. having been arrested whilst he was privileged, as attending on a summons at a judge's chamber, the judge made an order for his discharge out of custody, on condition that if B., the officer who made the arrest, paid A. his costs, to be taxed by the master, A. should not bring any action for the arrest. The costs were taxed, and the amount was accordingly paid. A., however, subsequently obtained an order for the master to review his taxation, which the master accordingly did, and allowed A. a further sum for costs. This B. refused to pay, upon which A. brought an action of assumpsit against B., as upon an agreement by him to pay the costs, in consideration that A. would relinquish all right of action against B. on occasion of the arrest:—Held, that under these circumstances the action was not maintainable. *King v. Taylor*, 2 C. M. & R. 235. 143

A., being indebted to B., B. sued out bailable process, which he delivered to the sheriff to execute, and the sheriff arrested A. whilst he was attending a trial as a witness, under a subpoena:—Held, that an action on the case was not maintainable by A. against B. for procuring A. to be illegally arrested, it not being shown that B. had any knowledge that A. was attending as a witness when he delivered the writ to the sheriff to be executed. *Stokes v. White*, 1 C. M. & R. 223; 4 Tyr. 786. 144

Where a party arrested whilst privileged from arrest pays money into court, by permission of a judge, in order to obtain his discharge, he is entitled, upon application to the court, to have the money restored to him. *Pitt v. Coombs*, 4 Nev. & M. 535; 2 Adol. & Ellis, 459; 1 Har. & Woll. 13. 144

But such application must be made within a reasonable time after the arrest, or the delay must be satisfactorily accounted for. *Id.*

The pendency of a motion to set aside the proceedings for irregularity, was held to be a satisfactory reason for having deferred the application for several terms. *Id.*

Where a party to a cause is arrested upon process out of another court, while attending at Nisi Prius in expectation of its coming on, he must apply for relief to the judge at Nisi Prius, or to the court out of which the process issues, and not to the court in which the cause is. *Pitt v. Evans*, 2 Dowl. P. C. 223. 145

Where a party in custody under a criminal charge is about to be discharged, but is then detained in custody under civil process, the proper course in order to obtain his discharge from the

latter is by application to the court out of which the civil process has been issued. *Rex v. M'-Loughlin*, 1 Alcock & Napier, 130, (*Irish*). 145

Where a party attended under a recognizance to answer a criminal charge, and was acquitted and discharged, he is privileged from arrest while going to and returning from the court where he was so bound to attend; and if arrested he will be discharged out of custody by the court from which the process issues, under which he is so arrested. *Callans v. Sherry*, 1 Alcock & Napier, 125, (*Irish*). 145

*Discharge from.*—No debt due. *Burton v. Harworth*, 4 B. & Adol. 462; 1 Nev. & M. 318. 146

Where the affidavit to hold to bail discloses that the debt is *prima facie* barred by the statute of limitations, and where other peculiar facts are stated on affidavit, to show that the plaintiff has no cause of action, the court will grant a rule nisi calling upon the plaintiff to show cause why the defendant should not be discharged out of custody on entering a common appearance. *Tucker v. Tucker*, 1 Scott, 463; 1 Hodges, 15. 146

The court will not discharge a defendant out of custody because it appears by the particulars of demand that the debt is barred by the statute of limitations. *Pottier v. Macdonell*, 1 Har. & Woll. 189. 146

The court refused to interfere summarily to discharge a defendant out of custody, on the ground that the arrest was against good faith, in being made for the whole debt, after an engagement to receive the amount by instalments. *Udall v. Nelson*, 4 Nev. & M. 637; 2 Adol. & Ellis, 215; 1 Har. & Woll. 177. 146

If the debt and costs in an action are paid to the plaintiff, no matter by whom, the defendant is entitled to be discharged out of custody. *Rimmer v. Turner*, 3 Dowl. P. C. 601. 146

Semble, that the sheriff has no right to detain a defendant in custody, although he has been compelled to pay the debt and costs under an attachment. *Id.*

The court refused to discharge a defendant out of custody on the ground of trifling defects in the process on which he had been arrested. *Pocock v. Mason*, 1 Scott, 51. 146

Evidence that a bailiff's assistant apprehended a party on a false pretence, and that the bailiff being at hand took advantage of the apprehension to arrest him on a writ of ca. sa.:—Held sufficient to establish an issue that the bailiff illegally seized and imprisoned the party. *Humphrey v. Mitchell*, 2 Bing. N. R. 619. 146

#### ASSUMPSIT.

*When maintainable.*—A declaration stated, that W. P. owed the plaintiff 13*l.*, and that in consideration thereof, and that W. P., at the plaintiff's request, had promised to work for him at certain wages, and also, in consideration of W. P. leaving the amount which might be earned by him in the defendant's hands, he, the defendant,



undertook and promised to pay the plaintiff the said sum of 13*l*. Averment, that W. P. had performed his part of the agreement. Judgment arrested, because the plaintiff was a stranger to the consideration. *Price v. Easton*, 4 B. & Adol. 433; 1 Nev. & M. 303. 150

A. being arrested at the suit of B., upon a writ indorsed "oath for 76*l*," C. writes that, in consideration of B.'s instantly discharging A., he will give his promissory note to B. for 10*l*s in the pound upon the debt on the arrival of the discharge. This engagement may be declared upon as a promise to pay 10*l*s. in the pound upon the debt for which he was arrested. *Brown v. Dean*, 2 Nev. & M. 317; 5 B. & Adol. 848. 151

Although a request to deliver the note be alleged, no request need be proved. *Id.*

A., during his minority, accepts a bill of exchange; and when of age, A. directs B. to pay the amount out of funds in B.'s hands. This contract need not be declared on specially. *Hunt v. Massey*, 3 Nev. & M. 109; 5 B. & Adol. 902. 149

A sum of money was delivered by the plaintiff to the defendant to carry to a particular place, and there to pay to a certain person for the plaintiff. The defendant took the money, but in answer to the inquiries of the plaintiff on the subject, said that he had lost it:—Held, that assumpsit for money had and received was maintainable on proof of these facts merely; though it was objected that the proper form of action was a special action for the negligence. *Barry v. Roberts*, 5 Nev. & M. 669; 3 Adol. & Ellis, 118; 1 Har. & Woll. 242. 148

*Consideration.*—The following agreement was held to show sufficient consideration moving from the plaintiff by way of detriment to him, in giving up the security of the debtor, C., for 150*l*., at the defendant's request:—"I undertake on behalf of Mr. P., (the plaintiff), in consideration of Mr. D. (the defendant) having this day given me an undertaking to procure Mr. W.'s check or note in favor of Mr. P. for 150*l*. on account of a debt due from Mr. C. to Mr. P., that Mr. C. shall have credit for that sum in his accounts with Mr. P., and that Mr. W. shall stand in the place of Mr. P. to that amount; and I further undertake that Mr. P. shall not personally dispute Mr. W.'s right to deduct that sum from the accounts owing by the colliers of the B. C. colliery to Mr. C." *Feate v. Dicken*, 1 C. M. & R. 422; 3 Dowl. P. C. 171; 5 Tyr. 116. 150

The declaration alleged the promise of D. (the defendant) to be in consideration of that of P. (the plaintiff) by way of mutual promise:—Held good, and that it was sufficient to aver that plaintiff was ready and willing to perform his part. *Id.*

In cases where an express promise will be supported, an implied promise arising out of the circumstances of the case, will also be available. *Betts v. Gibbins*, 4 Nev. & M. 64; 2 Adol. & Ellis, 57. 150

Where a declaration in assumpsit states several matters as a condition for the defendant's

promise, though all be not good, yet, if a sufficient consideration remains, it is enough to support the promise laid in the declaration. *King v. Sears*, 2 C. M. & R. 48; 5 Tyr. 587; 1 Gale, 241. 150

It is only necessary in cases of executed considerations, to state that the consideration for the defendant's promise moved at the defendant's special instance and request. *Id.*

A., by agreement, not under seal, in consideration of B.'s consenting to a supersedeas of a commission against him, undertook, in the event of his recovering a certain estate, to liquidate B.'s claim on him, which he was not bound legally to do:—Held, that this raised an implied promise on the part of A. to take some steps for recovery of the estate. *Edmunds v. Wilkinson*, 7 C. & P. 387—Denman. 150

In assumpsit on an agreement, want of consideration for the promise must be specially pleaded. *Passenger v. Brooks*, 7 C. & P. 110—Tindal. 150

*Money Paid.*—The rule that a tort-feasor cannot recover upon a promise to indemnify, made by the person at whose request the tortious act is committed, is confined to cases in which the act is of an obviously illegal character. *Betts v. Gibbins*, 4 Nev. & M. 64; 2 Adol. & Ellis, 57. 152

It does not extend to a case in which there is any bona fide doubt whatever, whether in point of law the act was authorized. *Id.*

The rule as to contribution between joint-tortfeasors must be similarly confined. *Id.*

Contribution is indemnity, and the same consideration that will support a promise to indemnify, will also support a promise to contribute, et a converso. *Id.*

If A. has accepted three bills for the accommodation of B., and is obliged to pay them, and also to pay the costs of two actions brought upon two of them:—Held, that A. cannot, in an action against B., recover the amount of the costs of the two actions, if his declaration contain only the common money counts: but that to recover these costs, he should have declared specially. *Seaver v. Seaver*, 6 C. & P. 673—Denman. 152

The plaintiff demised a house to the defendant, who, by the agreement of tenancy, agreed to pay a yearly rent clear of all deductions for taxes and parochial rates; after occupying the premises for some time, the defendant quitted them, leaving claims, for poor's rate and land tax unpaid, which the plaintiff as landlord was obliged to pay:—Held, that he could not recover the amount from the defendant in an action for money paid, because, as there was no original liability on the defendant to pay, it could not be said to be money paid to his use. *Spencer v. Parry*, 4 Nev. & M. 771; 3 Adol. & Ellis, 331; 1 Har. & Woll. 174. 153

*Money had and received.*—Where an overseer had stopt part of a pauper's parochial weekly allowance, and engaged to pay it over to the landlord of the pauper, in pursuance of an understanding between the three:—Held, that the landlord



could not support assumpsit for money had and received against the overseer. *Blackledge v. Harman*, 1 M. & Rob. 344—Alderson. 156

Where a party sued for money had and received, rested his defence on his having obtained the money bona fide, in satisfaction of an equitable claim, and the plaintiff, at the trial, merely endeavored to impeach the fairness of the receipt, and the claim generally, and the jury found for the defendant; the court refused to entertain a motion for a new trial, made on the ground that, admitting the fairness of the transaction, the defendant appeared, upon the plaintiff's case at the trial, to be not entitled to retain more than a part. *Moore v. Eddowes*, 2 Adol. & Ellis, 133. 156

Where the plaintiff and defendant, both claiming to act as clerks to the justices of a division, agreed to leave the dispute to the determination of third parties, who directed that the defendant should act in the office, and divide his fees with the plaintiff:—Held, that an action for money had and received might be maintained to recover the moiety of the fees received, and that the defendant could not allege that he was legally entitled to all the fees. *Roland or Rowland v. Hall*, 1 Scott, 539; 1 Hodges, 111. 156

Assumpsit for money had and received lies to recover money paid by the plaintiff under a forgetfulness of facts which were within his knowledge. *Lucas v. Worswick*, 1 M. & Rob. 293—Denman and Bolland. 158

Defendant was office-keeper of an Exeter and London coach, and servant to C., a proprietor at Exeter, where the office kept by defendant was. Defendant from time to time made up accounts of the shares of profits due to the several proprietors, and sent them to those parties, taking the money from a balance of C.'s which he had in hand. On one occasion, defendant sent to plaintiff, a proprietor, a packet purporting to contain 23*l.*, which was due to him, but in reality containing 20*l.* only. Plaintiff sued defendant for 3*l.* had and received to his use:—Held, that defendant was not liable, there being no privity of contract between him and the plaintiff; and that he was not precluded from this defence by having told the plaintiff (after action brought), that he, defendant, had had the 23*l.* of C., and sent it to the plaintiff, and debited C. with it. *Howell v. Batt*, 2 Nev. & M. 381; 5 B. & Adol. 504. 160

To an action by an indorsee for value of a bill which had been lost, it is no defence that the bill was taken under circumstances which ought to have excited the suspicion of a prudent and cautious man. *Crook v. Jadis*, 3 Nev. & M. 257; 5 B. & Adol. 909. 161

Nothing short of gross negligence will be an answer. *Id.*

Unless the circumstances be such that mala fides can be inferred. *Backhouse v. Harrison*, 3 Nev. & M. 188; 5 B. & Adol. 1098. 161

Negligence on the part of the loser of a bill of exchange, in not publishing his loss, will not cure any defect in the title of a subsequent hold-

er, in respect of the mode in which the bill came into the possession of the latter. *Id.*

In 1830 the plaintiff had his pocket picked of a 200*l.* bank-note at a public meeting. The note was paid to the defendant, as he said, upon a bet on the Derby in 1832, but he could not say by whom: Held, that the plaintiff was entitled to recover. *Easeley v. Crockford*, 3 M. & Scott, 700; 10 Bing. 243. 161

Where A. has accepted a bill for a debt due to B., and before the bill becomes due, and without the privity of B., lends 100*l.* to C., (which, at the time of the loan, A. was proceeding to deposit with his bankers, upon account of the bill), upon the assurance that C. would lodge the amount for that purpose, before the bill became due, at the bank; B. cannot, upon failure of C.'s promise, maintain an action against C. for money had and received. *McCarthy v. Smith*, 1 Alcock & Napier, 69, (Irish). 162

Upon the reading of the will of A. in the presence of her family, B., who had resided with her, produced a parcel containing bank notes, and stated that A. had given it to her about a fortnight before her death; upon which C., the brother of B., took up the notes, and said that he would keep them until B. required them, or, as stated by other witnesses, until the claims of the executors were disposed of:—Held, that in an action by B. against C. for money had and received, evidence of what had been stated by B. was admissible to show her title to the notes:—Held, also, that such statement, coupled with evidence of possession, of B.'s conduct at the time of the reading of the will, of her having told her sister some days before the death of A. of the gift having been made to her, and of the circumstance of other money of A.'s being untouched, although B. had had opportunities of possessing herself dishonestly of the notes, was sufficient evidence to go to the jury, upon a question raised whether B. was justly entitled to the notes. *Hayslip v. Gymer*, 3 Nev. & M. 479; 1 Adol. & Ellis, 162. 162

There being mutual accounts between A. and B. the latter met C., A.'s brother, to settle them. Two accounts were brought by C. The first contained various items of money received by B. for A. B. settled and signed this account. C. then produced another account between the parties respecting other items, which B. disputed, and refused to settle. No evidence was given of money had and received but the above:—Held, that A. was entitled to recover upon the count for money had and received. *Lorymer v. Stephens*, 1 C. M. & R. 62; 4 Tyr. 869. 163

*Account stated.*—An offer of a cognovit after action brought, will not support a count upon an account stated. *Spencer v. Parry*, 4 Nev. & M. 770; 3 Adol. & Ellis, 331; 1 Har. & Woll. 179. 163

Plaintiff declared for goods sold, and on an account stated. The particular delivered with the declaration was, "to a beast sold and delivered, 13*l.* 10*s.*" The only evidence was, that the plaintiff



admitted in conversation with a third person, not shown to be an agent of the plaintiff, that he owed the latter 13*l.* 10*s.* :—Held, that this was no evidence of an account stated, and that it was not evidence on the count for goods sold, as it was not shown to be applicable to the particular. Leave was given to the plaintiff to amend his particular, and go to a new trial on payment of costs. *Breckon v. Smith*, 1 Adol. & Ellis, 488 163

Plaintiffs sued upon an account rendered by the defendants.—Held, that the plaintiffs might impeach an item in the account by which the defendants sought to retain money under an illegal contract, notwithstanding that account was the only evidence in the action. *Rose v. Savory*, 5 Bing. N. R. 145; 1 Hodges, 269. 163

A landlord being in possession of the premises lately held by his insolvent tenant, in which were fixtures belonging to the latter, agreed to give up possession on his assignees paying 7*l.* for the rent due. They entered and sold the fixtures, but no occupation by them was proved.—Held, that the 7*l.* could not be recovered on the count on an account stated, the defendant's agreement to pay that sum not being bottomed on any previous transaction between the parties. *Clark v. Webb*, 1 C. M. & R. 29; 2 Dowl. P. C. 671; 4 Tyr. 673. 163

An acknowledgment by a defendant, after action brought, of money being due to the plaintiff, when there is no debtor account between them proved to have existed before action brought, is not evidence in an account stated. *Allen v. Cook*, 2 Dowl. P. C. 546. 163

In an action on an account stated, the defendant cannot now, under the plea of non-assumpsit, give in evidence a subsequent account alleged to be in his favor. *Fidgett v. Penny*, 2 Dowl. P. C. 714; 1 C. M. & R. 108; 4 Tyr. 650. 163

A banker's pass-book delivered to his customer, in which there are entries on one side only, is not evidence of a settled account between the parties, although the customer keeps the book without making any objection to the entries contained in it. *Ex parte Randleson*, 2 Deac. & Chit. 534. 163

If an error in a settled account is discovered and corrected before suit, and a bill be subsequently filed to surcharge and falsify, the corrected error is not a ground for a decree to surcharge and falsify. *Davis v. Spurling*, 1 Russ. & Mylne, 64. 163

A second count alleged that the defendant, on a particular day, was indebted to the plaintiff in 30*l.* "for money found to be due on an account stated between them :"—Held bad on special demurrer for not stating when the account was stated. *Spyer v. Thelwell*, 4 Dowl. P. C. 509; 2 C. M. & R. 692; *S. P. Ferguson v. Mitchell*, 2 C. M. & R. 687. 163

*Pleadings.*—A declaration stated a promise to the plaintiff and A. B., now deceased, in his lifetime, and in a second count, stated that the defendant was indebted to the plaintiff and the said

A. B. in his lifetime, but did not aver that he was deceased. The defendant having demurred to the second count.—Held, that the demurrer was frivolous within the 2nd rule Hil. T. 4 Will. 4. *Undershell v. Fuller*, 1 C. M. & R. 900. 164

Where the first count of a declaration was against the defendant as acceptor of a bill of exchange, stating a promise to pay the bill without any breach, and was followed by a count for money lent, money paid, &c., with a promise to pay limited to the latter sums, the breach is good if it goes on to state that he has disregarded his promises, and hath not paid the said monies to the said plaintiffs. *Turner v. Denman*, 4 Tyr. 313. 164

Where a declaration alleged the defendant to be indebted to the plaintiff in a certain sum for work and labor, without laying any promise to pay it, and then under a "Whereas also," proceeds to state him to be indebted to plaintiff in several other sums for goods sold and delivered, &c., concluding that the defendant had promised to pay the said last mentioned several monies respectively to the plaintiff on request :—Held bad on demurrer for want of a promise in the first count, which was not referred to by the words "last mentioned," in the second count. *Harding v. Hibel*, 4 Tyr. 314. 164

Where a promise is laid to pay on request the licet scipius requisitus need not be laid or proved. *Ring v. Roxbrough*, 2 C. & J. 418; 2 Tyr. 468. 164

Where several distinct causes of action, one of which is not sustainable, are stated in one count in assumpsit, general damages may be given. *Id.* 164

In assumpsit under a plea of non-assumpsit, the consideration for the promise is not traversed. *Passenger v. Brookes*, 1 Scott, 560; 1 Bing. N. R. 587; 1 Hodges, 123. 164

Want of consideration or any matter other than a direct denial of the contract, cannot be given in evidence under non-assumpsit. *Id.* 164

Where it is doubtful whether a statutable objection to the contract can be rendered available under the plea of non-assumpsit, the court will allow it to be specially pleaded. *Smith v. Dixon*, 4 Dowl. P. C. 571. 164

Indebitatus assumpsit on promises to pay on request. Plea, as to part, that defendant has paid the same, and in the same plea non-assumpsit to the residue, the whole concluding to the country :—Held, on special demurrer, that the plea was bad for not concluding with a verification. *Semble*, the plea was double, and that its subject-matters should have been divided into two pleas, the first concluding with a verification, the last to the country. *Ansell v. Smith*, 1 C. M. & R. 522; 5 Tyr. 141. 164

Assumpsit for money paid. Plea, that the money was paid by the plaintiff to the use of the defendant, in manner therein after mentioned, and in no other manner, viz. as one-sixteenth part, for the damages and costs recovered against the plaintiff as owner of a vessel of which the defendant was a part owner to the extent of one-sixteenth share, for the loss of certain goods shipped on board the vessel, and which loss was alleged



in the action to have happened through the negligence, &c. of the plaintiff, by his mariners and servants, whereas the loss complained of was not only caused by the negligence, &c. of the plaintiff, by his mariners and servants, but that the plaintiff, by his own personal and wilful misconduct, &c. contributed to the loss. The defendant pleaded further, that, although he was the legal owner of one-sixteenth part of the said vessel, yet he, the defendant, did not concur with the plaintiff and the other part-owners in the employment of the vessel in that voyage, but that the said voyage was undertaken and carried on for the profit and advantage of the plaintiff and certain other persons, separate and distinct from the defendant, and without his being concerned or in any way participating in the adventure. On special demurrer:—Held, that both pleas were bad, as amounting to the general issue. *Gregory v. Hartnoll*, 1 Mees. & Wels. 183; 4 Dowl. P. C. 635. 164

Where, in assumpsit, the plea admits the breach, and only alleges a number of facts, as matter of excuse, the replication of *de injuria* is proper. *Isaac v. Farrer*, 4 Dowl. P. C. 750; 1 Mees. & Wels. 65; *S. P. Griffin v. Yates*, 2 Bing. N. R. 579; 4 Dowl. P. C. 647; *Crisp v. Griffiths*, 2 C. M. & R. 159; 3 Dowl. P. C. 752; 1 Gale, 106. 164

To a declaration on a promissory note, by an indorsee against the maker, the defendant pleaded, that an advertisement appeared in a newspaper, offering loans of money at low interest, and that the defendant, being in want of a loan, was induced, by the false representations of the individuals to whom he applied, to draw that and other promissory notes for which he never had any consideration; and that all the parties to the bill were acquainted with these circumstances:—Held, upon special demurrer, that *de injuria* was a proper replication to this plea. *Id.*

The replication *de injuria* is not applicable in assumpsit, when the plea does not admit the promise stated in the declaration: as where the action was for a breach of contract in not paying for goods by bills with security, and the plea set out a custom of trade, that such security was only given when it was demanded before the goods were delivered. *Whittaker v. Mason or Marson*, 2 Scott, 567; 2 Bing. N. R. 359; 1 Hodges, 319. 164

Semble, that to a plea, showing a *prima facie* case of a promise, but avoiding it by showing some invalidity in the inception of a contract, *ex gr.* a want of consideration,—a replication that the defendant broke his promise without the cause alleged, is good on general demurrer. *Noel v. Rich*, 4 Dowl. P. C. 228; 2 C. M. & R. 360; 1 Gale, 225. 164

Assumpsit for 5000*l.* had and receiver. Plea, that the said money "being the money in the said declaration mentioned" was the proceeds of divers goods pledged, with a power of sale to the defendant, by persons whom the plaintiff allowed to hold the goods as their own, and which were in fact the joint property of those persons and the plaintiff, and that the defendant was willing to set off against the proceeds of the goods the advance

made on them. Replication, that the defendant, of his own wrong, and without the cause alleged, broke his said promise; and further, that the action was brought, not only for the proceeds of the goods mentioned in the plea, but also for the proceeds of other goods:—Held, on special demurrer, that the replication was bad, because it alleged that the defendant broke his promise, when the plea in effect was, that he never made one, and not an excuse for a breach. Secondly, because the plea claimed for the defendant an interest in the goods, and also asserted an authority from the plaintiff. *Solly v. Neish*, 2 C. M. & R. 355; 4 Dowl. P. C. 248; 1 Gale, 227. 164

Dicit the plea would be bad on special demurrer, as amounting to the general issue. *Id.*

Semble—Admitting that the *de injuria*, &c. put the whole plea in issue, nevertheless the new assignment did not make the replication double. *Id.*

### ATTACHMENT.

*Contempt.*—Mere violent snatching an original writ of summons from the person serving a copy of it, is not a contempt of the process of the court. *Weekes v. Whitely*, 3 Dowl. P. C. 536; 1 Har. & Woll. 218. 166

An attachment for misconduct cannot be moved for by a complainant in person, but the motion must be made by a gentleman at the bar. *Ex parte Fenn*, 2 Dowl. P. C. 527. 166

Contempt of court for nonpayment of costs, cannot be waived by the parties. *Gompertz v. Best*, 1 Y. & Col. 619. 166

An attachment will not be granted for not obeying a judge's order which has not been made a rule of court. *Hinchliffe v. Jones*, 4 Dowl. P. C. 86; 1 Har. & Woll. 337. 166

*Nonpayment of money.*—A conditional order for payment of costs cannot be enforced by attachment, although the step to be allowed on payment of costs has been taken without such payment. *Rese v. Fenn*, 2 Dowl. P. C. 541. 167

An attachment cannot be obtained for nonpayment of costs, pursuant to the master's allocatur, if there was no undertaking, in the judge's order for taxation, to pay what should be found due. *Harrison v. Ward* 3 Dowl. P. C. 541. 167

Where a party is allowed to amend, on condition of paying costs, but he amends and proceeds without such payment, he is still not liable to an attachment. *Turner v. Gill*, 3 Dowl. P. C. 30. 167

In order to obtain an attachment for nonpayment of costs, pursuant to the master's allocatur, it must appear by the affidavit, that the persons denying the payment are those mentioned in the allocatur. *France v. Wright*, 3 Dowl. P. C. 325. 167

The plaintiff, an attorney, brought an action for his bill of costs. The defendant obtained an order to tax the bill, which order did not contain a submission or undertaking to pay the amount



taxed. The usual submission was, however, entered in the judge's book. The master proceeded in the taxation, and made his allocatur for 6d. in favor of the defendant. The plaintiff applied on affidavits, and obtained another baron's order for the master to review his taxation. On the review, the master made his allocatur for 18l. in the plaintiff's favor. The plaintiff made the second order a rule of court, made a demand, &c. thereon, and moved for an attachment. Neither the first order nor the submission in the judge's book was made a rule of court. The court held, that the attachment was irregular, and set it aside. *Ryalls v. Emerson*, 2 C. & M. 464; 4 Tyr. 354; 2 Dowl. P. C. 357. 167

The plaintiff afterwards made the first order and the submission in the judge's book, a rule of court, served the two rules, the allocatur, &c., and made a fresh demand, and then obtained an attachment:—Held, that the second attachment was regular. *Id.*

**Demand.**—[In order to bring a party into contempt by not paying money according to an order, a demand of the money must be made after the order has been made a rule of court. *Chilton v. Ellis*, 2 Dowl. P. C. 338; 2 C. & M. 459; 4 Tyr. 369. 167

A personal demand is absolutely necessary before moving for an attachment for non-payment of costs. *Stunnell v. Tower*, 1 C. M. & R. 88; 2 Dowl. P. C. 673; 4 Tyr. 862. 167

Where a judge's order directed that certain deeds should be given up on a tender of, &c., to the plaintiffs or their agent:—Held, that, before an attachment for a refusal of the tender to him, the plaintiffs must have notice of that tender, and be personally required to give up the deeds. *Evans v. Millard*, 3 Dowl. P. C. 661; 1 Gale, 138. 167

An award directed that a bond should be delivered up to the plaintiffs upon demand:—Held, that a demand made by one plaintiff without a power of attorney from the others, was an insufficient demand to obtain an attachment. *Sykes v. Hague or Haigh*, 2 Scott, 193; 4 Dowl. P. C. 114; 1 Hodges, 197. 167

In order to bring a party into contempt for non-delivery of a bond pursuant to a rule of court, the demand of it must be made by one of the parties mentioned in the rule as entitled to receive it. *Ex parte Fortescue*, 2 Dowl. P. C. 443. 167

When a demand is made under a power of attorney a copy must be left. *Rex v. Packwood*, 2 Dowl. P. C. 570. 167

And the original produced. *Rex v. Martin*, 1 Alcock & Napier, 45, (Irish). 167

If money is ordered to be paid to a certain person, (not an attorney), or his agent, the demand must either be made by himself, or by some one authorized by power of attorney. *Brown v. Jenks*, 4 Dowl. P. C. 581. 167

In order to obtain an attachment for non-payment of costs, pursuant to the master's allocatur, a demand is not necessary, if the party sought to

be served, by his violence prevents the demand from being made. *Wenham v. Downes*, 3 Dowl. P. C. 573; 1 Har. & Woll. 216. 167

Where in a country cause costs are by a rule of court ordered to be paid "to the party or his attorney," a demand by the attorney in the country is sufficient to found a motion for an attachment for non-payment, although the agent in London is strictly the attorney on the record. *Dennett v. Pass*, 1 Scott, 586; 1 Bing. N. R. 638; 3 Dowl. P. C. 632; 1 Hodges, 157. 167

An attorney's bill having been ordered to be taxed after the client had given a bill of exchange for the amount, it was found that he had been overpaid, and the attorney was ordered to refund the over-payment to the client; and also, by a subsequent order, to pay the costs of taxation, more than a sixth having been taken off. Upon the application of the attorney to be allowed to pay these sums to the holder of the bill of exchange, (which had been dishonored), instead of his client, he was ordered to do so within a week, or, in default, that an attachment should issue:—Held, that no demand of these two sums was necessary to ground an attachment, but that it was his duty to seek the holder of the bill, and pay the money to him. *Woollison v. Hodgson*, 3 Dowl. P. C. 178. 167

**Non-performance of Awards.**—[On a rule nisi for an attachment on an award, no objection can be taken to it that does not appear on the face of it. *Paull v. Paull*, 2 C. & M. 235; 2 Dowl. P. C. 340; 4 Tyr. 72. 167

An attachment will not be granted if an action has been commenced, except upon the terms of discontinuing the action, and paying the costs. *Id.*

Where, in articles of agreement for the sale of land by A. to B., it is stipulated that the price shall be fixed by an arbitrator, and the agreement be made a rule of court, the award being published, and the agreement made a rule of court, A. cannot have an attachment against B. for non-payment of the price awarded. A's only remedy is by action on the articles. *In re Lee*, 3 Nev. & M. 860. 167

Matter of objection, not apparent upon the face of an award,—as an omission to adjudicate upon a matter or dispute brought before the arbitrator,—cannot be shown for cause against a rule nisi for an attachment for non-performance of the award. *M'Arthur v. Campbell*, 4 Nev. & M. 208; 2 Adol. & Ellis, 52. 167

**Practices.**—[A rule for an attachment, for any other cause than the non-payment of money pursuant to the master's allocatur, is only nisi in the first instance. *Richmond v. Bowdidge*, 4 Dowl. P. C. 749; 1 Mees. & Wels. 40. 169

Upon motion for an attachment for non-payment of costs, pursuant to the master's allocatur, to whom accounts had been referred upon the undertaking of the party, the courts will not grant a rule absolute in the first instance. *Rex v. Spragg*, 2 Nev. & M. 678. 169

When for non-payment of costs, as between at-



torney and client, it is a rule nisi. *Boomer v. Meller*, 2 Dowl. P. C. 533; *S. P. Spragg v. Williams*, 2 Dowl. P. C. 531; *Green v. Light*, 3 Dowl. P. C. 578; *Ryan v. French*, 4 Dowl. P. C. 583. 169

A party cannot have a rule absolute, in the first instance, for an attachment for not paying costs, pursuant to a rule of court, where those costs form part of a rule, for disobedience to which a rule nisi only for an attachment can be granted. *Ex parte Townley*, 3 Dowl. P. C. 39. 169

In the C. P. two motions are necessary to make a judge's order a rule of court, and for an attachment for disobedience thereto. *Filcher v. Woods*, 4 Dowl. P. C. 329. 169

In K. B., an application to make a judge's order a rule of court, and for an attachment for disobeying it, may be made on the same motion. *Hinchliffe v. Jones*, 4 Dowl. P. C. 86; 1 Har. & Woll. 337; *S. P. Forster v. Kirkwall*, 4 Dowl. P. C. 370. 169

In order to obtain an attachment, it is not sufficient that all the necessary steps are taken, partly at one time and partly at another. *Rogers v. Twissel*, 3 Dowl. P. C. 572. 169

In order to obtain an attachment for non-payment of costs, the rule for the payment of them, as well as the rule nisi for an attachment for non-payment must be personally served. *Birket v. Holme*, 4 Dowl. P. C. 556. 170

In order to ground an attachment for non-payment of costs, pursuant to a rule of court, or the prothonotary's allocatur, there must in all cases be a personal service, unless it appears that the rule or allocatur has been seen in the actual possession of the party. *Dicas v. Warne*, 1 Scott, 537; 1 Hodges, 91. 171

The court of K. B. will not grant an attachment without personal service, in any case where the party applying has another remedy. In *re Lowe*, 4 B. & Adol. 412. But see *Allier v. Newton*, 2 Dowl. P. C. 582. 171

It is not sufficient to show the party the original rule, without personal service of a copy. *Parker v. Burgess*, 3 Nev. & M. 36. 171

It is not necessary to place the original in the defendant's hands; if it be shown to him, so that he can read the contents, it is sufficient. *Calvert v. Redfern*, 2 Dowl. P. C. 505. 171

In order to obtain an attachment for non-payment of costs, pursuant to the master's allocatur, it is not indispensably necessary that a copy of the rule and allocatur should be left on the person of the defendant. *Rex v. Koops*, 3 Dowl. P. C. 566; *S. C. nom. Rose v. Koops*, 1 Har. & Woll. 213. 171

Personal service of the rule for payment of costs is necessary in order to obtain an attachment, although the defendant is an attorney. *Albin v. Toomer*, 3 Dowl. P. C. 563; 1 Har. & W. 215. 171

Where it is clear that the copy of the rule and allocatur have come to the hands of the defendant, an attorney, the court will grant a rule nisi for an attachment, although strict personal ser-

vice has not been effected. *Phillips v. Hutchinson*, 3 Dowl. P. C. 583; *S. P. Rex v. Dignam*, 4 Dowl. P. C. 359. 171

Where there had not been personal service of the rule of court and master's allocatur, but copies had been left, and notice had been given of a call that would be made, the court made a rule for an attachment against an attorney absolute, where, on showing cause against the rule nisi, he did not deny having received the papers and notice. *Bottomley v. Belchamber*, 4 Dowl. P. C. 26; 1 Har. & Woll. 362. 171

Where a rule nisi issues to show cause why an attachment should not issue for not obeying a judge's order, which has been made a rule of court, and the rule nisi is not personally served, but the party appears upon it and objects to the want of personal service, such appearance waives the necessity of personal service. *Levi v. Duncombe*, 1 C. M. & R. 737; 3 Dowl. P. C. 447; 5 Tyr. 490; 1 Gale, 60. 171

If a party is in contempt, it is not necessary that a rule calling upon him to answer it should be personally served. *Id.*

A personal service of the rule of court must be made to ground an attachment for non-payment of money, pursuant to a judge's order, which is afterwards made a rule of court; and service of the order and allocatur are not sufficient, nor is service of the rule on the London agents of the attorney sufficient; and for this defect an attachment, issued at the end of January, and executed on the 12th of February, was set aside in Trinity term following. *Woollison v. Hodgson*, 3 Dowl. P. C. 178. 171

Personal service must be effected before an attachment can be obtained for non-performance of an award on which an action will lie. *Richmond v. Parkinson*, 3 Dowl. P. C. 703. 171

Affidavits, in answer to an application for an attachment in a criminal case, should not be intitled in that case unless the record is in the K. B., but should be intitled in the court only. *Rex v. Stretch*, 4 Dowl. P. C. 30. 170

Where a wife sued as administratrix, together with her husband, and the title of an order to tax the attorney's bill took no notice of the husband, a rule nisi for an attachment for non-payment of a sum found due by the master's allocatur, was granted on an affidavit intitled as in the action, and not like the order. *Schooling v. Crouchman*, 1 Har. & Woll. 369. 170

Where, in the copy of a rule for an attachment for non-payment of costs pursuant to the master's allocatur, the defendant's name was spelt Calver instead of Calvert, and the master's name Day instead of Dax, the court set aside the attachment and discharged the defendant out of custody, although in the original rule the names were spelt correctly. *Rex v. Calvert*, 2 C. & M. 189; 4 Tyr. 77; *S. C. nom. Smith v. Calvert*, 2 Dowl. P. C. 276. 169

Upon a motion for an attachment for non-payment of money, the court refused to allow cause to be shown at chambers, though it was at



the end of the term. *Fall v. Fall*, 2 Dowl. P. C. 88. 170

Where a reasonable time had not been given between the day of serving a rule for an attachment, and the day of showing cause, the court, on making the rule absolute, directed the attachment to lie in the office a few days, until notice of that step being taken should be given to the defendant. *Rex v. Giles*, 4 Dowl. P. C. 569. 170

The proper mode of charging a defendant, who is a prisoner in custody of the marshal, with an attachment, is by lodging the attachment with the sheriff, who will take the defendant upon the attachment as soon as he is out of the custody of the marshal. *Boucher v. Simms*, 4 Dowl. P. C. 173; 2 C. M. & R. 392. 172

Where a party is arrested under an attachment for contempt of court in not paying money, he is not entitled to be discharged upon tendering the amount to the officer. *Pitt v. Coombs*, 3 Nev. & M. 212; 5 B. & Adol. 1078. 172

### ATTAINER.

Ejectment may be maintained for freehold lands, on the demise of a person attainted of felony, when there has been no office found on behalf of the king. *Doe d. Griffith v. Pritchard*, 5 B. & Adol. 765; S. C. nom. *Doe d. Evans v. Pritchard*, 2 Nev. & M. 489. 173

A lease for three lives contained a provision, that if the lessee, his heirs, &c., should, during the continuance of the term, happen to become insolvent, and unable in circumstances to go on with the management of the farm, the demise should from thenceforth cease and be absolutely void. Tenant (being the second cestui que vie) under such lease was attainted of felony, and transported. His mother and sister occupied the farm from that time till the expiration of the third life named in the lease, and during that period the reserved rent was regularly paid to B. W. P., to whom the reversion had come by devise, and who knew all the facts. The time of his becoming entitled did not appear. The reversioner, on the expiration of the third life, supposing that the term was at an end in point of law, let the land to a new tenant, whom he afterwards ejected, the attainted party being still alive. *Quere*, whether the attainer of the tenant was a forfeiture of the lease? but, held, that if it was a breach of the condition, it was not a continuing breach, but was contemporaneous with the conviction. *Id.*

*Quere* also, if a forfeiture was committed, whether it was one of which an assignee of the reversion might take advantage by stat. 32 Hen. 8, c. 34. *Id.*

Held, that if such a forfeiture was committed, the reversioner had waived it by accepting the reserved rent under the lease from the parties occupying the premises. *Id.*

*Semble*, that if the forfeiture had not been waived, a sufficient entry had been made to avoid the lease. *Id.*

A., in January, 1815, was convicted of bigamy. In April, 1815, he conveyed away, by lease and release, certain lands in which he had an estate for life:—Held, that such conveyance was not void as against the crown, there having been no attainer. *Rex v. Bridger*, 1 Mees. & Wels. 145. 173

In an action on the case for slander, the plaintiff had a verdict. Before judgment signed, the plaintiff was attainted of felony. *Quere*, whether, before office found, the damages vested in the king, and whether this would be sufficient matter suggested by the defendant, the crown refusing to interfere on a writ of audita querela, to prevent judgment and execution following the verdict? *Symonds v. Blake*, 2 C. M. & R. 416; 4 Dowl. P. C. 263; 1 Gale, 182. 173

On the trial of the felony, the defendant was examined as a witness; though dict. the record would nevertheless be undoubtedly admissible in evidence on a writ of audita querela, the court refused, in the exercise of its discretion, to stay proceedings on a motion suggesting this conviction. *Id.*

### ATTORNEY AND SOLICITOR.

#### 1. ARTICLED CLERKS.

If the original indenture of clerkship is lost, a copy may be inrolled. *Ex parte Chapman*, 3 Dowl. P. C. 562. 174

Draft of the articles of clerkship to an attorney allowed to be inrolled, where the original was lost through the misconduct of the person who had them delivered to him to be inrolled. *Ex parte Beckenden*, 1 Har. & Woll. 193. 174

If an attorney's clerk has been absent part of the five years with his master's consent, but has served on at the end of the five years under the same articles an equivalent additional time, he is entitled to be admitted. *Ex parte Frost*, 3 Dowl. P. C. 322; 1 Har. & Woll. 111. 174

Where a clerk has been articulated to a second master, pursuant to the 22 Geo. 2, c. 46, s. 9, and the affidavit of such articles has not been filed within three months after their execution, in accordance with section 3 of that statute, he cannot be admitted, nor can such affidavit be filed *nunc pro tunc*. *Ex parte Joy*, 3 Dowl. P. C. 343. 174

#### 11. ADMISSION.

*Rule.*—Whereas, by the statute 4 Hen. 4, c. 18, it was enacted, "that all the attorneys shall be examined by the justices, and by their discretions their names put on the roll; and they that be good and virtuous and of good fame shall be received, and sworn well and truly to serve in their offices:" and whereas, by the statute 3 Jac. 1, c. 7, s. 2, it was enacted, "that none shall from henceforth be admitted attorneys in any of the king's courts of record but such as have been brought up in the same courts, or



otherwise well practised in soliciting of causes, and have been found by their dealings to be skilful and of honest disposition, and that none be suffered to solicit any cause or causes in any of the courts aforesaid, but only such as are known to be men of sufficient and honest disposition :” and whereas, by a rule made in Michaelmas term, 1654, in the courts of K. B. and C. P. it was ordered, that the courts “should once in every year, in Michaelmas term, nominate twelve or more able and credible practisers, to continue for the ensuing year to examine such persons as should desire to be admitted attorneys, and appoint convenient times and places for the examination ; and the persons desiring to be admitted were first to attend with their proofs of service, then to repair to the persons appointed to examine, and being approved, to be presented to the court, and sworn :” and whereas, by the statute 2 Geo. 2, c. 23, s. 2, it was enacted, that the judges, or any one or more of them, should, and they were thereby authorized and required, before they should admit such person to take the oath to examine and inquire by such ways and means as they should think proper, touching his fitness and capacity to act as an attorney ; and if such judge or judges respectively should be thereby satisfied that such person is duly qualified to be admitted to act as an attorney, then, and not otherwise, the said judge or judges of the said courts respectively should, and they were thereby authorized to administer to such person the oath thereinafter directed to be taken by attorneys ; and after such oath taken, to cause him to be admitted an attorney of such court respectively :” and whereas, in order to carry the last mentioned statute more fully into effect, it is expedient annually to appoint examiners, subject to the control of the judges, in manner hereinafter mentioned.

It is ordered, that the several masters and prothonotaries for the time being of the courts of K. B., C. P., or Exchequer respectively, together with twelve attorneys or solicitors, be appointed by a rule of court in Easter term in every year, to be examiners for one year ; and five of whom (one whereof to be one of the said masters or prothonotaries) shall be competent to conduct the examination : and that from and after the last day of next Easter term, subject to such appeal as hereinafter mentioned, no person shall be admitted to be sworn an attorney of any of the courts, except on production of a certificate, signed by the major part of such examiners actually present at and conducting his examination, testifying his fitness and capacity to act as an attorney, such certificate to be in force only to the end of the term next following the date thereof, unless such time shall be specially extended by the order of a judge.

It is further ordered, that the examiners so to be appointed, shall conduct the examinations under regulations to be first submitted to and approved by the judges.

And it is further ordered, that in case any person shall be dissatisfied with the refusal of the examiners to grant such certificate, he shall be at liberty to apply for admission by petition

in writing to the judges, to be delivered to the clerk of the lord chief justice of the court of K. B., upon which no fee or gratuity shall be received, which application shall be heard in Serjeant's Inn Hall, by not less than three of the judges.

And whereas the hall or building of the Incorporated Law Society of the United Kingdom, in Chancery Lane, will be a fit and convenient place for holding the said examination, and the said society have consented to allow the same to be used for that purpose ; it is further ordered that until further orders, such examinations be there held on such days, being within the last ten days of every term, as the said examiners or any five of them shall appoint ; and that any person not previously admitted an attorney of any of the three courts, and desirous of being admitted, shall, in addition to the notices already required, give a term's notice to the said examiners, of his intention to apply for examination, by leaving the same with the secretary of the said society at their said hall, which notice shall also state his place or places of residence or service for the last preceding twelve months ; and in case of application to be admitted on a refusal of the certificate, shall give ten days' notice, to be served in the like manner of the day appointed for hearing the same.

And it is further ordered, that three days at the least before the commencement of the term next preceding that in which any person not before admitted, shall propose to be admitted an attorney of either of the courts, he shall cause to be delivered at the master's or prothonotary's office, as the case may be, instead of affixing the same on the walls of the courts as now required, the usual written notices, which shall state, in addition to the particulars now required, his place or places of abode or service for the last preceding twelve months ; and the master or prothonotary, as the case may be, shall reduce all such notices as in this rule first mentioned, into an alphabetical table or tables, under convenient heads, and affix the same on the first day of term in some conspicuous place within or near to, and on the outside of each court.

And whereas it is expedient that upon the re-admission of attorneys, the judges should have further means of inquiring as to the circumstances under which persons applying to be re-admitted discontinued to practise, and as to their conduct and employment during the time of such discontinuance ; it is further ordered, that, at the time of giving the usual notice of the intention to apply for such readmission, the party shall cause to be filed the affidavit on which he seeks to be readmitted, with the master or prothonotary, as the case may be, which affidavit shall contain, in addition to the particulars now required, a statement of his place or places of abode during the last preceding year : and such person shall also at the same time, cause to be left a copy of such affidavit with the clerk of the lord chief justice of the court of K. B. ; and the rule for the admission of such person shall be drawn up on reading such affidavit, and also an affidavit of such copy having been left in



compliance with this rule. Reg. Gen. K. B., C. P. and Exch. H. T. 6 Will. 4.

*Generally.*—Where an attorney had been admitted, and had practiced in the court of Great Sessions in Wales before the 11 Geo. 4, & 1 Will. 4, c. 70, but had ceased to practice, and was not “practicing” at the passing of that act:—Held, that he was not entitled to have his name inrolled in the superior courts under the act. *Ex parte Garratt*, 2 C. & M. 410; 2 Dowl. P. C. 371; 4 Tyr. 232. 175

On an application against an attorney for an attachment for his contempt of a judge’s order, made a rule of court; the court will take judicial notice of his being on the roll. *Ex parte Hore*, 3 Dowl. P. C. 600; 1 Har. & Woll. 211. 175

So in an application to tax an attorney’s bill, the court will take judicial notice of his being on the roll. *Ex parte King*, 3 Dowl. P. C. 41. 175

On a summary application against an attorney it must appear upon the affidavit that he is an attorney of the court. *In re Beck*, 1 Har. & Woll. 417. 175

The court will not entertain a motion touching the conduct of an attorney, unless it appears upon affidavit that he is an attorney of the court, or that the transaction arises in part at least out of a cause before the court: nor will the court exercise its summary jurisdiction over an officer, unless in a cause of palpable fraud. *In re Lord*, 2 Scott, 131; 1 Hodges, 195. 175

An attorney who has been admitted, or readmitted in another court, has a right to be admitted or readmitted in the court of Exchequer as of course, without giving any notice or undergoing any examination. *Ex parte Parry*, 1 Mees. & Wels. 295. 175

The court of review will, under special circumstances, admit an attorney nunc pro tunc. *Ex parte Tanner*, 3 Deac. & Chit. 10: S. P. *Ex parte A—*, 3 Deac. & Chit. 417. 175

Every person admitted an attorney of C. P., not having already entered his admission, and also every attorney hereafter to be admitted, shall forthwith enter his admission, and shall cause his annual certificate to be, on or before the first day of Easter term in every year, entered with the clerk of the warrants, which entries shall in all cases, where the annual certificate has been already entered in one of the courts, be made without fee or reward, and shall at the same time pay and discharge all his arrears of termage fees. Reg. Gen. C. P. M. T. 5 Will. 4. 175

The inrolment of an attorney in the Common Pleas is thus effected:—The party on receiving his admission from the secondary, takes it to the clerk of the warrants, who thereupon enters his name and address in a book kept for that purpose in alphabetical order. Unless inrolled, it is not competent to an attorney to sue for any fees or disbursements; therefore, where the de-

fendant’s attorney (in every other respect duly qualified to act as an attorney) had omitted to cause his name to be inrolled as above, the defendant having made no advances on account of the expenses of the suit, the court permitted the plaintiff to discontinue without paying costs. *Humphrys v. Harvey*, 4 M. & Scott, 500; 1 Bing. N. R. 62; 2 Dowl. P. C. 827. 175

An attorney having, through inadvertence omitted to inscribe his name on the roll of attorneys, although he had observed every other formality necessary for his admittance, the court refused to enter it nunc pro tunc to defeat an action for penalties incurred by the omission. *Ex parte Swift*, 1 Bing. N. R. 734; 1 Scott, 706; 3 Dowl. P. C. 636; 1 Hodges, 175. 175

But in such action they also refused to allow plaintiff to amend after special demurrer. *Id.*

Where an attorney, through the negligence of his clerk, has omitted to make the entry pursuant to the 37 Geo. 3, c. 90, s. 27, in due time, the court will allow that entry to be made nunc pro tunc, if he has taken out his certificate regularly, and paid the duty for that year. *Ex parte Fry*, 3 Dowl. P. C. 338. 175

*Notice of Application.*—The right names of all the persons with whom a clerk has served during the five years, must be introduced into the notices of his intention to apply for admission. *Ex parte Dobson*, 2 Dowl. P. C. 539. 175

Where a second christian name of both master and clerk was omitted in the articles of clerkship, and the notice of intention to apply for admission, described the parties by such second christian name, the court allowed the admission, on having an affidavit of the identity of the parties, in addition to the usual affidavits. *Ex parte Croft*, 5 Nev. & M. 58; 1 Har. & Woll. 375. 176

Where the notice of admission as an attorney was given with a view to admission in Easter Term, but by mistake the name of the person with whom he resided was inserted instead of the name of the party to whom he was article, the court, on an affidavit of the mistake, and denying any intention to evade inquiry, allowed him to be admitted on the same notice on the last day of Trinity term. *Anon.* 1 Har. & Woll. 141: S. C. nom. *In re Clarke*, 4 Nev. & M. 709; 3 Adol. & Ellis, 72. 176

Where an attorney applies for admission, it must be positively shown that his notice has been regularly put up in the King’s Bench office. *Ex parte Morgan*, 4 Dowl. P. C. 296. 176

The notice for the admission of an attorney having being omitted to be given in the King’s Bench office through inadvertence, the court allowed fresh notice to be given for admission on the last day of the following term. *Ex parte Stonehurst*, 1 Har. & Woll. 517. 176

The court will not admit an attorney on the last day of the term, upon a notice of application posted on the third day of that term. *In re Parsons*, 3 Nev. & M. 241; 3 Adol. & Ellis, 74; 1 Har. & Woll. 349. 176



So, although sufficient notice had been posted during the whole of a preceding term. *Id.*

Where a person wanted to go abroad to a colony to practice as an attorney, he was admitted without giving a full term's notice. *Ex parte Hulme*, 4 Dowl. P. C. 88; 1 Har. & Woll. 366. 176

Severe illness, under certain circumstances, will be considered as an excuse for not complying with the rule of court, in putting up notices in the King's Bench office, and outside the court of K. B., a term before applying for admission as an attorney. *Ex parte Herbert*, 2 Dowl. P. C. 172. 176

Where an attorney seeks to be admitted, he does not sufficiently comply with the rule of T. T. 33 Geo. 3. by sticking up the notice of his intention to apply in the King's Bench office, and outside the court, before the sitting of the court, on the first day of the term in which he seeks to be admitted. *Ex parte Gordon*, 2 Dowl. P. C. 470. 176

An attorney who was off the rolls, from his agent having neglected to take out his certificate, gave notice to the stamp office before Easter term that he should move for re-admission in Trinity term, Trinity being mentioned in the notice by mistake for Easter. On affidavit of the fact, and by consent of the stamp office, the court allowed the re-admission in Easter term. *Ex parte Nattall*, 3 Adol. & Ellis, 118. 176

The notice for the admission of the attorney was, by the inadvertence of an agent's clerk, given in the books of the Chief Justice, but not in the books of the other judges of the court: immediately on its being discovered, the notices were given:—Held, that the party might be admitted on the last day of the term. *Ex parte Woolright*, 4 Dowl. P. C. 274; 1 Har. & Woll. 517. 176

Amendment allowed in notice for admission of an attorney by inserting his place of residence. *Ex parte Jones*, 3 Adol. & Ellis, 74. 176

*Practice without Admission.*—An attorney who, though not admitted in the Exchequer, conducts an action there in his own name, notwithstanding 2 Geo. 2, c. 23, ss. 1, 5, & 10, cannot recover his fees or costs out of pocket from his client, and has therefore no lien for them upon a judgment recovered. Thus the costs of one action may be set off against those of another, without allowing him such fees. *Hyde v. Latham*, 3 Tyr. 143. 176

After the plaintiff's costs had been taxed and paid, it was discovered that their agent in the cause had never been admitted a solicitor; and an order was thereupon made, that the master should review his taxation, and disallow all such items as did not consist of fees paid to the clerk in court, with a view to having them refunded. *Coates v. Hawkyard*, 1 Russ. & Mylne, 746; *S. P. Prebble v. Boghurst*, 1 Russ. & Mylne, 744; and *Summer v. Ridgway*, 1 Russ. & Mylne, 748. 176

It is no ground for disallowing to the plaintiff's attorney his costs of conducting the action, that he was not on the roll of attorneys of

the court, if it appears that he conducted the proceedings in the name of a London attorney, who was an attorney of the court. *Goodner v. Cover*, 3 Dowl. P. C. 424; *S. C. nom. Gardner v. Cover*, 1 Gale, 45. 176

Where a declaration was delivered in the name of a person as the attorney, but who in fact was not so: it was held, that the defendant could not treat the declaration as a nullity, and sign judgment. *Bayley v. Thompson*, 2 Dowl. P. C. 655; 2 C. & M. 673. 176

A cause had been tried and a verdict found for the plaintiff, which was afterwards set aside by the court, on the ground that the contract upon which the plaintiff sued was illegal and void. After the rule for a new trial was made absolute, it appearing that the defence had been conducted by an attorney of the court of King's Bench, acting in the name of one who had for some years ceased to be an attorney of the court of C. P.—The court permitted the plaintiff to discontinue without payment of costs, except as to so much money as might be found to have been paid by the defendant to his attorney on account of the suit. *Paterson v. Powell*, 3 M. & Scott, 195. 176

Practising at quarter sessions without admission. *Slack q. t. v. Wilkins*, 3 Tyr. 158; 1 C. & M. 23. 177

It is no objection to a habeas corpus that the attorney suing it out was not on the roll, by reason of having omitted to take out a certificate. *Glynn v. Hutchinson*, 3 Dowl. P. C. 528; 2 Adol. & Ellis, 660. 176

A solicitor may practise in the name of an attorney as his agent in the courts of law, but an attorney at law cannot practise in the name of a solicitor, as his agent in the courts of equity. *Hockley v. Bautock*, 2 Mylne & K. 437. 177

*Certificate.*—An attorney who has taken out his certificate within a year from the expiration of a former certificate, but has transacted business between the expiration of the first certificate, and the taking out of the second, may recover for such business done, unless it appear that he delayed renewing the certificate with intent to evade the higher duties imposed by stat. 55 Geo. 3, c. 184, sched. Part 1, tit. "certificate," in which case he is disabled from renewing, by that act and by stat. 37 Geo. 3, c. 90, s. 36. *Bowler v. Brown*, 3 Dowl. P. C. 80; 2 Adol. & Ellis, 116; 4 Nev. & M. 17. 177

Defendant, on being sued, paid the debt, but refused to pay the costs; plaintiff's attorney proceeded to trial and issued execution for them; but being uncertificated, and the plaintiff having made him no advances, the court stayed the proceedings. *Meekin v. Whalley*, 1 Bing. N. R. 59; 2 Dowl. P. C. 823; 4 M. & Scott, 494. 177

#### IV. READMISSION.

Where an attorney has been admitted, but has never taken out his certificate, he is entitled to take it out without readmission. *Ex parte Jones*, 2 Dowl. P. C. 451. 178



Semble, that if an attorney has been admitted, and does not take out his certificate for a year, he need not be readmitted previous to taking it out; but whether he need or not, if he has taken out his certificate under such circumstances, the client's interest will not be affected. *Hilary v. Hungate*, 3 Dowl. P. C. 49. 178

If an attorney practises after the expiration of his certificate, even though with the hope of taking out one, he cannot be readmitted without payment of the arrears of duty for the years during which he has practised, and something more than a nominal fine. *Ex parte Philpot*, 3 Dowl. P. C. 339. 178

An attorney will be readmitted, although upon two occasions he has acted as an attorney whilst uncertificated. *Ex parte Lowerton*, 1 *Hodges*, 77. 178

If an attorney omits to take out his certificate, but discontinues to practise, he may be readmitted without payment of fine or arrears of duty. *Ex parte Thompson*, 2 Dowl. P. C. 160. 178

If an attorney has practised abroad during a period for which he has not taken out his certificate, he may be readmitted without payment of arrears of duty or fine. *Ex parte Philcox*, 2 Dowl. P. C. 450. 178

Where an attorney has by accident omitted to pay the proper amount of certificate duty for some years, as also to take out his certificate during another period, and has practised during that time, the court will readmit him on payment of the arrears of duty and a nominal fine. *Ex parte Jones*, 2 Dowl. P. C. 199. 178

The court will, upon payment of a moderate fine, readmit an attorney who has inadvertently practised without his certificate, through the omission of a clerk usually employed to take it out. *Ex parte Rigby*, 1 Nev. & M. 593. 178

Rule granted to readmit an attorney without a term's notice, when the omission to take out the certificate for the current year was the act of the agent. *Ex parte Ford*, 1 Har. & Woll. 192. 178

If the agent of an attorney neglect to take out his certificate, and the latter continues to practise, in ignorance of the neglect, he may be readmitted on payment of a nominal fine and the arrears of duty. *Ex parte Thorpe*, 3 Dowl. P. C. 592. 178

An attorney who through inadvertence has practised without his certificate, cannot be readmitted without an affidavit showing that a notice has been given to the stamp office of his intention to apply for readmission. *Ex parte Franks*, 3 Dowl. P. C. 319; *S. P. Ex parte Bridgman*, 3 Dowl. P. C. 371. 178

If an attorney has practised after he has ceased to take out his certificate, but has had the penalties remitted by the commissioners of stamps, he may be readmitted on taking out his certificate for the current year. *Ex parte Tufkin*, 1 Har. & Woll. 516. 178

On applying to readmit an attorney, it is sufficient if the affidavit clearly shows by its statements that he must have been admitted, without positively stating the facts. *Ex parte Wentworth*, 2 Dowl. P. C. 607. 178

An attorney seeking to be readmitted, sufficiently complies with the rule as to the term's notice previous to his application, by sticking it up in the King's Bench office on the morning of the first day of the term in which he applies, at the opening of the office. *Ex parte Filkins*, 2 Dowl. P. C. 203. 178

A notice by an attorney to the last day of one term to apply for readmission in the next, is not sufficient, although the notice remain up throughout the vacation. *Ex parte Cross*, 4 Dowl. P. C. 18. 178

Where by some inadvertence the necessary affidavits could not be procured for the readmission of an attorney on the last day of the term, for which he had given notice, the court on application the first day of the following term, refused to readmit him, but allowed the notices then to be given for the last day of the same term. *Ex parte Mosley*, 4 Dowl. P. C. 69; 1 Har. & Woll. 331. 178

Where on application for the readmission of an attorney, it was stated that he had not practised since he last took out his certificate, the court compelled him on his readmission to pay a fine of 5*l.*, besides the arrears of duty. *Ex parte Stonecroft*, 1 Har. & Woll. 368. 178

## V. PRIVILEGES.

Since the Uniformity of Process Act, an attorney sued with an unprivileged person does not lose his own privilege, and cannot be arrested. *Reep v. Biggs*, 2 Dowl. P. C. 278. 179

An attorney sued jointly with an unprivileged person, does not lose his privilege of freedom from arrest, as he may now be served with a copy of the capias under which the other person is arrested, pursuant to the provision of the 4th section of the 2 Will. 4, c. 39. *Pitt v. Pocock*, 2 C. & M. 146; 4 Tyr. 85. 180

By the act of 11 Geo. 4 & 1 Will. 4, c. 70, s. 10, which opened the court of Exchequer to all attorneys, and gave them leave to practise there without employing clerks in court, the privileges of the sworn and side clerks are not abolished; and therefore they may still arrest other attorneys who become indebted to them, in the same way as they did before. *Stokes v. White*, 2 Dowl. P. C. 703; 1 C. M. & R. 223; 4 Tyr. 786. 180

The office of sworn clerk of the court of Exchequer is not abolished by any of the several statutes of 11 Geo. 4 & 1 Will. 4, c. 58; 11 Geo. 4 & 1 Will. 4, c. 70; and 2 & 3 Will. 4, c. 110. The object of the first-mentioned statute is to provide means of paying the officers of the various courts of justice by salaries instead of fees; that of the second, to abolish the monopoly of at-



tornies' business which existed on the plea side of the court of Exchequer; and that of the third, to distribute the duties of the officers of that court, and to give to them appropriate names. *Clarke v. Richards*, 1 Y. & Col. 351. 180

Where the plaintiff, under an apprehension of the defendant going abroad, arrested the defendant, who was admitted to be an attorney of the court of Exchequer, then entitled to privilege, and the defendant lodged in court the deposit required by sect. 2 of 10 Geo. 4, c. 35, the court, on application, allowed the defendant to draw out the money so lodged. *Curtis v. Brennan*, 1 Allcock & Napier, 122, (*Irish*). 181

A party cannot be deprived of his privilege, unless upon a strong and clear case of facts, which will satisfy the court of the necessity of the arrest for the purposes of justice; and where the plaintiff in any way admits the privilege, the court will not put the defendant to the trouble and delay of pleading his privilege. *Id.*

Quære, whether an attorney of the King's Bench, sued by a writ of summons in C. P., can plead his privilege in abatement. *Davidson v. Chilman*, 1 Scott, 117; 1 Bing. N. R. 297. 181

At all events such plea must be verified by affidavit, or the plaintiff may treat it as a nullity, and sign judgment. *Id.*

Trespass is not maintainable for holding an attorney to bail, notwithstanding his privilege. *Noel v. Isaac*, 1 C. M. & R. 753; 5 Tyr. 376. 181

An attorney plaintiff, though he does not describe himself as attorney on the record, does not, since the Uniformity of Process Act, lose his privilege of suing in the superior courts. *Wright v. Skinner*, 4 Dowl. P. C. 745; 1 Mees. & Wels. 144. 181

An attorney is not within the Court of Requests Act, so as to deprive him of his privilege of suing in the superior courts at Westminster, unless it is so enacted in them, notwithstanding the Uniformity of Process Act. *Dyer v. Levy*, 4 Dowl. P. C. 630. 181

An attorney, by employing another to bring an action for him, waives his privilege, and therefore cannot as a matter of course try his cause in the county of Middlesex. *Harrington v. Page*, 2 Dowl. P. C. 164. 181

If the plaintiff, being an attorney, does not sue as such, but appears by an attorney, the defendant may change the venue as a matter of course, on the usual affidavit. *Lowless v. Tims*, 3 Dowl. P. C. 707. 181

Privilege of visiting prisons. *Ex parte Maule*, 4 B. & Adol. 265; S. C. nom. *In re Jones*, 1 Nev. & M. 128. 182

## VI. DUTIES.

*Retainer.*—By 2 Will. 4, c. 30, s. 17, every attorney whose name shall be indorsed on any writ issued by authority of that act, shall, on demand in writing made by or on the behalf of any defendant,

declare forthwith whether such writ has been issued by him, or with his authority or privity; and if he shall answer in the affirmative, then he shall also, in case the court or any judge of the same or any other court shall so order and direct, declare in writing, within a time to be allowed by such court or judge, the profession, occupation, or quality, and place of abode of the plaintiff, on pain of being guilty of a contempt of the court from which such writ shall appear to have been issued; and if such attorney shall declare that the writ was not issued by him, or with his authority or privity, the said court, or any judge of either of the said courts, shall and may, if it shall appear reasonable so to do, make an order for the immediate discharge of any defendant or defendants who may have been arrested on any such writ, on entering a common appearance.

The statute applies to both serviceable and bailable process. *Gilson v. Carr*, 4 Dowl. P. C. 618. 182

Where bail made a motion in the name of an attorney, who denied having given any authority to allow his name to be used, the court discharged the rule, but refused to make an order for costs against the person making the affidavit, on the ground that he was not before the court. *Norton v. Curtis*, 3 Dowl. P. C. 245. 182

To obtain such costs a special application must be made against him. *Id.*

Where an action is brought by an attorney without the plaintiff's consent, and the defendant at the trial agrees to withdraw a juror, the court will not order the attorney acting for the plaintiff to pay the costs of the defendant. *Hammond v. Thorpe*, 1 C. M. & R. 64; 4 Tyr. 838; 2 Dowl. P. C. 721. 183

Where a plaintiff's attorney receives a sum of money from the defendant, it is incumbent on the plaintiff to show that the receipt was without his authority, otherwise it is money paid to his use. *Vorley v. Garrard*, 2 Dowl. P. C. 490. 183

Where an attorney has been employed in a cause, and is afterwards discharged by his client, not on the ground of misconduct, the court will not restrain him from acting for the opposite party, unless it clearly and distinctly appears that he has obtained information in his former character which it would be prejudicial to the cause of his former client to communicate. And, therefore, where an attorney was employed by the assignees of a bankrupt to commence an action, and he accordingly did so, and went on to issue, and in the course of his employment laid a case before counsel, containing all the facts of the case, the court refused to restrain him from acting for the defendant after his dismissal by the plaintiffs, there being no affidavit by the parties or their solicitor, showing that the attorney obtained a knowledge of facts which would be prejudicial to their cause to communicate, nor any affidavit stating that the case which had been laid before counsel disclosed facts which it was necessary to conceal, and which would be injurious to the plaintiffs if they were communicated. *Johnson v. Marriott*, 2 C. & M. 183; 2 Dowl. P. C. 343; 4 Tyr. 78. 183



A solicitor ought to have a special authority from his client for instituting a suit, but such authority need not be in writing. *Lord v. Kellett*, 2 Mylne & K. 1. 183

If A., having employed an attorney to defend an action, assign his property to trustees for the benefit of his creditors, and the trustees direct the attorney to go on with the defence, they are liable to pay the attorney for what he does after they directed him to go on, but are not liable for the bygone business, unless there be an agreement in writing to make them so. *Becke v. Penn*, 7 C. & P. 397—Tindal. 183

An attorney, who is retained as the agent of a candidate to represent a place in parliament, is not entitled to recover any thing for a retaining fee, unless there has been an express agreement that such fee should be paid to him. *Parker v. Robinson*, 7 C. & P. 241—Williams. 184

The court will stay proceedings in an action, if it appear to be doubtful whether the action is brought with the knowledge and consent of the plaintiff. *Doe d. Baker v. Roe*, 3 Dowl. P. C. 496. 184

When an attorney, who has not been admitted into the Exchequer, practises in the name of one who has, the proceedings must appear to be taken by the Exchequer attorney. That does not appear in a notice, "A. by B." B. being the attorney of that court. *Chadwick v. Hough*, 2 C. M. & R. 29, 164; 1 Gale, 143. 184

Where bail was put in in this form:—"Ely by Cole," the former not being an attorney of the Court of Exchequer, though the latter was, the proceedings were held to be informal, but time was given to amend. *Marden's Bail*, 4 Dowl. P. C. 654. 184

**Conduct of Business.]**—An attorney, who has commenced an action for his client, has a right to refuse to go on without an advance of money on account, provided he gives his client sufficient notice of his intention, to enable him to make the required provision. *Lawrence v. Potts*, 6 C. & P. 428—Tindal. 185

If an attorney has reasonable and probable grounds for commencing an action, and desists from prosecuting it because he afterwards discovers that the cause cannot be successfully proceeded with, he is entitled to recover his costs from his client. *Id.*

An attorney who has undertaken a cause is not bound to proceed, without adequate advances from time to time by his client, for expenses out of pocket; and, therefore, the court will not compel an attorney, even after notice of trial, to carry the cause into court, unless the client supply him with sufficient funds to pay the expenses out of pocket thereby incurred. *Wadsworth v. Marshall*, 2 C. & J. 665. 185

The contract of an attorney or solicitor retained to conduct or defend a suit is entire and continuing, viz. to carry it on till its termination, and can only be determined by the attorney

upon reasonable notice. *Harris v. Osbourn*, 4 Tyr. 445; 2 C. & M. 629. 185

If the attorney of a party authorize A. to pay money for his client, and A. pay it, and the attorney mention the matter to his client, who does not disclaim the transaction till several months after, this is evidence to go to the jury that the authority to pay was authorized by the client. *Parker v. Dubois*, 7 C. & P. 406—Abinger. 185

**Dealing with Client.]**—Where an attorney who draws the will of the testator takes a benefit under it, the case is to be considered with peculiar jealousy, and the jury who try the validity of the will must be satisfied that the testator knew its contents; but their consideration need not be confined to direct evidence; and they may find for the will upon circumstantial evidence only. *Ra-worth v. Mariott*, 1 Mylne & K. 643. 185

## VII. LIABILITY.

**On Undertakings.]**—The undertaking of an attorney cannot be summarily enforced, unless he is acting as attorney in the cause. *In re Bateman*, 2 Dowl. P. C. 161. 187

The plaintiff's attorneys gave the defendant's attorneys an undertaking to pay the costs in the event of the defendant obtaining a verdict: the defendant obtained a verdict and died, and judgment was entered up within two terms:—Held, that the plaintiff's attorneys were liable to pay the costs, although no sci. fa. had been sued out by the personal representatives. *Chauvel v. Chimmelli*, 1 Nev. & M. 731; 4 B. & Adol. 590. 187

The solicitor of the London creditors of a bankrupt in the country wrote to B., the solicitor of the country creditors of the same bankrupt, the following letter:—"I am willing, on behalf of the London creditors, to bear two-thirds of the expense of Messrs. B. & B., or such barrister as you may think fit, for resisting Mr. K.'s proof under the commission, and of investigating the accounts of assignees at the meeting on the 18th instant. I hereby undertake to bear and pay on behalf of these creditors, two-thirds of the expenses incident thereto accordingly." And the meeting being afterwards adjourned, A. wrote to B. another letter, in which he said—"I shall have no objection to bear as before the proportion of expense of the barrister attending the meeting stated in your letter:—"Held, that A. was personally liable for the proportion of the expenses. *Hall v. Ashurst*, 1 C. & M. 714; 3 Tyr. 420. 187

The solicitor for the petitioning creditor, on the commission being superseded, writes to the bankrupt, "I am ready, and hereby offer to allow and pay the costs incurred by the bankrupt in petitioning for the supersedeas:—"Held that the solicitor was personally liable on this undertaking, and that the bankrupt might petition for an order on the solicitor to pay these costs, notwithstanding a subsequent commission had issued against him, under which he had not obtained his



certificate, his assignees disclaiming all interest in the matter. *Ex parte Bentley*, 2 Deac. & Chit. 578. 187

The prudent course for attornies, when they enter into any arrangement with an opposite party, is to draw up a memorandum of the terms agreed upon, and read it over to the party, and let him sign it. *Greenwood v. Eldridge*, 6 C. & P. 128—Gurney. 187

*To Attachment.*—If a rule of court requires a client to pay a certain sum of money, an attachment cannot be obtained against his attorney for its non-payment. *Poole v. Watkins*, 4 Dowl. P. C. 11. 187

Where an attorney is in contempt by disobeying a rule of court, the proper course of proceeding against him is by moving for an attachment, and not by applying to strike him off the roll. *Ex parte Townley*, 3 Dowl. P. C. 39. 187

Where an attorney disobeys a rule of court, requiring him to do a particular act, an application cannot in the first instance be made to strike him off the roll; but a rule nisi for an attachment may be obtained. *Ex parte Gran*, 3 Dowl. P. C. 320. 187

If, by the same rule, he is required to pay certain costs, and a clause is also introduced into it, authorizing the issue of an attachment in case of non-payment, that may at once issue, although a rule nisi only will be granted for disobedience to the other part of the rule. *Id.*

*To summary Jurisdiction.*—Where an attorney has not fulfilled his engagement with respect to a loan of money, independent of his character of attorney, the court will not summarily compel him to fulfil it. *In re Chitty*, 2 Dowl. P. C. 421. 188

If the agent of an attorney does wrong, the client cannot make a summary application against the agent. *Ex parte Jones*, 2 Dowl. P. C. 161. 188

The court of bankruptcy will only exercise a summary jurisdiction over an attorney, when he is acting in the character of an officer of the court, and not in an ordinary case between attorney and client. *Ex parte Bull*, 3 Deac. & Chit. 116. 188

The court will not interfere summarily to try the question of negligence on the part of an attorney towards his client's interests. *Brazier v. Bryant*, 2 Dowl. P. C. 600. 188

Where an attorney has been appointed to receive certain monies in furtherance of a trust, pursuant to the provisions of the Lords' Act, the court will not deprive him of that trust, unless some ground is shown for considering him unfit to fulfil it. *Davis v. Lane*, 4 Dowl. P. C. 419. 188

Directing an attorney to employ a proctor to obtain probate of a will is not such employment of him in the character of an attorney, as will give the court summary jurisdiction over him, as to

money received by him to pay the proctor. *Ex parte Cowie or Cohen*, 3 Dowl. P. C. 600; 1 Har. & Wol. 211. 188

An attorney cannot be ordered to pay the costs of an unsuccessful application to which he is not a party, except upon special motion. *Chealyn v. Pearce*, 4 Dowl. P. C. 603. 188

*Striking off Roll.*—Semble, that the court will not strike an attorney off the roll, unless for some misconduct in his business of attorney, or where criminal proceedings have been taken against him. *Ex parte* —, 2 Dowl. P. C. 110. 188

A verdict having been obtained against an attorney, in an action for publishing a libel of a very aggravated nature, but in which the jury only gave one shilling damages, the court refused to strike him off the roll, on the mere ground of the publication of that libel. *Ex parte* —, 2 Dowl. P. C. 110. 188

It is no cause for striking an attorney off the roll, that he has commenced several *qui tam* actions for the purpose of revenge. *Ex parte Warren*, 1 Har. & Woll. 113. 188

Where an attorney brings several *qui tam* actions, and after their commencement makes an offer to the defendant to compromise them, it is no ground for striking him off the roll. *Smith v. Gillett*, 3 Dowl. P. C. 364. 188

The court of King's Bench will not grant a rule, calling on an attorney to show cause why he should not be struck off the roll, if the affidavits in support of the rule state an offence for which he would be liable to indictment. *In re* —, 5 B. & Adol. 1088. 188

The court will not receive an application to strike an attorney off the roll, except on the application of a barrister. *In re* —, *Gent.*, 3 Nev. & M. 566. 188

Where it was sworn that an attorney had no place of residence in this country, an order nisi for his being struck off the roll in the court of bankruptcy, was permitted to be served at his last place of residence. *In re Mark*, 4 Deac. & Chit. 28. 188

Where a rule for striking an attorney off the roll for misconduct is referred to the prothonotary, he is not to be confined to the affidavits already before the court, but may receive any evidence tending to the elucidation of the matter. *Dicas v. Warne*, 4 M. & Scott, 420; 2 Dowl. P. C. 812. 188

On a reference to the prothonotary of a rule for striking an attorney off the roll, on a charge of having hired sham bail in error, the officer reported that the attorney did not actually hire the bail, but was aware they were hired:—The court discharged the rule on the terms of the attorney paying all the costs of and occasioned by the proceedings. *Id.*

Though the rule of another court for striking an attorney off the roll be produced, semble, an order nisi only can be obtained in the court of bankruptcy in the first instance. *In re Mark*, 4 Deac. & Chit. 482. 188



*As to Clerks.*—Where an attorney receives a promissory note from the father of a clerk articulated to him, as his fee for taking him, on an undertaking that the note should not be negotiated until the expiration of a certain period, and he did negotiate it contrary to his undertaking, the court compelled him to take it up. *Ex parte Gardner*, 2 Dowl. P. C. 520. 189

*Allowing others to use their Names.*—A superior court is bound, upon summary application, under 22 Geo. 2, c. 46, s. 11, to order an attorney, who is shown to have allowed an unqualified person to practice in his name in such court, to be struck off the roll. *In re Palmer*, 4 Nev. & M. 529; 2 Adol. & Ellis, 686; 1 Har. & Woll. 55. 189

But that court only from which the abused process issues, can, upon summary application under this enactment, order the attorney to be struck off the roll. *Id.*

Where, upon such an application under this statute, the court referred it to the master to say whether, in any instance, the unqualified person had with the permission of the attorney, practiced in that court, the rule can be made absolute only upon its appearing by the master's report, that the case is within the statute, not upon the ground of a general jurisdiction of the court over its officers. *Id.*

An attorney who resided at A., occasionally occupied part of a house in B., where his articulated clerk lived, the names of both being on the door. The clerk was in the habit of attending a court of requests and before magistrates, as such clerk, but deriving a profit to himself therefrom; he also conducted an appeal in the name of his master, who allowed part of the bill to be paid by a suit of clothes made for the clerk. It also appeared, that several writs, issued out of K. B., had been placed in the hands of an officer to be executed, having the master's name upon them, for part of which he paid, but referred the officer to the clerk for the remainder, saying it was the clerk's business and not his; and that in an action carried on in K. B., in the name of the master, with his knowledge and concurrence, the clerk appeared and acted as the attorney, and after verdict obtained, claimed to have the costs paid to himself, and objected to have them paid to the master:—Held, that this was a case within 22 Geo. 2, c. 46, s. 11; and the court ordered the attorney to be struck off the rolls. *Id.*

A person who has been regularly admitted as an attorney, but who is off the roll, by reason of his having neglected to take out his certificate for one whole year, is not an "unqualified [person]" within the meaning of sect. 11 of 22 Geo. 2, c. 46. *In re Ross*, 4 Nev. & M. 763; S. C. nom. *In re Hodgson*, 1 Har. & Woll. 265; 3 Adol. & Ellis, 224. 189

But he may be proceeded against by virtue of the general jurisdiction of the court over its officers, if he takes upon himself to act as an attorney. *Semble.* *Id.*

Quære, whether a person, who had been struck off the roll for misconduct, would be an "unqualified person" within 22 Geo. 2, c. 46, s. 11? *Id.*

An application to commit a person to prison, under 22 Geo. 2, c. 46, s. 11, for having acted as an attorney, not being qualified, must also be to strike the agent, through whom the business was transacted, off the roll. *In re Hodgson*, 3 Dowl. P. C. 330; 1 Har. & Woll. 110. 189

In affidavits filed to support an application to strike an attorney off the roll for suffering an unprofessional person to carry on business for him as his clerk, contrary to 22 Geo. 2, c. 46, s. 11, it is not sufficient to state facts from which the court may infer that the parties shared the profits; the prosecutors must state their belief that such was the case, unless the facts are such as cannot lead to any other conclusion. *In re King*, 1 Adol. & Ellis, 560; 3 Nev. & M. 716. 189

The mere fact, that an attorney has employed an unprofessional person to carry on business for him as his clerk, at a place ninety miles distant from the attorney's own residence, is not sufficient ground for such an application. *Id.*

*Delivery up of Documents.*—Where a client obtained an order that his attorneys should deliver him an account of all monies received on his behalf, and they accordingly delivered an account, the court refused to grant an attachment against them upon affidavits impeaching the correctness of the account. *Ex parte Lawrence*, 2 Dowl. P. C. 230. 190

The court can only interfere to compel an attorney to deliver up deeds in his possession, at the instance of the party who deposited them with him. *In re Thornton*, 2 Dowl. P. C. 156. 190

An attorney, with whom a will has been deposited by the testator, will not be compelled to deliver it up to the sole legatee under it. *Ex parte Crisp*, 2 Dowl. P. C. 455. 190

An attorney, with whom deeds are deposited in order to enable him to obtain money for the party depositing, is bound, upon inquiry by his client, to inform him where such deeds are. *Wilmott v. Elkington*, 1 Nev. & M. 749. 190

An attorney, with whom deeds are deposited, places them, without his client's knowledge, in the hands of a party from whom he has borrowed money for his client. The attorney afterwards is unable to inform his client where the deeds are:—he is chargeable with having mislaid such deeds. *Id.*

If a party successfully resists an action by an attorney plaintiff for costs, on the ground of his never having been employed, he cannot afterwards summarily compel the attorney to give up documents which have come to his possession in the course of the business, for doing which the action was brought. *Ex parte Maxwell*, 4 Dowl. P. C. 87. 190

Where an attorney, having the custody of certain papers, has been ordered by the court of Chancery, in which he has been made a party to



a suit, to deliver them into the custody of the officer of that court, the court of K. B. will not direct him to deliver them up, though on application of a party interested in them; because it would render the attorney liable to an attachment for non-compliance with the order of the court of Chancery. In *re Walmaley*, 4 Nev. & M. 543; 2 Adol. & Ellis, 576; 1 Har. & Woll. 88. 190

Where an attorney had obtained from an aged lady, in the absence of her attorney, her signature to a paper, whereby she agreed to abandon a judgment in ejectment, obtained by her by default of the tenant in possession, and to allow the question of title to be fairly tried as between her and the attorney's client, landlord of the tenant in possession, the court compelled him to give up the instrument to be cancelled. In *re Oliver*, 4 Nev. & M. 471; 2 Adol. & Ellis, 620; 1 Har. & Woll. 79. 190

If A has employed B as his attorney, and has paid his bill, A. has a right to have his papers delivered up to him; and it is no defence to an action of detinue brought by A. against B., for B. to shew that his London agent detains the papers, he having a lien on them as against B., for a balance of account for business done. *Anderson v. Passman*, 7 C. & P. 193—Coleridge. 190

The court refused to order an attorney to deliver up a deed which had been given to him by one of the parties to it to get executed by his client, who was another party. *Ex parte Smart*, 1 Har. & Woll. 526. 190

Where a client has deposited a deed in the hands of his attorney, and the latter afterwards becomes bankrupt, the court will not summarily interfere to compel the assignees to deliver up those deeds which have come to their hands from the bankrupt. *Ex parte Roy*, 4 Dowl. P. C. 573. 190

An attorney having brought an action for his bill of costs, which was defended by the client, on the ground of negligence, was ordered to give to the defendant a copy of a case, with the opinion of counsel thereon, (which had been procured for the defendant by the plaintiff as his attorney), at the defendant's expense, or to deliver up the case itself on being paid the costs which the plaintiff claimed in respect of such case and opinion. *Evans v. Delegal*, 4 Dowl. P. C. 374. 190

By a deed of settlement, estates were conveyed to trustees for the use of A. for his life, remainder to such uses as he should direct by his will, the deed giving the usual powers for appointing new trustees in case of death, &c. A. devised all the real estates of which he had power to dispose, and all his personality to trustees, (whom he also made his executors), to sell and invest the produce, and pay the interest to his widow during her life, and afterwards to stand possessed of the funds, in trust for B. and C., share and share alike. A. died leaving his widow surviving. Two of the executors proved the will. The last surviving trustee under the settlement died, leaving

a son, to whom, as his heir at law, the legal estate in the settled property descended, but who never was appointed a trustee. Before and after the testator's death, an attorney was employed in business relating to the settled and devised estates, for which a sum of money was due to him, and he held the title deeds. After the testator's death, the son of the trustee under the settlement, and one of the executors, joined in an application to the court, that the attorney might account for all sums received by him in respect of the estates, and deliver up the deeds to the trustees for the said estates, on payment to him of any thing that might appear to be due from them. The other executor, and all the parties beneficially interested, objected to the application. The court refused to interpose, the rights of the parties not being clear, and one executor not concurring in the motion. In *re Bunting*, 2 Adol. & Ellis, 497. 190

**Payment of Money.**—Liability for payment of money. In *re Bonner*, 4 B. & Adol. 811; 1 Nev. & M. 555. 191

The court will not interfere to compel an attorney to pay over money, the right to which is dependent on the existence of a special agreement between the client and the attorney, which the latter disputes. *Hodson v. Terrall*, 2 Dowl. P. C. 264. 191

The court will not interfere summarily to compel an attorney to pay over or account for money received by him during his clerkship. *Ex parte Deane*, 2 Dowl. P. C. 533. 191

A summary application being made against three attorneys jointly, to pay over to the assignees a sum of money which they had received as the bankrupt's solicitors, under an order of the court of Chancery:—Held, not sustainable, as they were not all collectively attorneys of the court of Review. *Ex parte Hicks*, 2 Deac. & Chit. 573. 191

Quere whether such an order would have been made if they had been all attorneys of that court? Id.

A bankrupt's certificate does not remove an attorney's liability to an attachment for not duly investing his client's money. *Ex parte Grant*, 3 Dowl. P. C. 320. 191

Where a rule is made absolute by consent, ordering that A., an attorney, who has fraudulently retained in his hands the money of his client, shall pay the amount by a particular day, that he shall pay the costs of the application, and that otherwise, an attachment shall issue.—It is no answer to a motion for such attachment, that, on the day after that appointed for the investment, a fiat in bankruptcy issued against A., under which he has obtained his certificate, and that no service of the rule and allocator took place before the bankruptcy. In *re Newberry*, 5 Nev. & M. 419; 1 Har. & Woll. 375. 191

Whether the supervention of the fiat and certificate would have excused the non-obedience to the rule by A., so as to have exempted him



from an attachment, if no fraud had been shown, quere? *Id.*

Where an attorney received money to pay over to a proctor for probate of a will, the court refused to interfere summarily to make him account for it. *Ex parte Cohen or Cowie*, 3 Dowl. P. C. 600; 1 Har. & Woll. 211. 191

The court will not order an attorney to pay over a sum of money received by him in his character of attorney, except upon the application of the client to whom the money is due. *In re Fenton*, 5 Nev. & M. 239; 3 Adol. & Ellis, 404; 1 Har. & Woll. 310. 191

No rule will be granted at the instance of a third party. *Id.*

The court refused a rule made on the behalf of the crown, calling on an attorney to pay over to the receiver of stamp duties a sum of money which the attorney had received from his client, an executor, for the purpose of paying legacy duty, but which he had not in fact paid. *Id.*

The court will not call upon an attorney to repay money, or to account before the master, on the grounds merely that the attorney obtained such money from his client as if for the purposes of a suit, but that his bill is said not to account satisfactorily for the obtaining and application of such money; that the amount obtained seems immoderate, and that the client states a case of fraud. *In re Marris*, 2 Adol. & Ellis, 582. 191

A judge at chambers has power to make an order on an attorney in a cause to pay money, and such order will be made a rule of court, as of course, without a rule to show cause. *Wilson v. Northop*, 2 C. M. & R. 326; 4 Dowl. P. C. 441. 191

Where it is clearly shown that an attorney keeps out of the way to avoid being served with rules for the payment of money, the court will allow service upon his clerk to be good service. The affidavit, however, must specify the endeavors to effect a service, and the reasons for believing that he is in town, and avoiding service. *Hinton v. Deane*, 4 Dowl. P. C. 352. 191

*Answering matters of Affidavit.*—An application for a rule requiring an attorney to answer the matters of an affidavit, must be made by a gentleman at the bar. *Ex parte Pitt*, 2 Dowl. P. C. 439; 5 B. & Adol. 1077. 192

It is too late to move for a rule, calling on an attorney to answer the matters of an affidavit, within the four last days of term; neither can cause be shown against such rule on the last day of term. *Ex parte —*, 2 Dowl. P. C. 227. 192

It was held no ground for making an application against an attorney, that he had advised his client to hand him over money which the Insolvent Debtors' Court, on the client's application there for his discharge, considered a misappropriation, and for which he was remanded by that court. *Smith v. Tower*, 2 Dowl. P. C. 673. 192

A rule nisi against an attorney to answer matters in an affidavit, cannot be moved for on the

last day of term. *In re Turner*, 3 Dowl. P. C. 557; 1 Har. & Woll. 217. 192

*Negligence.*—It is not every mistake or misapprehension of an attorney that will make him liable to an action for negligence. The question in such an action is, whether the attorney has used reasonable skill and reasonable care. In an action against an attorney for negligence, the declaration stated that the plaintiff was a prisoner in execution for a debt not exceeding 20*l.*, and had been so for twelve calendar months, and was desirous of obtaining his discharge, of all which the defendant had notice; and that he, the defendant, in consideration that the plaintiff would employ him to obtain his discharge, undertook to use due diligence, yet the defendant, not regarding, &c., did not take proper measures to obtain the plaintiff's discharge. To this declaration the defendant pleaded, first, non-assumpsit, and secondly, that he did take proper measures, and did use due diligence:—Held, that on the second issue it lay on the plaintiff to prove negligence in the defendant; and held, also, that by these pleadings the prefatory allegations of the declaration were admitted by the defendant. *Shilecock v. Passman*, 7 C. & P. 289—Alderson. 192

Where there appears to be negligence or ignorance of the law on the part of the attorney, which creates unnecessary costs, the court will order the costs to be disallowed on taxation, without prejudicing his right to bring an action for them. *Cliffe v. Prosser*, 2 Dowl. P. C. 21. 195

If attorneys, employed by a vendor to settle on his part the assignment of a term, allow him to execute an unusual covenant, without explaining the liability thereby incurred, they are responsible to him for consequent loss, notwithstanding he is himself, at the time of the assignment, aware of the fact in respect of which he afterwards incurs liability on his covenant. *Stannard v. Ullithorne*, 10 Bing. 491; 4 M. & Scott, 359. 194

A., a complainant in Chancery, employed B. as his solicitor, during whose employment an irregular order to dismiss the bill on a certain day, unless publication passed, was obtained; before that day arrived, C. was appointed the solicitor of A.; and the bill having been dismissed because no step was taken by C., an action was commenced against him for negligence, which was held to be maintainable, because he should have conformed with the order, or should within the time have moved to vacate it. *Frankland v. Cole*, 2 C. & J. 590. 194

The court of Chancery has no jurisdiction to make a solicitor responsible for negligence in the conduct of a suit. *Frankland v. Lucas*, 4 Sim. 587. 195

An action having been brought against an attorney for negligence, in which action the jury gave a verdict for the plaintiff, finding also that the attorney had been guilty of gross negligence, and then the attorney brought an action for his bill of costs, the court refused to stay proceedings



in the latter action. *Smith v. Rolt*, 2 Dowl. P. C. 62. 195

Where an attorney was charged with oppression towards his client, but the application was not made till after three terms had nearly elapsed, and no attempt was made to explain the delay, it was held that the motion was too late. *Garry v. Wilks*, 2 Dowl. P. C. 649. 195

An agreement was entered into between A. and B. B. died, and administration to his effects was granted to C., his daughter. D., who was a friend of C., employed the same attorney who had prepared the original agreement to prepare another between him and C., by which he was authorized to bring an action against A., on the original agreement, in C.'s name, and also instructed the attorney to bring such action. The action was brought, and, after argument on demurrer, the original agreement was declared void, on the ground of champerty. But it appeared that the attorney, in preparing such original agreement, had consulted a conveyancer, who gave it as his opinion that the agreement was valid:—Held, at Nisi Prius, that the attorney was entitled, under the circumstances, to recover from D., his employer, the costs of preparing the second agreement, and also those of bringing the action upon the first. *Potts v. Sparrow*, 6 C. & P. 749—Tindal. 194

The court will not compel an attorney to refund to his client costs unnecessarily incurred, unless he has been guilty of gross negligence. *Meggs v. Binns*, 2 Bing. N. R. 625. 195

The attorney for a defendant who was in custody on final process, obtained the consent of the plaintiff's attorney not to charge him in execution in the term in which that step ought to have been taken, on the false representation that he had the defendant's authority and consent to take no advantage of his not being charged in execution till the next term. The defendant's attorney signed an undertaking to that effect, which, however, did not state that the proceedings were stayed at the defendant's request, pursuant to Reg. Gen. of the Exch., Hil. 26 & 27 Geo. 2. The defendant was not charged in execution till the next term, and was afterwards discharged on the ground of the above omission in the undertaking. An action having been brought by the plaintiff against the defendant's attorney, for damages accruing from the defendant's discharge by the false representation, it was held that it could not be maintained, for the damage laid arose from the informality of the undertaking. *Hewitt v. Melton*, 4 Tyr. 1003; 1 C. M. & R. 232. 193

#### IX. BILL OF COSTS.

*Delivery of Bill.*—Business done in Middlesex county court. *Becke v. Wells*, 3 Tyr. 193; 1 C. & M. 75. 197

Business done in county court. *Wardle v. Nicholson*, 4 B. & Adol. 469; 1 Nev. & M. 355. 197  
J. Semble, that the drawing and ingrossing a warrant of attorney is a taxable item. *James v. Child*, 2 C. & J. 678; 2 Tyr. 732. 197

Charges for searching the Warrant of Attorney office, and for a fee paid there, do not make an attorney's bill taxable under stat. 2 Geo. 2, c. 23. *Ex parte Bowles*, 1 Scott, 583; 1 Bing. N. R. 632; 1 Hodges, 143. 197

Procuring an appearance to be entered by a proctor in the Consistory Court, is not a taxable item in an attorney's bill. *In re Marris*, 2 Adol. & Ellis, 582. 197

An attorney employed to transfer stock, found that a distringas had been entered at the Bank to prevent the transfer. He thereupon made several inquiries respecting the transactions on behalf of his client, and prepared a notice to the solicitor of the Bank to file a bill in consequence of the writ being entered:—Held, that his charges were not taxable items between him and his client, it not appearing that the distringas originated in any suit, or that the business had reference to any proceeding in a court—*Per Patterson, J.*—If the distringas had been in a suit, the steps taken by the plaintiff did form taxable items. *Nicholas v. Hayter*, 2 Adol. & Ellis, 348. 197

Charges for inquiries made, and attendances in the course of such inquiries, relating to a suit of which another attorney had the management, and in which, after such inquiries, the attorney making them did not further interfere, are not taxable items. *Id.*

Quære, whether a country fiat be a proceeding at law or in equity? *Ex parte Jones*, 2 Mont. & Ayr. 207. 197

If an attorney, who is not admitted in the court of Bankruptcy, employ an agent who is admitted to strike a docket, and after payment of the agent by the official assignee, the attorney, who is the principal, deliver a bill with charges for striking the docket, it is taxable. *Ex parte Cass*, 2 Mont. & Ayr. 170. 197

Items of the costs taxed in two actions, and paid by the attorney, and for which he had received no specific payment from his client, are properly inserted in the bill of costs, and need not be in the cash account. *Harrison v. Ward*, 4 Dowl. P. C. 39; 1 Har. & Woll. 353. 197

If an attorney deliver a bill to his client duly signed, for business in court, and another separate bill for conveyancing, not signed, in an action for the amount of the conveyancing bill, its not being signed is no objection at the trial; but a judge would, on application, order both bills to be taxed. *Beck v. Penn*, 7 C. & P. 397—Tindal. 197

If various matters form but one transaction, some being at law, and others for conveyancing, one bill only ought to be made out. *Doe d. Palmer v. Roe*, 4 Dowl. P. C. 95; 1 Har. & Woll. 339. 197

An attorney is not bound to insert in his bill of costs the amount paid to a proctor employed by him for his client. *Franklin v. Featherstonhaugh*, 3 Nev. & M. 779; 1 Adol. & Ellis, 475. 197

In an action on an attorney's bill, the defendant cannot, after being let in to plead to the merits,



plead that no signed bill was delivered. *Beck v. Mordaunt*, 4 Dowl. P. C. 112; 2 Scott, 178; 1 Hodges, 196; 2 Bing. N. R. 140; S. P. Holmes v. Grant, 1 Gale, 59. 197

Quere, whether such a defence can be given in evidence under the general issue? *Id.*

In an action on an attorney's bill, the defendant suffered judgment to go by default, which was set aside on an affidavit of merits and payment of costs, and the defendant was let in to plead. She pleaded that no signed bill had been delivered, and afterwards added two pleas of non-assumpsit, and that the plaintiff had not taken out his certificate. The plaintiff, on application to a judge at chambers, obtained an order confining the defendant to the plea of the general issue. The court held that this order was proper, it appearing that the defendant had had the bill taxed. *Biggs v. Maxwell*, 3 Dowl. P. C. 497. 197

To an action on an attorney's bill, defendant pleaded that the bill was for work at law and in equity, and was not delivered to her a month before action. Replication, that the bill was not for work at law and in equity:—Held, ill. *Moore v. Boulcott*, 1 Bing. N. R. 323; 1 Scott, 122. 197

In an action by an attorney for business done, for which no signed bills had been delivered, in pursuance of the statute, an admission by the defendant, in an examination before the commissioners under a commission of bankruptcy since superseded, that the sum claimed was due, is not sufficient evidence to support a count upon an account stated. *Eicke v. Nokes*, 4 M. & Scott, 585; 1 M. & Rob. 359. 197

After the lapse of nine years, the court will not compel an attorney to re-deliver bills for business done by him, without some suggestion of fraud, mistake, or overcharge. *Manning v. Brown*, 3 Dowl. P. C. 71. 197

Whether a bill delivered by an attorney, without mentioning the court in which the business is done, is a sufficient compliance with the 2 Geo. 2, quere? *Semble*, that it is. *Lester v. Lazarus*, 4 Dowl. P. C. 397; 1 Gale, 317; 2 C. M. & R. 665; 1 Tyr. & G. 123. 197

An assignee of an insolvent attorney is entitled to recover the bills of costs due to the estate without delivering signed bills, according to the directions of the 2 Geo. 2, c. 23. *Id.*

It is the duty of the attorney to cause his name to be inrolled; and if he omits to do so, he is incompetent to obtain costs, though otherwise duly qualified as an attorney. *Humphreys v. Harvey*, 1 Bing. N. R. 62; 4 M. & Scott, 500; 2 Dowl. P. C. 82. 198

*Taxation of Bill.*—Agreements not to tax attorney's bills are discountenanced. *Woosnam v. Pryce*, 3 Tyr. 375; 1 C. & M. 352. 199

The court has no direct power to refer an attorney's bill for taxation, except under the authority of 2 Geo. 2, c. 23, s. 23. *Ex parte Bowles*, 1 Bing. N. R. 632; 1 Scott, 583; 1 Hodges, 143; S. P. Doe d. Palmer v. Roe, 4 Dowl. P. C. 95; 1 Har. & Woll 339. 199

An attorney does not waive his right to object to the jurisdiction of the court directly to refer his bill for taxation by attending its taxation before the master, on which, according to the statute, he would be liable to pay the costs of taxation, the client not having given the undertaking required by the statute to pay what should be found due. He will, however, be liable to refund what should be overpaid on such taxation. *Howard v. Gloom*, 4 Dowl. P. C. 21; 1 Har. & Woll. 355. 199

The court cannot direct a bill to be taxed at the instance of any person but the original client. *Doe d. Palmer v. Roe*, 4 Dowl. P. C. 95; 1 Har. & Woll. 339. 199

A person, who is the real plaintiff in a cause, but who is obliged to sue in the name of another, may apply to the court to have his attorney's bill in the cause taxed. *In re Masters*, 4 Dowl. P. C. 18; 1 Har. & Woll. 348. 199

It is no answer to an application to tax an attorney's bill, that an agreement has been made that the attorney shall receive one-half the proceeds of a suit carried on at the instance of the client. *Id.*

A client is entitled to have his attorney's bill taxed, although he may have expressed his satisfaction at the bills, paid a sum on account, and allowed four years to elapse from the delivery of the bills before he applies for an order to tax. *Woolaston v. Weston*, 4 Dowl. P. C. 3; 1 Har. & Woll. 366. 199

In an application to tax an attorney's bill, it must be sworn that there are taxable items in the bill, although the bill itself is exhibited. *Ex parte King*, 3 Dowl. P. C. 41. 199

An order was made for the taxation of four several bills of a solicitor for various business done for the same assignee, under which more than one-sixth was taken off the gross amount of every one of the bills:—Held, that as the bills were incurred by the same person, in the same right, there was no need for a separate order of taxation for each bill; and that, as more than a sixth was taken off from the whole amount, the solicitor must pay the costs of the taxation. *Ex parte Barrett*, 3 Deac. & Chit. 731. 199

Where an attorney's bills are referred for taxation to the prothonotary of the Common Pleas, he may refer items for business done in the King's Bench to be taxed by the master of the latter court; and the King's Bench has no jurisdiction to interfere with that taxation of the master, nor is the prothonotary bound by it. *In re Jones*, 1 Dowl. P. C. 424. 200

The court will not grant a rule for the taxation of an attorney's bill of costs at the instance of a third party, who makes the application simply for the collateral purpose of reducing the bill so low as to make him a bad petitioning creditor. *Clutterbuck v. Coombs*, 2 Nev. & M. 209; 5 B. & Adol. 400. 199

A party agreeing to pay the costs of the attorney of another, as between attorney and client, is entitled to have the attorney's bill taxed. *Sad-*



ler v. Palfreyman, 3 Nev. & M. 599; 1 Adol. & Ellis, 717. 199

A court has no power to order the bill of an attorney to be taxed, unless it appear that some part of the business was done in the court to which application for the order is made. *Ex parte King*, 3 Nev. & M. 437. 200

Although the master, on taxation, has not jurisdiction to determine whether acts done by the attorney were useful, he may determine what were necessary. *Heald v. Hall*, 2 Dowl. P. C. 163. 200

Several persons having agreed to share with a plaintiff the expenses of an action, and he, having paid the attorney's bill, brought an action for contribution against one of those persons; the court, on his application, ordered the attorney's bill to be taxed, though it had been paid, and the defendant in the action had paid his full share of the money into court. *Grover v. Heath*, 2 Dowl. P. C. 285. 200

The master, to whom a bill of costs is referred for taxation, has no power to inquire into the fact whether the business charged for was agreed to be done for costs out of pocket. *Evans v. Taylor*, 2 Dowl. P. C. 349. 200

A fiat was sued out on the 7th of June by an attorney against his debtor for the amount of a bill of costs, and the bankrupt was shortly afterwards discharged under the Insolvent Act, having inserted the amount of the attorney's bill in his schedule. The bankrupt passed his last examination, and on the 4th December petitioned for an order to tax the attorney's bill, with a view of suspending the fiat, on the ground of the insufficiency of the petitioning creditor's debt:—Held, that the bankrupt could not, after lying so long, and after his previous admission of the debt, apply for such an order—*Diss. Cross, J. Ex parte Gingell*, 2 Deac. & Chit. 546. 200

An agreement to pay costs is an agreement to pay taxed costs; and a third party paying a solicitor's bill of costs, in order to compromise a suit, stands in the same situation with respect to the right of claiming taxation as the solicitor's client. *Vincent v. Venner*, 1 Mylne & K. 212. 200

An application to tax an attorney's bill ought to be made at chambers. *Bassett v. Giblett*, 2 Dowl. P. C. 650. 201

Where an action was brought to recover an attorney's bill of costs for several distinct businesses, as to some part of which the client disputed his liability on account of the negligence of the attorney, but the other part was not disputed; the court refused to order the master to tax the disputed part of the bill separately from the rest, a judge's order to tax having been before obtained on the usual terms. *Jones v. Roberts*, 2 Dowl. P. C. 656; 4 Tyr. 310. 201

Where an action of ejectment was brought on the forfeiture of a lease by the breach of the covenants, and a compromise was come to, by which the old lease was to be surrendered and a new one granted, and the costs of the lessors of the plaintiff were to be paid, which was done, the court refused afterwards to refer the bill of costs

of the attorney to the lessors of the plaintiff for taxation. *Doe d. Palmer v. Roe*, 4 Dowl. P. C. 95; 1 Har. & Woll. 339. 201

In taxing an attorney's bill, the master is not bound to enquire into the reasonableness of a bill paid to a proctor. *Franklin v. Featherstonhaugh*, 3 Nev. & M. 779; 1 Adol. & Ellis, 475. 201

According to the practice of the Ecclesiastical Court, a bill of costs cannot be taxed as between proctor and client. *Id.*

*Costs of Taxation.*—In taxing an attorney's bill, if a full sixth is taken off, the attorney is always liable to pay the costs of taxation; if less than a sixth is taken off, it is in the discretion of the court to make him pay the costs or not; and therefore, where a large sum is taken off, being within a trifle of a sixth:—Held, that the master was justified in charging the attorney with the costs of taxation. *Baker v. Mills*, (or *Wills*), 2 Dowl. P. C. 322; 2 C. & M. 415; 4 Tyr. 279. 201

An attorney having taken a bill of exchange from his client in payment of a bill of costs, but the bill of exchange not being paid, the attorney sued upon it; the court allowed him to pay the costs of taxing his bill (more than a sixth having been taken off) to the holder of the bill in part payment. *Woollison v. Hodgson*, 2 Dowl. P. C. 351. 201

An attorney employed to defend an action, and receiving from his client the debt and costs, for the purpose of being paid over to the plaintiff, is not entitled to make that sum an item in his bill, so as to increase the amount of it. *Woollison v. Hodgson*, 2 Dowl. P. C. 360. 201

A defendant's attorney having delivered to his client his bill of costs, from which more than one sixth is taxed off, cannot afterwards alter that proportion by adding on both sides of the account a sum received by him from his client and paid into court. *Hays v. Trotter*, 3 Nev. & M. 176; 5 B. & Adol. 1106. 201

Where an attorney brings an action to recover the amount of his bill, and after action brought his bill is taxed, he is not bound to pay the costs of taxation, unless it appears that the action was brought to avoid those costs. *Toomer v. Fuller*, 2 Dowl. P. C. 195. 201

An action between A. and B. is compromised, B. undertaking to pay A.'s costs as between attorney and client. The bill of costs of A.'s attorney being taxed, more than a sixth is taken off. The attorney is liable to pay the costs of the taxation to B. *Saddler v. Palfreyman*, 3 Nev. & M. 599; 1 Adol. & Ellis, 717. 201

An attorney delivered his account in three bills; a class of items in one bill was disallowed, and the whole amount of the three bills reduced one-sixth:—Held, that the attorney was liable to the whole costs of taxation. *Morris v. Parkinson*, 2 C. M. & R. 178; 3 Dowl. P. C. 744; 1 Gale, 160. 201

The court refused to require an attorney to pay the costs of taxation, where the deduction beyond one-sixth was occasioned by the master's



disallowing one of the bills delivered, on the ground of non-liability. *Mills v. Revett*, 3 Nev. & M. 767; 1 Adol. & Ellis, 856. 201

Where less than one-sixth is, upon taxation, struck off an attorney's bill, the court will, as a matter of course, order the client to pay the costs of taxation. *Id.*

In considering whether more than one-sixth of an attorney's bill has been taxed off, the entire amount of the bill must be taken, inclusive of a proctor's bill. *Franklin v. Featherstonhaugh*, 3 Nev. & M. 779; 1 Adol. & Ellis, 475. 201

On the taxation of an attorney's bill, very nearly one-sixth was taxed off, and afterwards a rule to refer back the bill for taxation was discharged on the merits; no objection was, however, made to items being inserted in the bill of costs instead of the cash account, where, if they had been inserted, more than one-sixth would have been deducted.—The court afterwards refused, on a fresh rule, to listen to that objection. *Harrison v. Ward*, 4 Dowl. P. C. 39; 1 Har. & Woll. 353. 201

It is too late to rescind a judge's order allowing to the plaintiff's attorney the costs of taxing the costs on the back of a writ, from which more than a sixth was taken off, after the order has been made a rule of court, and an attachment obtained upon it. *Thomson v. Carter*, 3 Dowl. P. C. 657. 201

Taxation of bankrupt attorney's bill. *Featherstonehaugh v. Reece*, 2 Dowl. P. C. 30; 1 C. & M. 495; S. C. nom. *Featherstonehaugh v. Keen*, 3 Tyr. 540. 201

The assignees or executors of a bankrupt are not under the statute liable to pay the costs of taxation if more than one-sixth of the bill of costs of the solicitor is deducted on taxation. *Willasey v. Mashiter*, 3 Mylne & Keen, 293. 201

The costs of taxing the bill of costs of a solicitor who has become bankrupt, do not fall upon his assignees on the ground that more than a sixth part is deducted on taxation, although the assignees may have attended the taxation by their solicitor. *Allsop v. Oxford (Lord)*, 1 Mylne & Craig, 26. 201

The plaintiff had obtained an order for taxation of his solicitor's bill, amounting to 399l. The solicitor, with the Master's permission, struck out certain items as having been inserted by mistake. The bills were then taxed, and less than a sixth was taken off, but if the items struck out were included, more than a sixth would have been taken off.—Held, that as less than a sixth had been taxed off, the plaintiff must pay the costs of taxation. *Marshall v. Oxford*, 5 Sim. 456. 201

Upon an application that the solicitor may be directed to pay the costs of taxation, more than a sixth part having been taken off his bill, the court will not enter into the particulars of the items of the bill. *Ex parte Millington*, 1 Deac. 114. 201

ney's bill, an order for better particulars was obtained on payment of costs:—Held, that a charge for drawing the bill, as part of the costs, was properly disallowed by the Master. *Jones v. Roberts*, 2 Dowl. P. C. 374; 4 Tyr. 310. 202

Where a London agent has been employed to attend the trial of a cause, it is a matter within the discretion of the Master, whether the costs of a journey to London by the country attorney, to attend the trial of the cause, shall be allowed. *Parloe v. Foy*, 2 Dowl. P. C. 181. 202

The Master's decision on questions of taxation is final as to matters of fact and amount of charges, and is only reviewed by the court when the Master acts upon a mistaken principle; and if the solicitor negligently or ignorantly takes some unnecessary proceeding, it is the duty of the Master to disallow the charge made in respect of such proceeding. *Alsop v. Oxford (Lord)*, 1 Mylne & K. 564. 202

Where it is the usage of the profession that certain business should be intrusted to an agent in London, a country solicitor will not be allowed to charge for his attendance in London to perform that business, although his client has requested his attendance, unless the solicitor has first explained to his client that, by the usage of the profession, such attendance is considered to be unnecessary. *Id.*

The comparison of an abstract of title with the title deeds is business within this rule, and a country solicitor will not be allowed to charge for his personal attendance in London in respect of such business. *Id.*

The proper charges in respect of an abstract of title are 6s. 8d. per sheet for drawing, and 3s. 4d. for copying. *Broadhurst v. Darlington*, 2 Dowl. P. C. 38. 202

An attorney who is a party to a suit is not entitled to charge a guinea for attending the trial, though he acts as his own attorney, unless it appears that it was necessary he should attend in person. *Leaver v. Whalley*, 2 Dowl. P. C. 80. 202

Where a vendor's attorney disclosed outstanding terms upon an abstract, although a marketable title might have been shown by taking it up at a subsequent date:—Held, that upon taxation of the attorney's costs, he was entitled to be paid his charges incurred in getting in the outstanding terms. *Ex parte Quicke*, 2 Scott, 184; 1 Hodges, 202. 202

But the attorney will not be allowed his charges for attested copies of a will, which, by the conditions of sale, were to be given at the vendor's expense, such a condition not being unusual. *Id.*

Where a country attorney, a defendant in a cause, not being an attorney of the court, defended in the name of a London agent, who was an attorney of the court, and the defendant attended the assizes in person, and the plaintiff was non-suited:—Held, that the defendant was entitled to his fees for attending the trial, drawing briefs, &c., as all the business must be considered to have been done in the name of the London agent. *Jervis v. Dewes*, 4 Dowl. P. C. 764. 202



The expense of an accountant, employed with reference to and pending the suit, does not come under the general denomination of costs, and will not be allowed on taxation. *Small v. Attwood*, 1 Y. & Col. 53. 202

*Recovery of Bill.*—Where a party has employed two attorneys, partners, to manage a cause for him in the Palace Court, an action in the common form lies against him at the suit of both, for the bill of costs, though one only was an attorney of the court, and actually did the business there. *Arden v. Tucker*, 1 Nev. & M. 759; 4 B. & Ad. 815; 5 C. & P. 248; 1 M. & Rob. 191. 202

Although the client gave a written retainer to the latter attorney only, and he only was mentioned in the rule for taxing costs, these facts were held not conclusive, there being evidence, aliunde, of a contract with both. *Id.*

If a party taxes the bill of an attorney for costs due from a third person, and pays that bill, he cannot afterwards recover the amount without showing the payment to have been made through ignorance or misrepresentation, and if an action be brought, the court will stay proceedings. *Kendall v. Allen or Alken*, 4 M. & Scott, 319; 4 Bing. 438; 2 Dowl. P. C. 763. 202

The plaintiff obtained a judge's order, with the usual undertaking for the taxation of the bill of costs due from her son to the defendant:—Held, that it was not competent to her afterwards to bring an action against the defendant to recover back the money paid by her in pursuance of that order, in the absence of proof of fraud or misrepresentation by the defendant. The court therefore stayed the proceedings. *Id.*

Where an order was made for the taxation of a solicitor's bill, and for staying all proceedings at law till after the Master's report, and the solicitor died pending the taxation and before any report, and no revived order for taxation being made, the solicitor's personal representative proceeded at law against the client:—Held, that this was not a contempt. *Houlditch v. Houlditch*, 1 Wils. C. C. 17. 202

Where an action was brought by an attorney for his bill of costs, and the defendant obtained an order to tax the bill, but which order did not contain any direction to the defendant to pay what was due, though he signed the usual consent in the judge's book, and another order was afterwards made for reviewing the taxation, which also contained no direction to the defendant to pay what was due, and the Master found a sum of money to be due to the plaintiff, who made the latter order only a rule of court:—Held, that an attachment obtained thereon was irregular, as it did not contain any order on the defendant to pay. *Ryalls v. Emerson*, 2 Dowl. P. C. 357; 2 C. & M. 464; 4 Tyr. 364. 203

Where in an order to refer an attorney's bill for taxation, the usual undertaking to pay the amount taxed is omitted, the court will not grant an attachment for non-payment in pursuance of the Master's allocatur. *Ex parte Ward*, 1 Har. & Woll. 212. 203

Whilst proceedings are pending on an order to tax an attorney's bill, he cannot bring an action for the amount. *Sheriff v. Greasley (Lady)*, 5 Nev. & M. 491; 1 Har. & Woll. 588. 203

A delay of two days in following up an order for the taxation of a bill of costs, is not a waiver of such order. *Id.*

If, after such a delay, a client is arrested for the amount of the bill, the court will stay the proceedings in the action, and discharge the defendant. *Id.*

A summons to refer an attorney's bill for taxation, and a judge's order thereupon, do not operate as a stay of proceedings, so as to prevent the attorney from suing upon the bill. *Williams v. Roberts*, 1 C. M. & R. 676; 5 Tyr. 421; 3 Dowl. P. C. 512; 1 Gale, 56. 203

It is no ground of demurrer to a declaration in an action by an attorney, that he seeks to recover for "materials" supplied by him to his client. *Fisher v. Snow*, 3 Dowl. P. C. 27. 203

A solicitor cannot receive a deposit of title deeds as security for future bills. *Ex parte Laing*, 2 Mont. & Ayr. 381. 204

Upon a summons to refer an attorney's bill for taxation, if he intends to insist upon interest under 3 & 4 Will. 4, c. 42, s. 26, he ought to have it made part of the order that the Master shall allow interest. *Berrington v. Phillips*, 4 Dowl. P. C. 758. 204

Where an attorney, defendant in assumpsit, sets off the amount of his bill, the plaintiff cannot deduct from that set-off costs of taxation allowed against the attorney, pursuant to 2 Geo. 4, c. 23, s. 23. *Field v. Bezant*, 2 Nev. & M. 207; 5 B. & Adol. 357. 204

Payment of bill. *James v. Child*, 2 C. & J. 678; 2 Tyr. 732. 204

#### X. LIEN FOR COSTS.

Lien of mortgagee's attorney. *Ogle v. Story*, 1 Nev. & M. 474; 4 B. & Adol. 735. 204

A., the attorney of B., an intended mortgagee, has no lien against C., the intended mortgagor, for the costs of preparing the mortgage upon deeds delivered by C. to B., and by the latter handed over to A. for the purpose of investigating C.'s title. *Pratt v. Vizard*, 2 Nev. & M. 455; 5 B. & Adol. 808. 204

An attorney has no right as against his client to retain money in his hands which he has received as attorney for his client, even though it should be the proceeds of an execution against the goods of a defendant who objects to the amount levied, and who has a rule then pending before the Master, calling on the plaintiff or his attorney to refund part of the money. *Sibley v. Leicester*, 2 Dowl. P. C. 234. 204

Where a defendant is entitled against the plaintiff to be released from a verdict obtained against him, the court will not abstain from interfering, on the ground of the lien of the plaintiff's attorney upon the verdict for his costs. *Symons v. Blake*, 2 C. M. & R. 416; 4 Dowl. P. C. 263; 1 Gale, 152. 204



The lien of an attorney is only co-extensive with the rights of his client, and therefore, as between the plaintiff and defendant, the lien of the plaintiff's attorney cannot affect the right of the defendant. *Id.*

An attorney is not justified in proceeding with an action after it has been settled between the parties themselves, though it is known that costs have been incurred, and that the plaintiff himself is not in a condition to pay them; it must be shown affirmatively, that the settlement was come to for the purpose of cheating the attorney. *Jordan v. Hunt*, 3 Dowl. P. C. 666; 1 Gale, 159. 204

The lien of an attorney cannot be affected by a reference of the cause and all matters in dispute between the parties. *Cowell v. Betteley*, 4 M. & Scott, 265; 10 Bing. 432; 2 Dowl. P. C. 780. 205

Where an attorney has a lien for his costs upon a sum recovered, and gives notice to the attorney for the opposite party to have his lien made available before a final settlement between the parties; if afterwards a final settlement be made, without having the lien made available, the attorney having the lien may proceed with the cause for the exclusive purpose of securing his costs. *Fleury v. Meath (Earl)*, 1 Alcock & Napier, 88, (*Irish*). 206

Seem, that it is a better course to apply to the court on motion. *Id.*

Where the plaintiff and defendant compromise the action without consulting the plaintiff's attorney, the interference of the court upon motion is an equitable jurisdiction, and the court will not assist the attorney unless he come in with clean hands. *Sheppard v. Sherrock*, 1 Alcock & Napier, 93, (*Irish*). 206

The attorney's right to lien, under Reg. H. T. 2 Will. 4, No. 93, extends to costs taxed as between attorney and client. *Waston v. Masekall*, 1 Scott, 158; 1 Bing. N. R. 366; 3 Dowl. P. C. 638; 1 Hodges, 73. 206

Where one judgment is set off against another the lien of an attorney does not extend beyond his costs in the particular cause. *Id.*

Where, in an action of trespass, a verdict is found against one defendant, but in favor of another, the costs may be set off, notwithstanding the effect of it would be to deprive the attorney of his lien. Reg. H. T. 2 Will. 4, does not apply to such a case. *George v. Elston*, 1 Scott, 518; 3 Dowl. P. C. 419; 1 Bing. N. R. 513; 1 Hodges, 63. 206

*Agent in town.*—If a London agent receives money improperly, the remedy of the client is not against him, but against his attorney. *Gray v. Kirby*, 2 Dowl. P. C. 601. 202

Where an affidavit is reported to be scandalous, the agent in London, who files the affidavit, is responsible for the costs as between attorney and client, notwithstanding the country attorney may have himself drawn the affidavit. *Ex parte Wake*, 3 Desc. & Chit. 246. 207

## XII. CHANGE OF ATTORNIES.

In all cases, the order for changing an attorney must be served on the opposite party. *Rex v. Middlesex (Sheriff)*, 2 Dowl. P. C. 147. 208

Where a defendant pleaded by an attorney who was in partnership, and the partnership was afterwards dissolved; and the other partner took a step in the cause, which the plaintiff's attorney recognized; the court refused to set aside the proceedings for want of an order to change the attorney. *Farley v. Hebbs*, 3 Dowl. P. C. 538; 1 Har. & Woll. 203. 208

If the attorney on the record is changed, without an order for that purpose, but the opposite party treats the new attorney as the attorney in the cause, he cannot afterwards object that no order was obtained. *Id.*

## AUDITA QUERELA.

The court will relieve on motion, instead of putting a party to his audita querela, where the case is clear, but not otherwise; and, therefore, where a plaintiff, after he recovered damages in an action of slander, for words imputing felony, was convicted and attainted for felony, and the defendant in the action was a witness against him, the court refused to interfere, by staying all further proceedings in the action, though the crown declined to interfere. *Symons v. Blake*, 4 Dowl. P. C. 263; 2 C. M. & R. 416; 1 Gale, 182. 209

## BAIL.

*Form of Bail-Bond.*—A bail-bond conditioned to appear in eight days after the date (the arrest having been on the same day):—Held sufficient. *Evans q. t. v. Moseley*, 2 Dowl. P. C. 364; S. C. nom. *Evans v. Shropshire (Sheriff)*, 4 Tyr. 169. 211

An attorney ought not to prepare a bail-bond for a larger sum than is requisite according to the practice of the court. *Wingrave v. Godmond*, 6 C. & P. 66—*Tindal*. 211

Where the sheriff has taken only one surety to the bail-bond, the court will set aside an attachment against him for not bringing in the body on payment of costs, at the instance of the bail, though it would not do so on his own application. *Rex v. Middlesex (Sheriff)*, 2 Dowl. P. C. 140. 211

The sheriff took a bail-bond with one surety only; he afterwards made a day's default in returning the writ. The court set aside an attachment obtained against him on payment of costs. *Rex v. Surrey (Sheriff)*, 2 C. M. & R. 698; 1 Tyr. & G. 32. 211

A bail-bond is a nullity, if executed without filling in blank spaces left for the name of the party to whom the copy of the writ has been delivered, and for the name of the party upon whose putting in special bail the bond is to be void. *Holding v. Raphael*, 5 Nev. & M. 655; 1 Har. & Woll. 571. 211

In an action against the sheriff for an escape, the production of a bond so executed will not,



therefore, support a plea justifying by reason of having taken a bail-bond with a condition, subscribed according to the statute. *Id.*

**Discharge of Bail-Bond.**—Although a bail-bond is given, a render may be accepted at any time within eight days from the time of the arrest. *Turner v. Brown*, 2 Dowl. P. C. 547. 212

The Uniformity of Process Act, 2 Will. 4, c. 39, sched. No. 4, repeals sect. 24 of the first general rule of Hilary term, 2 Will. 4; and, therefore, if a party held to bail on a *capias* do not put in special bail within eight days after execution of the process upon him, including the day of such execution, the plaintiff, immediately on the expiration of that time, may put the bail-bond in suit. *Hillary v. Rowles*, 5 B. & Adol. 460; 2 Dowl. P. C. 201. 213

When to proceed. *Alston v. Underhill*, 2 Dowl. P. C. 26; 1 C. & M. 492; 3 Tyr. 427. 213

Time given to principal. *Woosnan v. Pryce*, 1 C. & M. 352; 3 Tyr. 375. 213

The assignment of a bail-bond without more is not a step in a cause. *Id.*

A defendant who has been arrested on a *capias* since the Uniformity of Process Act, and given a bail-bond, cannot discharge the bail-bond by a surrender into actual custody within eight days after the arrest. *Hodson v. Mee*, 5 Nev. & M. 302; 1 Har. & Woll. 398. 213

And if the plaintiff omit to declare *de bene esse*, when he is at liberty to do so, he is not entitled to have the bail-bond stand as a security. *Id.*

If one of the bail below consents to time being given to the defendant to perfect bail above, this act is binding on both. *Howard v. Bradberry*, 3 Dowl. P. C. 52. 213

Notice of render having been given to plaintiff's attorney, he, notwithstanding, took an assignment of the bail-bond, and commenced proceedings, as no notice of bail had been given, and no entry of the render could be found on searching the books:—Held, that the proceedings were irregular. *Short v. Doyle*, 4 Dowl. P. C. 202. 213

**Assignment of Bail-Bond.**—The assignment of a bail-bond must be executed in the presence of two witnesses, but it is not necessary that they should both subscribe their names in the presence of the officer assigning. *Phillips v. Barlow*, or *Barber*, 1 Scott, 322; 1 Bing. N. R. 433; 3 Dowl. P. C. 381; 6 C. & P. 781. 214

An assignment of a bail-bond is invalid, if executed in the presence of and attested by the plaintiff in the action and another person; the stat. 4 Anne, c. 16, s. 20, requiring the assignment to be made to the plaintiff in the presence of two "credible" witnesses, which means disinterested persons. *White v. Barrack*, 1 Mees. & Wels. 425. 214

A bail-bond, taken under an attachment for not putting in an answer, cannot be assigned. *Meller v. Palfreyman*, 1 Nev. & M. 696. 215

The creditor's remedy is by action in the name of the sheriff. *Id.*

An action by the assignee of a bail-bond must be brought in the court out of which the bailable process issued. *Id.*

A bail-bond was given to the sheriff on the 24th of November, and it recited, that the defendant had been arrested on the 17th: bail above not having been put in within due time after the 17th, the plaintiff took an assignment of the bond. Upon a motion to set aside the assignment as having been made too early, upon an affidavit that the recital in the bond was false—that, in fact, no arrest was made, but only a letter sent, and that therefore the writ could not be said to be executed till the 24th, when the bond was given, the court refused to interfere. *Call v. Thelwall*, 3 Dowl. P. C. 443; 1 C. M. & R. 780; 5 Tyr. 231; 1 Gale, 16. 215

**Action on Bail-Bond.**—It is no plea to debt on bail-bond, that there was no affidavit of debt filed in the action against the principal. *Knowles v. Stevens*, 1 C. M. & R. 26; 4 Tyr. 1016; S. C. nom. *Snow v. Stevens*, 2 Dowl. P. C. 664. 216

In an application by bail to stay proceedings on a bail-bond, collusion with the defendant must be denied by both the bail. *Dowson v. Cull*, 2 C. & J. 671. 217

The court of Exchequer will stay proceedings on the bail-bond, (when bail above is put in and perfected), on payment of costs, if it appear that a trial has not been lost, without an affidavit of merits, and without complying with the rule of *Michaelmas*, 59 Geo. 3, K. B., which is not adopted in the Exchequer. *Rourke v. Bourne*, 2 Dowl. P. C. 250; S. C. nom. *Bourne v. Walker*, 2 C. & M. 338; nom. *Walker v. Bourne*, 4 Tyr. 121. 217

It is irregular to sue out process on a bail-bond after the rule for the allowance of bail has been served, although the bail-bond has been forfeited, and an assignment has been written for before the justification of the bail. *Ellis v. Bates*, 2 C. & M. 143; 4 Tyr. 54. 217

In making the rule to set aside such proceedings absolute, the court directed the costs of taking an assignment of the bail-bond, which had been occasioned by the defendant's default, to be allowed to the plaintiff, and to be deducted from the costs of the rule. *Id.*

Though a plaintiff is not bound to declare *de bene esse*; yet, if he do not, he cannot say that he has lost a trial, so as to have the bail-bond stand as a security on setting aside proceedings upon the bail-bond. *Balmont v. Morris*, 1 C. & M. 661; 3 Tyr. 821. 218

Where two of three parties to a bail-bond were sued jointly:—Held to be no irregularity. *Knowles v. Johnson*, 2 Dowl. P. C. 653. 219

Where several actions are brought on the same bail-bond, it is too late, after verdict, to move to stay proceedings on payment of the costs of one action only. *Johnson v. Macdonald*, 2 Dowl. P. C. 45. 219



The plaintiff declared in the commencement of his declaration, as assignee of the sheriff, and then set forth a bond to himself:—Held, no ground of demurrer. *Reynolds v. Walsh*, 1 C. M. & R. 580; 5 Tyr. 202; 3 Dowl. P. C. 441. 215

Where there has been delay in applying to the court to have a bail-bond set aside, which has arisen from compliance with the request of the plaintiff:—Held, that it could not be objected that the application was not made in a reasonable time. *Gould v. Williams*, 1 Har. & Woll. 344. 217

Where proceedings were taken on a bail-bond before default in the original action, the mode of taking the objection is, by moving to set aside the writ itself, and not the service of it. *Edwards v. Danks*, 4 Dowl. P. C. 357. 217

Proceedings against bail to the sheriff, are not waived by the plaintiff declaring *de bene esse* in the original action, after the bail have been served with process. *Vernon v. Turley*, 4 Dowl. P. C. 660; 2 Mees. & Wels. 316. 215

Though the defendant is sued jointly with the bail, proceedings in the action may be stayed on the application of the latter only. *Stride v. Hill*, 4 Dowl. P. C. 709; 1 Mees. & Wels. 37. 217

To have the bail-bond stand as a security, it must appear that a trial was lost at the time of moving for the rule. *Id.*

In an action against the defendant and bail, on a bail-bond, the affidavits in support of a rule for setting aside proceedings, may be intitled either in the original action, or in that against the bail. *Id.*

If, in consequence of bail not being put in and perfected, the plaintiff obtains an attachment against the sheriff, without having declared *de bene esse*, the latter may set aside the attachment upon the defendant being rendered, without the attachment or bail-bond standing as a security. *Rex v. Barrington*, 2 Dowl. P. C. 648. 218

The plaintiff is not entitled to insist upon the bail-bond standing as a security, where, the defendant not being in custody, the plaintiff has not declared *de bene esse*. *Call v. Thelwall*, 1 C. M. & R. 280; 5 Tyr. 231; 3 Dowl. P. C. 443; 1 Gale, 16. 218

On an application by the bail to stay proceedings on the bail-bond on payment of costs, the affidavit stated that the application was made by them at their own expense, and for their own indemnity:—Held, that the affidavit was irregular for not complying with the rule 59 Geo. 3. *Id.*

The plaintiff cannot have the bail-bond to stand as a security where he has not declared *de bene esse*, although he was prevented from declaring by the vacation. *Stanley v. Stoneham*, 2 C. M. & R. 658; 4 Dowl. P. C. 678. 218

*Deposit of money.*—Where money is paid into court under the 7 & 8 Geo. 4, c. 71, in lieu of bail, and issue is joined, an application to take it out must be made before issue joined. *Hanwell v. Mure*, 2 Dowl. P. C. 155. 220

Where a motion is to be made to take out money paid into court by a defendant in lieu of bail, notice of the motion should be given to the solicitor of the treasury. *Haines v. Nairn*, 2 Dowl. P. C. 43. 220

Semble, that poundage cannot be claimed on money so paid in, where it is not sufficient to satisfy the amount of the plaintiff's verdict. *Id.*

Where money has been paid into court in lieu of bail, the plaintiff, on moving to have it paid out to him, is entitled to the costs of the application. *Freeman v. Paganini*, 4 M. & Scott, 165; 2 Dowl. P. C. 776. 221

The court cannot allow part of a sum paid into court in lieu of special bail, to be appropriated to the purposes of a plea of tender—the 3rd section of the 7 & 8 Geo. 4, c. 71, expressly pointing out the only mode in which money so deposited can, during the progress of the cause, be released, viz. by putting in and perfecting special bail. *Stultz v. Heneage*, 4 M. & Scott, 472; 2 Dowl. P. C. 806. 221

Where a defendant has paid the debt, and 10*l.* for costs, to the sheriff in lieu of bail, under the 43 Geo. 3, c. 46:—Held, that he has, under 7 & 8 Geo. 4, c. 71, till the day for perfecting special bail, to pay in the additional 10*l.* for costs. *Stafford v. Love*, 3 Dowl. P. C. 593; S. C. nom. *Stafford v. Love*, 1 Har. & Woll. 195. 220

And where, previous to that day, a bona fide correspondence to settle the action commenced, which did not terminate until after that day, and on the termination the defendant paid in the 10*l.* additional:—Held, that the plaintiff was not entitled to have the debt and costs paid out of court to him. *Id.*

If a defendant has deposited money in lieu of bail, which the sheriff pays into court, he is entitled to take it out on justifying bail in due time. *Young v. Maltby*, 3 Dowl. P. C. 604; 1 Har. & Woll. 214. 220

An affidavit by the defendant, on taking money out of court which had been deposited in lieu of bail, stating that bail had been put in, but not stating "in due time:"—Held sufficient. *Id.*

If a defendant deposits money in the hands of the sheriff, pursuant to the 43 Geo. 3, c. 46, s. 2, which is paid into court, the defendant will not be allowed to take it out, unless he has put in bail according to the exigency of the capias, although such a deposit is not mentioned in the warning attached to that writ. *Geach v. Coppin*, 3 Dowl. P. C. 74. 220

If, however, bail has been perfected, but not in due time, before the plaintiff takes the money out, he must make his election as to which security he will take. *Id.*

Money paid into court in lieu of bail, cannot be transferred to the account of a payment into court. *Ball v. Stafford*, 2 Scott, 421; 4 Dowl. P. C. 327; 1 Hodges, 316. 220

Before bail are perfected, or until the time for excepting to them has passed, the defendant is entitled as a matter of right to pay in the debt, with a sum for costs, under the 7 & 8 Geo. 4, c. 71,



s. 2; and, therefore, though he does not pay in the money until after he has put in, though not justified bail above, and the plaintiff has been put to expense by searching for them, and making inquiries, the defendant is not liable to pay those expenses, but they are properly costs in the cause. *Stanforth v. Stanford v. M'Cann*, 4 Dowl. P. C. 367; 2 C. M. & R. 631. 220

Where money is paid into court under the stat. 7 & 8 Geo. 4, c. 71, s. 2, in lieu of special bail, it can only be taken out on putting in and perfecting bail, notwithstanding it has been paid in without prejudice to an application to the court for defects in the affidavit of debt. *Green v. Glasbrooke*, 1 Scott, 462; 1 Bing. N. R. 516; 1 Hodges, 27. 220

A defendant who deposits money with the sheriff in lieu of bail, is not in court, so as to demand a declaration, until the money is actually paid into court, though the sheriff has returned that he has paid in the money, and the plaintiff has consented to the defendant entering a common appearance, and paying into court the additional 10*l.*, under the 7 & 8 Geo. 4, c. 71, s. 1. *Hall v. Champneys*, 4 Dowl. P. C. 713. 221

Money deposited by a third person, in lieu of special bail, cannot be got back by application to the court, on the defendants rendering; it must remain in court to abide the event. *Bull v. Turner*, 4 Dowl. P. C. 734; 1 Mees. & Wels. 47. 220

Where money is paid into court in lieu of bail, not by the defendant himself, but by one of the bail, and the plaintiff obtains judgment, he is entitled to have the money paid out to him in discharge of the debt and costs. *Id.*

A plaintiff is not entitled to receive out of court, money paid in by a defendant in lieu of bail, under the 7 & 8 Geo. 4, c. 72, s. 2, unless judgment has been obtained, or the suit otherwise legally determined. *Johnson v. Wall*, 4 Dowl. P. C. 315. 220

Where the friend of a party arrested makes a deposit of his own money on the defendant's behalf, in lieu of bail, and the sum is afterwards paid into court to abide the event of the suit, and the defendant then renders, the owner of the money may have it restored to him on motion, under stat. 7 & 8 Geo. 4, c. 71, s. 5, if the defendant appears in court and assents. For this purpose the render is equivalent to putting in and perfecting special bail. *Douglass v. Stanbrough*, 3 Adol. & Ellis, 316. 220

A sheriff, against whom an action for falsely returning that money deposited with him by a defendant, in lieu of bail, had been paid into court, had been brought, was allowed to pay into court in the original action the money so deposited, though the plaintiff had been delayed two months by the sheriff's neglect. *Hall v. Jones*, 4 Dowl. P. C. 712. 221

Where the action has been commenced in an inferior court, without process, against the person, and afterwards removed, semble, that the defendant cannot pay money into court in lieu of special bail. *Morgan v. Fedlar*, 4 Dowl. P. C. 645. 221

The rule for taking money, deposited in lieu of bail, out of court, in consequence of the plaintiff becoming nonsuit, is nisi in the first instance. *Grant v. Willis*, 4 Dowl. P. C. 561. 221

*Qualification of Bail.*—In justifying for bail, where the qualifying property consisted of money deposited in the hands of bail to indemnify him, the qualification was held insufficient. *Nicholls' bail*, Hodges, 77. 223

Keeping a brothel is not of itself a ground for rejecting bail. *Gouge's bail*, 3 Dowl. P. C. 320. 223

Although bail are unopposed, the court will not allow them to justify, if it has been satisfied in a previous case that they are unfit. *Laporte's bail*, 3 Dowl. P. C. 110. 223

*Putting in Bail.*—The 2 Will. 4, c. 39, excepting the period between the 10th of August and 24th of October, is applicable only to declarations and pleadings after declaration; and a defendant arrested within that interval must put in and justify bail before a judge at chambers, in the same way as in any other part of the vacation. *Rex v. Middlesex (Sheriff)*, 2 C. & M. 333; 2 Dowl. P. C. 226; 4 Tyr. 60. 224

Where a defendant is arrested upon an alias or pluries capias, issued into another county, the defendant must put in bail in the county where he was arrested. *Reg. Gen. M. T. 4 Will. 4, K. B., C. P., and Exch.: S. P. Rex v. Essex (Sheriff)*, 3 M. & Scott, 870. 224

The 14th rule of H. T. 2 Will. 4, is virtually rescinded by the statute 2 Will. 4, c. 39, sched. No. 4. Therefore a defendant arrested on a writ of capias has only eight days to put in special bail, whether in a town or a country cause. *Grant v. Gibbs*, 1 Scott, 390; 3 Dowl. P. C. 409; 1 Hodges, 56. 224

And such bail is not deemed to be put in until notice thereof served on the plaintiff's attorney or agent. *Id.*

Where bail are put in to render, no notice of their having been put in is necessary. *Wilson v. Griffin*, 3 C. & J. 683. 226

A notice of bail describing him as a house-keeper is insufficient, if he is only a lodger, although on examination it appears that he is a freeholder. *Wilson's bail*, 2 Dowl. P. C. 431. 226

The objection to a notice of bail, that the number of the street is not stated, must be taken in the first instance; and it is waived by obtaining time to inquire, unless it is sworn that the bail's residence cannot be found. *Foster's bail*, 2 Dowl. P. C. 586. 227

If a bail has two places of residence, it is only necessary to state one of them in the notice. *Fortescue's bail*, 2 Dowl. P. C. 541. 227

A notice of bail did not state the numbers of the houses where the bail resided, upon which ground, the bail having been found and being



sufficient, the plaintiff had the costs of his appearance to oppose. *Annis v. Smith*, 2 C. & J. 634. 227

It is sufficient if the notice of bail by a prisoner be signed by him as being "in custody," though it does not state in the usual way that he is a prisoner. *Frith's bail*, 2 Dowl. P. C. 229. 226

Informality in the notice of bail. *Rex v. Middlesex (Sheriff)*, 1 C. & M. 482; 3 Tyr. 440. 228

Notice of bail. *Ward's bail*, 3 Tyr. 208; 1 C. & M. 28; 1 Dowl. P. C. 596. 228

Where the notice of bail omitted to state the residences of the bail for six months, and whether they were housekeepers or freeholders:—Held, that this was not such a defect as entitled the plaintiff to treat it as a nullity, and an attachment against the sheriff was set aside. *Rex v. Middlesex (Sheriff)*, 2 Dowl. P. C. 5; 1 C. & M. 482. 228

A plaintiff cannot take proceedings on the bail-bond on the ground of an informality in the notice of bail. *Wigley v. Edwards*, 2 C. & M. 320; 2 Dowl. P. C. 282; 4 Tyr. 235. 228

In future, it is not to be considered necessary to state in a notice of bail that the bail-piece has been filed "with the filacer at the proper office." *Id.*

A notice of bail describing them as of a parish merely is sufficient. *Treasurer's bail*, 2 Dowl. P. C. 670. 228

An affidavit of justification giving the deponent's residence without his addition is bad. *Id.*

A notice of bail omitting to state the residence of the bail "for the last six months," is an irregularity of which the court will take notice, though the bail be unopposed. *Sywood v. Doherty*, 1 Scott, 79. 228

If the defendant be a prisoner, the notice of bail must state that fact. *Fuller's bail*, 5 Tyr. 491. 228

*Exception.*—The want of entry in the book of the notice of exception is waived by giving notice of justification. *Hanwell's bail*, 3 Dowl. P. C. 425. 228

After bail had justified, the plaintiff not having excepted to them, in consequence of each of them positively swearing to the requisite amount, the plaintiff discovered that they were both insolvent:—The court refused to compel the defendant to put in other bail. *Lazarus v. Levaux*, 4 Dowl. P. C. 353. 228

*Notice of Justification.*—1 Reg. Gen. T. T. 1 Will. 4, as to giving four days' notice of justification, only applies where the bail justify at the time of putting in. *Jones's bail*, 2 Dowl. P. C. 153. 229

If notice of country bail is given, who are to justify pursuant to the old practice, the four

days' notice required by 1 Reg. Gen. T. T. 1 Will. 4, need not be given. *Hardbottle v. Clark*, 4 Dowl. P. C. 12. 229

The days between Thursday next before, and Wednesday next after Easter-day, are not to be reckoned in notices of justification of bail. *Cammings v. Pullen*, 1 Scott, 638. 229

A notice of justification of bail omitted to state where the bail resided for the last six months, and also whether they were householders or freeholders:—Held, not to be cured by the affidavit of justification according to the old rules, though it contained those requisites; and time to amend was refused, the bail having been put in too late; and also the costs of opposition. *Beal's bail*, 3 Dowl. P. C. 708. 229

A notice to justify at eleven, all parties appearing at ten:—Held sufficient. *Id.*

A notice of justification of bail at chambers, not specifying the hour, is a nullity; and though a notice of waiver of the first notice, and a fresh notice of justification specifying the time, were served two hours afterwards, yet, being too late:—Held, that the plaintiff was justified in not attending to oppose the bail:—Held, also, that the plaintiff was entitled to move to set aside the allowance of bail, though a judge at chambers had decided that the proceedings were regular. *Staines v. Stoneham*, 4 Dowl. P. C. 678; 2 C. M. & R. 658. 229

A notice of justification, which stated that the bail had resided for the last six months at the parish of W., without stating the street, &c., held bad. *Hanwell's bail*, 3 Dowl. P. C. 425. 229

A two days' notice of justification by a prisoner, accompanied by an affidavit according to the rule of T. T. 1 Will. 4, is bad, unless it expresses that he is a prisoner. *Bullen's bail*, 3 Dowl. P. C. 422. 229

*Adding Bail and giving Time.*—The rule of T. T. 1 Will. 4, as to changing bail, does not apply to the case of a prisoner. *Bird's bail*, 2 Dowl. P. C. 583. 231

The fifth rule of Hilary Term, 1 Will. 4, which prohibits the changing of bail without leave of court or a judge, applies to the case of bail put in by the sheriff for the purpose of rendering the defendant. *Rex v. Essex (Sheriff)*, 4 M. & Scott, 247; 2 Dowl. P. C. 782. 231

Where one of the bail put in for a prisoner justifies, time must be granted for justifying another; if neither justified, it would not have been necessary. *Foy's bail*, 2 Dowl. P. C. 442. 232

The 4th rule of T. T. 1 Will. 4, which directs, that, if a plaintiff does not give one day's notice of exception, where the bail justify under the new rules, the recognizance may be taken out of court, does not apply where the bail are put in in that mode after the regular time for putting in bail has expired, for then the bail must ac-



tually justify as formerly, before a motion can be made to set aside proceedings upon the ground that bail have been put in and justified. *Rex v. Wilson*, 3 Dowl. P. C. 255. 231

A defendant had leave to add another bail on condition of making an affidavit of merits, which he did, but pleaded a plea by which the merits could not come in question. This was held not to be a virtual breach of the condition. *Rix v. Kingston*, 3 Dowl. P. C. 158. 231

Where time is given to add new bail, the rule is imperative in all cases, that the notice of justification of new bail must be served before three o'clock of the day on which the order for new bail was granted. *Newton's bail*, 4 Dowl. P. C. 270; *S. C. nom. Sievers v. Newton*, 1 Gale, 171. 231

Time to justify bail on account of the illness of the bail, refused, because it did not appear on the affidavit that he was really ill. *Gablentz's bail*, 1 Har. & Woll. 111. 233

*Justification.*—Affidavit of justification. *Rogers v. Jones*, 1 C. & M. 323; 1 Dowl. P. C. 704; 3 Tyr. 256. 236

The affidavit of justification must agree with the form: it is not sufficient that it is equivalent. *Okil's bail*, 2 Dowl. P. C. 19. 236

The affidavit of sufficiency made by bail pursuant to the rules of T. T., must state the bail to be "worth," and not "possessed of," the required sum. *Harrison's bail*, 2 Dowl. P. C. 198. 236

If bail justify by affidavit, which states that they are "possessed," instead of "worth," &c., the plaintiff is not liable to pay the costs of an unsuccessful opposition. *Thompson's bail*, 2 Dowl. P. C. 50. 236

Affidavits of justification, which merely state that the bail is "possessed," instead of "worth," will not in future be allowed to be amended. *Worlisen's bail*, 2 Dowl. P. C. 53; *S. P. Naylor's bail*, 3 Dowl. P. C. 452. 236

An affidavit of justification stated the deponent to be possessed of a certain sum "over and above all his just debts."—Held sufficient. *Honsley v. Boyd*, 1 Scott, 698; *S. C. nom. Boyd's bail*, 1 Hodges, 93. 236

An affidavit stating that the deponent's property consists of "a freehold house situate without, &c." without stating its value, is sufficient. *Id.* 236

An affidavit of justification of bail, describing one as of a parish which contained 7000 inhabitants, "Ely, in the county of Cambridge," but not saying of any street, is sufficient. *Hunt's bail*, 4 Dowl. P. C. 272; 1 Har. & Woll. 520. 236

Stating that the bail was worth property to the requisite amount "over and above his just debts," but omitting "what will pay," is also sufficient. *Id.* 236

Stating that he was not bail in any other action for any defendant is also sufficient. *Id.*

An affidavit of sufficiency must give the addition of the bail. *Morgan v. Stone*, 1 Gale, 15. 236

An affidavit in justification of bail, omitting to disclose their residence, is insufficient, notwithstanding the plaintiff does not appear to oppose. *Welsh v. Lywood*, 1 Bing. N. R. 258. 236

Country bail stating himself to be a house-keeper at a place named, but not that he was resident there, allowed without costs. *Heald's bail*, 3 Dowl. P. C. 423; *S. C. nom. Batley v. Heald*, 5 Tyr. 231. 236

"Gentleman" is a good description of a clerk in the post-office. *Wood v. Ray*, 4 Dowl. P. C. 692. 236

The place where the affidavit of justification was sworn need not be mentioned. *Id.*

Where it was sworn that bail justifying by affidavit was an infant, time was given the other party to answer, without payment of costs. *Higgin's bail*, 1 Hodges, 94. 236

If a defendant, in justifying his bail, adopts the new practice under Reg. Gen. T. T. 1 Will. 4, he must conform to it strictly; and therefore an affidavit of sufficiency, though good by the old practice, but deficient by the new, is insufficient. *Penson's bail*, 4 Dowl. P. C. 627. 236

"He's" is sufficient in an affidavit of justification, instead of "he is." *Lanyon's bail*, 3 Dowl. P. C. 85. 236

The name of a township, without the name of a street, stated to be in a certain parish named in the notice of bail, is sufficient. *Id.*

It is sufficient for a bail to swear to property over and above "what will pay his debts." *Id.*

"Debts," without describing them as "book debts" is sufficient. *Id.*

"Yeoman" is a good description of a bail. *Id.*

*Costs of Justification.*—In order to obtain the costs of justifying bail, an application should be made at the time of justification. *Fream v. Best*, 2 Dowl. P. C. 590. 237

In the Exchequer, if bail have been once rejected, a deposit must be made for costs before the second set of bail justify, in the case of country as well as town bail. *Goodricke v. Turley*, 2 C. M. & R. 636; *S. C. nom. Turley's bail*, 4 Dowl. P. C. 498. 237

It is no objection that bail has been already rejected, unless it appear that he was rejected on the merits. *Id.*

Bail coming up a second time to justify, must pay or deposit the costs of a former unsuccessful attempt; and where costs are payable, the defendant being in prison will not excuse him from payment. *Pasmore's bail*, 3 Dowl. P. C. 214. 237

The affidavit filed of country bail at a judge's



chambers was incorrect, but that upon which the motion was made to justify them was right:—Held, that they were entitled to justify without the defendant either receiving or paying costs. *Saunders v. Popjoy*, 5 Tyr. 196; S. C. nom. *Popjoy's bail*, 1 C. M. & R. 594; 3 Dowl. P. C. 170. 237

Costs of opposition on technical grounds are not allowed. *Hanwell's bail*, 3 Dowl. P. C. 425. 237

It is too late after bail are sworn, to object that the costs of a former opposition have not been deposited with the officer of the court. *Knight's bail*, 4 Dowl. P. C. 328; 1 *Hodges*, 370. 237

Upon the justification of bail in a country cause, one of the bail was allowed time to explain respecting some property which it was alleged was mortgaged: this being afterwards done:—Held, that the defendant was entitled to the costs of justification. *Grant's bail*, 3 Dowl. P. C. 165; 1 C. M. & R. 598; 5 Tyr. 227. 237

Where an affidavit of sufficiency omits to state the place where the property of the bail is situate, and only ascribes the value to several kinds of property collectively, it is a departure from the form given by the rule 3 T. T. 1 Will. 4; and the bail having justified, the defendant is not entitled to the costs of justification. *Hodgson v. Cooper*, 2 C. M. & R. 43; S. C. nom. *Cooper's bail*, 3 Dowl. P. C. 692. 237

On bail justifying, the plaintiff was allowed the costs of a former successful opposition, though he did not ask for them until after the bail had passed. *Lewis v. Glossop*, 2 C. M. & R. 655. 237

*Allowance of Bail.*—The court refused, on behalf of bail to the action, to set aside a regular attachment against the sheriff, upon an affidavit of merits, and on payment of costs, where the rule for the allowance of bail had not been served on the plaintiff's attorney. *Rex v. Middlesex (Sheriff)*, 2 Dowl. P. C. 116. 239

Where a bail has misdescribed his place of residence on justification, but has been allowed to pass, the court will not set aside the rule for the allowance of the bail, but he may be indicted for perjury. *Eaglefield v. Stephens*, 2 Dowl. P. C. 438. 240

*Liability of Bail.*—Under rule 21 of H. T. 2 Will. 4, the liability of bail upon their recognizance is limited to the sum sworn to by the affidavit of debt and the costs of suit, not exceeding in the whole the single amount of one recognizance. *Vansandau v. Nash*, 3 M. & Scott, 834; 10 Bing. 329; 2 Dowl. P. C. 767. 240

In a case arising before the rules of Hilary Term, 2 Will. 4, the court of K. B. stayed proceedings in an action on a recognizance of bail, (where the action against the original defendant was by bill,) on payment of double the sum sworn to, and costs of the action against the bail. *Baney v. Holt*, 5 B. & Adol. 241; 3 Nev. & M. 529. 240

The liability of bail upon a recognizance given in an action commenced by original writ, is neither destroyed nor extended by inserting in the declaration under an order to amend, new causes of action not included in the writ, and increasing the general claim of damages, and also increasing the amount claimed in the several causes of action stated in the writ. *Taylor v. Wilkinson*, 5 Nev. & M. 189; 1 Har. & Woll. 451. 240

*Discharge of Bail.*—Where a cause in the Palace Court was removed by habeas corpus into the court of the King's Bench, but was remanded back by procedendo, and afterwards interlocutory judgment was signed in the court below, and a writ of inquiry executed:—Held, that the bail of the same defendant in another action brought in the Exch., had no right to remove the cause to the Palace Court again by habeas corpus, in order that the defendant might be rendered in discharge of his bail in the action in the Exch. *Lawes v. Hutchinson*, 1 C. M. & R. 766; 5 Tyr. 236; 3 Dowl. P. C. 506. 241

But the court gave the bail time to render, until fourteen days after the expiration of the custody in the Palace Court, no cause being shown against so much of the rule for such time. *Id.*

*Semble*, that Dover Castle is the county jail (upon an arrest in the Cinque Ports) to which to render a defendant, within the 11 Geo. 4 & 1 Will. 4, c. 70, s. 21, and Reg. Gen. Exch. M. T. 1 Will. 4, Reg. 12. *Stride v. Hill*, 4 Dowl. P. C. 709; 1 Mees & Wels. 57. 242

Defendant in criminal custody. *Campbel v. Acland*, 1 C. & M. 73; 1 Dowl. P. C. 635; 3 Tyr. 230. 244

Where a sheriff has put in bail above in order to render, and has obtained a judge's order for rendering at the instance of himself and his bail (see 11 Geo. 4 & 1 Will. 4, c. 70, s. 1), that order will not be rescinded, though it might be amended by striking out all which showed it to be granted at the sheriff's instance. *Green v. Jacobs*, 3 Tyr. 231. 245

*Semble*, the notice of render should not be stated to be signed by any person as attorney to the sheriff. *Id.*

Where the principal and bail both became bankrupts, the court ordered them to be relieved on motion, without pleading, though the bail-bond had been ordered to stand as a security. *Streeter or Slater v. Scott*, 2 Dowl. P. C. 363; 2 C. M. & R. 475; S. C. nom. *Slatter v. Stacey*, 4 Tyr. 372. 247

In such a case the bail must swear that they obtained their certificates. *Id.*

In the case of a London as well as a country commission, the court, on behalf of bail, will, to prevent inconvenience, allow the time for the render to be enlarged. *Ruston v. Green*, 2 Dowl. P. C. 617. 246

In the case of a London commission, the court of C. P. refused to enlarge the time for the render of the principal until after his final examina-



tion before the commissioners. *Coombs v. Dod*, 3 M. & Scott, 817; 2 Dowl. P. C. 766. 246

If a defendant against whom judgment has been recovered, afterwards become bankrupt and obtain his certificate within fourteen days of service of process upon his bail, the bail are entitled, under the general rule of 17th June, 1833, to have proceedings stayed, though no notice be given to the plaintiff, or application made to stay such proceedings, till after the expiration of the fourteen days. *Jones v. Ellis*, 1 Adol. & Ellis, 382. 246

The defendant having been committed to the King's Bench prison by a court of bankruptcy, the court of Common Pleas gave the bail time to render, notwithstanding the committal was under a London commission of bankruptcy, and the bail had justified after the bankruptcy, after judgment and at the request of the defendant's attorney. *Waugh v. Ashford*, 1 Scott, 167; 1 Bing. N. R. 294; 3 Dowl. P. C. 123. 246

Although not "till he has passed his last examination." *Id.*

Defendant, with consent of bail, gave a cognovit with stay of execution. He omitted to pay when the time had elapsed. Plaintiff not having given the bail notice of this:—Held, that he could not proceed against them half a year afterwards, upon defendant's death. *Surman v. Bruce*, 4 M. & Scott, 184; 2 Dowl. P. C. 777; 10 Bing. 434. 248

Bail are discharged by time being given to their principal without their consent, although they may not have been damnified. *Hannington v. Beare*, 4 Dowl. P. C. 256. 248

Bail knowing of an agreement to give time, must apply for relief immediately on being served with process. *Vernon v. Turley*, 4 Dowl. P. C. 660; 1 Mees. & Wels. 316. 248

The plaintiff signed an agreement with an agent of the defendant on the 29th of September, that on the defendant's entering into an agreement to pay the debt, part in iron within a month, and the remainder by bill at two months, the action should be discontinued; and the defendant was to call on the plaintiff on the following day, to enter into the agreement. He never did so call. On the 8th of October, the plaintiff gave notice to the defendant that he held himself disengaged from the agreement, and should proceed with the action forthwith. On the 20th of October, the defendant delivered to the plaintiff, and the latter received, two bills of exchange for the greater portion of the debt. He did not deliver any iron, and became bankrupt on the 6th of November:—Held, that there was not a giving of time to the defendant, so as to discharge the bail. *Id.*

If plaintiff, at defendant's request, accepts without opposition bail named by the defendant, defendant cannot afterwards move to discharge the bail on the ground of a defect in the affidavit of debt. *Mammatt v. Mathew*, 4 M. & Scott, 356; 2 Dowl. P. C. 797; 10 Bing. 506. 249

The court will not exonerate bail for a variance between the declaration and affidavit of

debt, where they have consented to a stay of execution, and apply late for relief. *Coppin v. Potter*, 1 Bing. N. R. 443; S. C. nom. *Coppin v. Macqueen*, 1 Scott, 372. 250

Irregularities in the conduct of the ca. sa. against the principal, may be objected to on motion, in proceedings under the sci. fa. against the bail as well as by plea. *Goldney v. Laporte*, 2 Bing. N. R. 456; 4 Dowl. P. C. 639. 250

Where bail would be fixed by an indulgence granted by the court, such terms will be imposed upon the plaintiff as will give the bail an opportunity of freeing himself from his liability. *Bradley v. Bailey*, 3 Dowl. P. C. 111. 250

*Proceedings against Bail by Action*—In debt on a recognizance of bail, the declaration stated the recognizance to have been entered into in an action of debt against J. S. On the production of the record (on a plea of nul tiel record), it appeared that the original action was on promises. The court allowed the declaration to be amended on payment of costs, but required a special application for that purpose. *Munkenbeek v. Bushnell*, 1 Scott, 569. 251

It is not a ground of general demurrer, that the plaintiff in an action against bail, is stated to have brought a bill into court, if upon the whole record it appears to be a proceeding by scire facias. *Darling v. Gurney*, 2 Dowl. P. C. 101, 235; 2 C. & M. 226; 4 Tyr. 2. 253

To debt on a recognizance of bail, the defendant having pleaded that no ca. sa. issued, to which the plaintiff replied that a ca. sa. did issue directed to the sheriffs of London, and the defendant rejoined that the original action was brought in Middlesex and not in London, which the plaintiff denied in his surrejoinder, and concluded with a verification by the record:—Held, on special demurrer, that the conclusion was proper. *Id.*

A plaintiff having recovered a verdict at the summer assizes, the judge who tried the cause, under the power given by 1 Will. 4, c. 7, made an order that execution should issue forthwith, and a ca. sa. was thereupon issued returnable "immediately after execution thereof," pursuant to 3 & 4 Will. 4, c. 67, s. 2. This writ having remained in the sheriff's office a considerable time without having been executed, an order was made by a judge on the 12th of September, for the sheriff to return the writ in six days, which order was served upon him on the 14th, and he on the same day returned non est inventus, whereupon the plaintiff commenced an action against the defendant's bail:—Held, that under these circumstances the bail were not fixed, and that the action was prematurely commenced. *Kemp v. Hyslop*, 1 Mees. & Wels. 58; 4 Dowl. P. C. 697; 1 Tyr. & G. 77. 251

The bail ought either to have notice given them of the order, or else the order with the writ should be entered in the public book, four clear days at least before the writ is made returnable by the order; and for want of this, proceedings afterwards taken against the bail were set aside as irregular. *Id.*



It is recommended by the court, that when a ca. sa. is issued with the intention of fixing the bail, it should be in the old form, returnable in term; and it seems doubtful whether a ca. sa. returnable immediately is sufficient for the purpose of fixing bail. *Id.*

The rule of M., 59 Geo. 3, K. B., is now adopted into the practice of the court of Exchequer; and, therefore, bail or sheriffs, applying for relief, must comply with the terms of that rule. An affidavit by bail, applying to stay proceedings on payment of costs, which stated that the application was made for their own indemnity, instead of only indemnity, was held insufficient. *Call v. Thelwell*, 3 Dowl. P. C. 444; 1 C. M. & R. 780; 5 Tyr. 231; 1 Gale, 16. 254

**Proceedings against Bail by sci. fa.]**—Proceedings against bail are irregular, if the plaintiff has procured the ca. sa. against the defendant to be returned non est inventus, knowing that the defendant is in custody of the sheriff, although by a different name. *Briggs v. Richardson*, 2 Dowl. P. C. 158. 250

The sci. fa. against bail need not be tested on the return day of the ca. sa. *Sandland v. Clarendon*, 2 Dowl. P. C. 115; 1 C. & M. 673; 3 Tyr. 804. 252

It may be tested afterwards. *Id.*

The four days during which a sci. fa. against bail must lie in the sheriff's office need not be in term. *Id.*

A sci. fa. served upon bail on the evening before the return day—Held, regular. *Lewis v. Fine or Pyne*, 2 Dowl. P. C. 133; 3 Tyr. 867; 1 C. & M. 771. 252

Judgment cannot be signed on a sci. fa. against bail resident out of the county of Middlesex, unless they have received notice of the proceedings, or attempts have been made to give such a notice. *Wimall v. Cook*, 2 Dowl. P. C. 173. 252

The court will not give leave to sign judgment on a sci. fa. against bail, on a summons of one in Middlesex, unless the other, resident out of Middlesex, is warned of the proceeding. *Newton v. Maxwell*, 2 C. & J. 635. 252

In sci. fa. against bail and return of sci. feci, the bail must have been summoned before the rising of the court. *Stevenson v. Molony*, 1 Alcock & Napier, 225, (*Irish*). 252

Where a writ of sci. fa. has not lain in the office the proper number of days, the motion should be to set aside the proceedings thereon, and not the writ itself. *Williams v. Brown*, 3 M. & Scott, 218. 252

It is irregular in a sci. fa. to state the bail to have been put in on a day previous to the issuing of the writ. *Peacock v. Day*, 3 Dowl. P. C. 201. 252

It is an immaterial objection to a sci. fa. that it is tested on the 3rd of November, and returnable on the 15th of November, "next coming." *Id.*

Since the Uniformity of Process Act, it is irregular for a sci. fa. to recite the action as com-

menced "by bill, without our writ," if it has been commenced by summons. *Id.*

In sci. fa. upon a recognizance of bail taken before a commissioner in the country, it is necessary to aver that the recognizance was transmitted to, and inrolled in, the court above, as a sci. fa. can only issue on a matter of record, and inrolment is essential to constitute a record. *Lavery v. Duffin*, 1 Alcock & Napier, 295, (*Irish*). 253

Where the writ of sci. fa. does not aver any record upon which it is founded, the proper course is to demur; a plea of nul tiel record would be improper. *Id.*

The absence of such an averment will render the writ defective on special demurrer. *Id.*

**Bail in Error.]**—If a defendant brings a writ of error and puts in sham bail, the plaintiff may treat them as a nullity, and issue execution. *Sutcliffe v. Eldred*, 2 Dowl. P. C. 184. 257

In order to obtain time to justify bail in error, on account of the bail suddenly leaving town, it must be sworn that the fact of such departure was a surprise on the defendant. *Roger's bail*, 2 Dowl. P. C. 197. 258

## BAILMENT.

Upon a bailment without reward, in order that an act may be done by the bailee for the sole benefit of the bailor, such bailee (or mandatory) is liable only for gross negligence. *Doorman v. Jenkins*, 4 Nev. & M. 170; 2 Adol. & Ellis, 256. 259

What shall amount to gross negligence is a question for the jury. *Id.*

In assumpsit against a bailee it was proved that the defendant, a coffee-house keeper, having custody of money without reward, lost it and made the following statement:—"That he had unfortunately put it with a larger sum of money of his own, into his cash box, which was kept in his tap room; that the tap room had a bar in it, and was open on a Sunday, but the rest of his house which was inhabited was not open on Sunday, and that the cash box, with his own and the plaintiff's money, had been stolen on that day. The judge left it to the jury whether the defendant was guilty of gross negligence; and he told them that the loss of the defendant's own money did not necessarily prove reasonable care. The jury found for the plaintiff."—Held, first, that the question of gross negligence was properly left to them; secondly, that there was evidence upon which they might find for the plaintiff. *Id.*

In the case of the simple bailment of a chattel, without reward, it may be recovered in trover either by the bailor or bailee, if taken wrongfully out of the bailee's possession. *Nithols v. Bastard*, 2 C. M. & R. 659; 1 Tyr. & G. 156; 1 Gale, 295. 259

Trover for horses, cows, furniture, &c. &c.—Plea, that J. H. was possessed of the cattle, goods, and chattels, in the declaration mentioned, and fraudulently sold them to the plain-



tiff to avoid an execution against the goods of J. H., and that the defendant (the sheriff) seized them under such execution. Replication, that J. H. did not fraudulently sell the cattle, goods, and chattels, in the declaration mentioned, to the plaintiff, and issue thereon; the particular of demand was merely "one cow." It appeared that the plaintiff had lent a cow to J. H.; that the goods of J. H. were fraudulently sold to avoid an execution, and the greater part of them bought by the plaintiff; that the plaintiff's cow was not sold, nor was any cow sold at such sale:—Held, that the plaintiff was entitled to a verdict on the above issue. *Id.*

A person has no right to keep the property of another, and charge for the standing of it, unless there was a previous bargain between him and the owner of the property, or between him and some agent authorized by the owner. *Buxton v. Baughan*, 6 C. & P. 674—Alderson. 259

### BANKER.

Money deposited with bankers is, in law, a loan by the customer to the bankers. *Sims v. Bond*, 2 Nev. & M. 608. 262

Where A., having certain funds standing to his credit at his bankers, by letter directed them to carry some parts of such funds to the account of certain persons as trustees for his wife, and after her decease for his son, and other parts thereof to the account of certain persons as trustees for his son; and such sums were accordingly carried over by the bankers to the account of such persons in their books, and the dividends were from time to time carried to the same accounts, but the testator never communicated the facts to the trustees, and there was some evidence that the testator had directed the transfers under an impression that he should be able by that means to evade the legacy duty, and that he had shown an intention to exercise some acts of ownership over the funds; the court held, that the appropriations were void, and that the testator might have revoked them. *Gaskell v. Gaskell*, 2 Y. & J. 502. 262

On the 23rd November country bank-notes were paid by A., a purchaser of goods, to B. the vendor. On the 28th, B. requested the purchaser's shopman as a favor to exchange the notes for money, and received the amount accordingly. The bank, which was situated at a considerable distance from the place where the shopman gave the money, had stopped payment two hours before. A., the purchaser heard of it on the 29th, and on the 30th wrote to B. to inform him of the event, and that he, B., was to be liable for the notes, but did not tender them to him then or for some days after, nor were they ever presented at the bank:—Held, that A. should have returned them to B. without delay, or presented them at the bank as holder; and that having done neither, he could not recover the amount from B. *Rogers v. Langford*, 1 C. & M. 637; 3 Tyr. 654. 262

Where a customer of the Bank of England was in the habit of making his acceptances pay-

able at the bank, and one of such acceptances being presented for payment at eleven o'clock in the morning was dishonored for want of assets, and was presented again by a notary at six in the evening when the same answer was given by a person stationed for that purpose, it was held, that the bank, although they had before six o'clock received assets, were not bound to pay the bill, it being after the usual hours of business. *Whitaker v. England (Bank)*, 1 C. M. & R. 744; 5 Tyr. 268; 6 C. & P. 700; 1 Gale, 54. 260

Semble, that it was the duty of the bank to have informed the notary that they had received assets, and that the bill would be paid the following day. *Id.*

The production of a bank promissory note, though it be payable to A. B. or bearer, is prima facie evidence in an action against the banker, of money had and received by him for the use of the plaintiff. *Kerr v. James*, 1 Gale, 21. 260

When a customer pays to his bankers a check drawn upon them by another customer, he must, in order to make them liable at all events, demand payment, or request that the amount may be placed to his credit. *Boyd v. Emmerson*, 4 Nev. & M. 99; 2 Adol. & Ellis, 184. 260

An assent, on the part of the banker, to such a demand or request, would raise an implied promise to pay or give credit for the amount. *Id.*

When a customer pays into his bankers, in the ordinary way, a check drawn upon them by another of their customers, the bankers are entitled to the same time for ascertaining whether the check will be paid and giving notice of dishonor (in case it be resolved by them not to pay the check) as in the case where a check is drawn upon other bankers. *Id.*

Therefore, in such a case, no promise to pay the check on the part of the bankers will be implied from the absence of earlier notice. *Id.*

A. and B. are respectively customers of C., a banker. A. goes to C.'s bank at a quarter before one on Monday, and gives C.'s managing clerk directions as to the payment of a bill, and, whilst the clerk is making a memorandum of those directions, lays on the counter a check drawn by B. on C., and says "place this to my account" or "credit." No intimation as to whether the check would or would not be paid was given to the clerk. The clerk did not debit B. with the amount, or place it to A.'s credit, or cancel the check. B. having overdrawn his account, inquiries were made on Tuesday, the result of which was, that C. resolved not to pay the check. The check, with notice of dishonor, was sent to A. at his residence, by seven o'clock, p. m. on Tuesday:—Held, sufficient notice of dishonor. *Id.*

Semble, that as the post did not leave the town in which the bank was situate until seven o'clock p. m., a notice of dishonor received by A. at his residence, at a few miles distance, at 7 o'clock, was earlier than necessary. *Id.*

A bill for an account will lie against a banker by his customer. *Bowles v. Orr*, 1 Y. & Col. 454. 262



## BANKRUPT.

## II. JURISDICTION IN BANKRUPTCY.

The Lord Chancellor sitting in bankruptcy committed the solicitor to the commission for not obeying an order:—Held, that the Lord Chancellor had jurisdiction so to do; and that no action lay against him for so doing:—Held, also, that the Lord Chancellor, in an action brought against him for so doing, need not plead specially. *Dicas v. Brougham*, (Lord), 6 C. & P. 249; 1 M. & Rob. 309—Lyndhurst. 267

The Lord Chancellor's jurisdiction to annul a fiat still exists. In re Chambers, 4 Deac. & Chit. 578; S. P. Ex parte Keys, 3 Deac. & Chit. 263; 1 Mont. & Ayr. 226. 267

A petition presented to the Lord Chancellor before 1 & 2 Will. 4, c. 56, must be transferred by the Lord Chancellor, to the court of Review, before that court can hear it. In re Stokes, 4 Deac. & Chit. 578. 267

Although upon a fiat being superseded the Lord Chancellor has issued his confirmatory order, the court of Review, upon a proper case on rehearing, can in effect order a procedendo, by means of its intimation to the Lord Chancellor. Ex parte Lavender, 4 Deac. & Chit. 496; 2 Mont. & Ayr. 103. 267

Quere, as to the power of the court of Review to issue a writ of habeas corpus? Ex parte Jones, 2 Mont. & Ayr. 41; 4 Deac. & Chit. 536. 267

In general an uncertificated bankrupt cannot file a bill against his assignees for an account of their dealings under the bankruptcy; nor can the bankrupt obtain this relief indirectly, by charging fraud and collusion between the assignees and a third party, where the bill states no specific acts of fraud on the part of the assignees, and prays no relief against them on the ground of fraud. *Tarleton v. Hornby*, 1 Y. & Col. 172. 267

A general order acts as if a particular order in each case. Ex parte Sidebotham, 2 Mont. & Ayr. 151. 267

## III. WHO MAY BE BANKRUPTS.

A fiat was superseded with costs, to be paid by the petitioning creditor, on the ground of the bankrupt's minority; but the court of Review made no order for assigning the bond. Ex parte Hehir, 3 Deac. & Chit. 107. 269

A person who keeps livery stables and buys large quantities of hay and straw and oats, which he supplies to the horses standing in the stables, and sells to any person generally, is a trader, subject to the bankrupt law. *Cannan v. Denew*, 3 M. & Scott, 761; 10 Bing. 292. 272

Cow-keepers. *Carter v. Dean*, 1 Wils. C. C. 85; 1 Swans. 64. 271

A country attorney hired a room in Bell-court, Brook's Market, London, which he kept four weeks, and in which he put eighty-two old volumes of books, sticking up a paper in the

window, in which his name was written, with the addition of "bookseller;" a fiat having been issued against him by this description, was annulled on the ground of fraud. Ex parte Dart, 2 Deac. & Chit. 543. 270

By 2 Will. 4, c. 39, s. 9, in all personal actions, wherein it shall be intended to proceed against a member of Parliament, according to the provisions of the statute 6 Geo. 4, c. 16, s. 10, the process shall be according to the form contained in the schedule annexed to the 2 Will. 4, c. 39, marked No. 6, and which process and a copy thereof shall be in lieu of the summons, or original bill and summons and copy thereof, mentioned in the said statute. 273

Semble, a coach proprietor is not a trader. In re Walker, 2 Mont. & Ayr. 267. 273

A builder is a person who builds either on his own or another's land for a profit. Ex parte Neiricks, 2 Mont. & Ayr. 384; 1 Deac. 78. 271

A party who bought six carcasses of houses for the purpose of finishing them, and selling them again when he had made them habitable, and who ordered materials for this purpose, representing himself to be a builder, may be made a bankrupt as a builder, within the 6 Geo. 4, c. 16, s. 2. Id.

A single act of buying and selling by a farmer, with evidence of intent to continue, is a sufficient act of trading. Ex parte Lavender, 4 Deac. & Chit. 487; 2 Mont. & Ayr. 11. 269

Although there be not evidence of the trading on the proceedings, the fiat will not be superseded, if the bankrupt admitted to the petitioning creditor that he was a trader. Ex parte Bailey, 2 Mont. & Ayr. 86. 269

After the issuing of the fiat, the petitioning creditor heard and believed that the party against whom it was issued was a married woman. The court would not for this cause, on the petition of the petitioning creditor, order the fiat to be annulled, but merely suspended the prosecution of it. Ex parte Harland, 1 Deacon, 75. 269

The non-possession of property by the bankrupt is not a sufficient reason for not declaring him a bankrupt. Ex parte Johnson, 2 Mont. & Ayr. 390. 273

## IV. ACT OF BANKRUPTCY.

Act of bankruptcy after ceasing to trade. *Bailey v. Grant*, 1 Clark & Fin. 238; 2 M. & Scott, 193; 9 Bing. 121. 275

Breaking an appointment to delay creditors is an act of bankruptcy. *Robinson v. Carrington* (Lord), 1 Mont. & Ayr. 13. 278

The bare neglect to keep an appointment to meet a creditor does not amount to an act of bankruptcy. Ex parte Lavender, 4 Deac. & Chit. 484; 2 Mont. & Ayr. 11. 277

A bankrupt, pending a negotiation for the loan of money, is arrested in the country, and discharged on bail. He at the time promises to meet the creditor and his solicitor on the following day, and give security. On the following day, how-



ever, he goes to London, in order to procure part of the loan, and therewith to pay the creditor the debt instead of giving security. He writes to the solicitor, stating the fact and its object, and promises to return in a day or two and pay the debt. He is, however, detained longer in London, bona fide, upon the same negotiation:—Held, that evidence of the intent to delay his creditor was rebutted. *Id.*

A trader does not commit an act of bankruptcy within 6 Geo. 4, c. 16, s. 3. by absenting himself from some place at which he would in the ordinary course of his life and business, be expected to be found, or at which he has appointed to meet particular creditors. *Bernasconi v Farebrother*, 5 M. & R. 364. 277

A trader, being in debt to several persons, leaves this country in June, 1831, for America, with some intention of returning, but does not actually return, nor does he make provision for the payment of all his debts. In September, 1833, one of the creditors whose debt was left unpaid for, issues a fiat against him, which the bankrupt, by his agent in this country, after the 42nd day, petitions to supersede.—Held, (*diss.* Sir J. Cross), that the fiat could not be superseded without the previous surrender of the bankrupt:—Held, also, per tot. cur., that the continued absence of the bankrupt, under these circumstances, amounted to an act of bankruptcy. *Ex parte Kirkman*, 3 Deac. & Chit. 451. 277

Where a trader, whose goods are under seizure quits his home, it is for the jury to say whether he departs with the bona fide intention to endeavor to procure the means of removing the execution, or, whether, having gone for that purpose, he stays away for the purpose of avoiding his creditors. *Batchelor v. Vyse*, 4 M. & Scott, 552; 1 M. & Rob. 331. 277

A trader in embarrassed circumstances, absented himself from his house from the 16th of February till the 9th of March. Upon an issue, whether he had committed an act of bankruptcy on or before the 5th of March, two letters, written by him on the 16th of January preceding, asking for time on two bills of exchange, payable by him in February, were received in evidence to show the motive of his absence. *Smith v. Cramer*, 1 Scott, 541; 1 Bing. N. R. 1; 1 Hodges, 124 277

Upon an issue directed to try whether one P. had committed an act of bankruptcy on a given day, it appeared that on the preceding day he sent a letter from his dwelling-house at Greenwich to his place of business, addressed to his son, stating that he was unable to meet his engagements, and desiring that he might be denied to any creditor who might call, and immediately after dispatching his letter he left home, and remained absent during the whole of that and the following day. A witness proved that P. called on the day in question at her brother's house in London; that he expressed to her an apprehension of being sent to the Fleet, and stated that he was in no hurry to get home, and would not go very early, as he had creditors who would lay hold of him, and that he did not leave till after

dark. The jury were told, that if they believed the statements made by the witness, P. on that occasion committed an act of bankruptcy; they said they did believe the witness, but they did not think P. spoke with bona fides:—Held, that P. had committed an act of bankruptcy; and that evidence of his conduct and conversations, on the day subsequent to the date mentioned in the issue, was not admissible to explain his conduct on that day. *Johnston v. Woolf*, 2 Scott, 373. 277

A trader conveying away property to such an extent as will prevent him from continuing his business, and render him insolvent, thereby commits an act of bankruptcy. *Wedge v. Newlyn*, 4 B. & Adol. 831. 262

But those who rely upon such act of bankruptcy on a trial must show that it was calculated to have the alleged effect, by evidence of the general state of the party's affairs at the time of such conveyance. *Id.*

It is not sufficient to prove that the trader, under pecuniary pressure, disposed of some article essential to the carrying on of his business; as that a miller, by bill of sale, transferred his wagon and horses to a creditor who had arrested him. *Id.*

A fair and bona fide sale of the whole of a trader's property is not, of itself, an act of bankruptcy. *Rose v. Haycock*, 3 Nev. & M. 645; 1 Adol. & Ellis, 460. 282

The party who impeaches the sale of the whole of a bankrupt's property must show some facts from which fraud may be inferred. *Id.*

A sale of the whole of a trader's stock in trade, with an intention to abscond with the money and cheat his creditors, to a bona fide purchaser, who is ignorant of the trader's design, is not an act of bankruptcy. *Baxter v. Pritchard*, 3 Nev. & M. 638; 1 Adol. & Ellis, 456. 282

An assignment by a trader of all his estate and effects, for the benefit of all his creditors, executed by the trader, but not executed by the trustee or by any creditor, or further acted on, is an act of bankruptcy. *Botcherley v. Lancaster*, 3 Nev. & M. 383; 1 Adol. & Ellis, 77. 282

Quere, whether the court can, upon showing cause against a rule for a new trial, entertain a question as to whether a deed amounted to an act of bankruptcy, where the rule nisi was obtained upon the ground of the improper reception of evidence to show insolvency preparatory to proof of another act of bankruptcy, in which the parties failed at the trial? *Id.*

A conveyance of part of a bankrupt's property in trust to sell and dispose of the proceeds as he shall direct, is not an act of bankruptcy. *Robinson v. Carrington (Lord)*, 1 Mont. & Ayr. 1. 283

A trader entitled to large freehold and leasehold estates, but greatly embarrassed, and having committed acts of bankruptcy, conveyed his freehold and leasehold estates to trustees, upon trust to sell or mortgage, and to apply the produce as he should direct; it appeared that the trust-deed



was executed under advice, for the purpose of effecting a conversion of the trader's property, with a view to an arrangement with his creditors, to which he was himself considered incompetent from the state of his health:—Held, that the trust deed was not an act of bankruptcy. *Greenwood v. Churchill*, 1 Mylne & K. 546. 282

Two creditors persuaded a bankrupt to execute an assignment of his effects to them for the benefit of his creditors, and issued a fiat against him, setting up this assignment as the act of bankruptcy: they then seized his furniture and stock, without taking any proceedings under the fiat: on the application of a bona fide creditor, this fiat was ordered to be annulled, and a new one issued. *Ex parte Mucklow*, 3 Deac. & Chit. 25. 285

Where a trader assigned by deed all his property in trust for the benefit of his creditors:—Held, that it was an act of bankruptcy under 6 Geo. 4, c. 16, s. 3, although, in so doing, he did not intend to defeat or delay his creditors, as that being the necessary consequence of the assignment, he must, in law, be taken to have intended it. *Stewart v. Moody*, 1 C. M. & R. 777; 5 Tyr. 493. 283

A deed by F., one of two traders in partnership, conveyed his separate estate to trustees for the joint creditors of both: the joint creditors agreeing that the traders should continue in possession of their stock, and carry on business with a view to retrieve themselves: and that upon their paying 4s. 6d. in the pound by certain installments, they should receive a general release:—Held, not an act of bankruptcy:—Held, also, that it was properly left to the jury to say, whether the deed was executed bona fide to enable the traders to retrieve themselves, or was executed by F. with intent to defraud his separate creditors. *Abbott v. Burbage*, 2 Bing. N. R. 444. 282

A fraudulent delivery of goods by a trader, will be of itself an act of bankruptcy. A delivery of goods to one to whom no debt was due, would be such a fraudulent delivery; and the delivery would likewise be fraudulent, though a debt was due, if the transfer of the goods was made voluntarily, and in contemplation of bankruptcy. *Scott v. Thomas*, 6 C. & P. 611—Parke. 283

Quere, whether the payment of a country bank note to a creditor, with the intention of giving him a fraudulent preference, is an act of bankruptcy within the 6 Geo. 4, c. 16, s. 3? *Carr v. Burdiss*, 1 C. M. & R. 782; 5 Tyr. 309. 283

A., a soap and alkali manufacturer, being indebted to a banking company, assigned to them, to secure past and future advances, his leasehold property, with all the stock in trade, utensils, and effects thereon, and also a policy of insurance, as a security for monies advanced or to be advanced. The deed contained a power of sale, and a proviso, that the trader should remain in possession until default. The assignment did not include another part of A.'s property, equal in amount to the debt covered by the security. In an action by A.'s assignees to recover part of the property assigned, the jury found that the deed was not

executed in contemplation of bankruptcy:—Held, that it was a valid deed, and did not amount to an act of bankruptcy. *Carr v. Burdiss*, 1 C. M. & R. 443; 5 Tyr. 136. 283

The court has no jurisdiction to control the discretion of a commissioner as to what documentary evidence he shall require to be produced to prove an act of bankruptcy. But the court intimated its opinion, that a letter written by the bankrupt's wife to a third party, in whose possession it remained, though it could not in any way afford direct evidence of the act of bankruptcy (unless it was also proved that she was authorized by her husband to write it as his agent), she not being examinable as a witness upon that point, yet might be ordered to be produced, to be used only as a clue to the procurement of other evidence as to the act of bankruptcy. *Ex parte Groom*, 4 Deac. & Chit. 640. 287

Concerted act of bankruptcy. *Marshall v. Barkworth*, 1 Nev. & M. 279; 4 B. & Adol. 506. 285

#### V. PETITIONING CREDITOR.

The assignees of a bankrupt gave B., their solicitor, a check for the amount of the bill of costs of A., the petitioning creditor (who was his own solicitor); B. offered to pay A. the full amount of those costs, provided that he would engage in the receipts that the costs should be afterwards liable to taxation; A. refused to give such engagement, and requested B. to pay out of the same some commissioners' fees included in the bill:—Held, that no promise arose upon the offer, the terms of which were not acceded to; and without the promise there was no privity of contract to support an action for money had and received. *Barron v. Husband*, 1 Nev. & M. 728; 4 B. & Adol. 611. 290

The petitioning creditor's bill was ordered to be taxed by an officer of the court of Review, where objectionable charges had been allowed by the commissioners. *Ex parte Hatteraley*, 2 Deac. & Chit. 373. 290

Attendance of petitioning creditor dispensed with, under the circumstances, at the opening of the fiat. *In re Polton*, 3 Deac. & Chit. 688. 289

A petitioning creditor is entitled to be repaid out of the estate a sum paid to the creditor to render him a competent witness to support the fiat. *Ex parte Forth*, 2 Mont. & Ayr. 381. 289

Although the money first received under a fiat is by the statute required to be appropriated in discharge of the expenses incurred by the petitioning creditor, yet, where he assents to a different appropriation, he is estopped from afterwards contending that the directions of the act have not been complied with. *Hornidge v. Eyland*, 2 Scott, 357. 289

Reference to the commissioners to allow, on the taxation of the petitioning creditor's bill of costs, certain expenses incurred before adjudication, by parties appointed by the creditors to act for the benefit of the estate. *Ex parte Evans*, 4 Deac. & Chit. 392. 289



Although the petitioning creditor is not entitled to an order on the assignees to pay the amount of his costs before they have received money under the fiat, he is, nevertheless, entitled to an inquiry whether any assets have been received by the assignees. *Ex parte Abram*, 4 Deac. & Chit. 401. 289

#### VI. PETITIONING CREDITOR'S DEBT.

*Validity.*—A docket was struck on a note on which the bankrupt and one W. were jointly liable; afterwards a tender was made on behalf of W.: a petition to supersede for want of a petitioning creditor's debt, dismissed—payment, after docket struck, would have been invalid. *Ex parte Jones*, 1 Mont. & Ayr. 442; 3 Deac. & Chit. 697. 293

Semble, that pending a replevin on a distress for rent, the landlord cannot sue out a commission of bankruptcy against the tenant, founded on his demand for rent. *Emery v. Mucklow*, 4 M. & Scott, 263. 294

If money be advanced to a trader, to enable him to commence a trade, of which the lender is to share the profits, it is a good petitioning creditor's debt. *Ex parte Notley*, 1 Mont. & Ayr. 46. 294

Such debt may be proved. *Id.*

Quære, whether a mortgagee in trust can alone issue a fiat against the mortgagor on the mortgage deed? He can, if the legal validity of his debt has been previously established by an action at law. *Ex parte Gray*, 2 Mont. & Ayr. 283. 293

*Per C. J.*—If a partner files a bill, and treats a debt as mixed with the partnership, a fiat cannot afterwards be issued on that debt. *Id.*

Quære, whether a joint commission against two, joint traders with a third, not included in the commission, on a debt due from the two, is valid? *Ex parte Chambers*, 2 Mont. & Ayr. 440. 293

Where a bankrupt, on a petition to annul a fiat, pressed for further inquiry as to the validity of the petitioning creditor's debt against the opinion of the court, and the matter was accordingly referred to the deputy registrar, who reported that the debt was a good one; the court ordered the bankrupt to pay the costs of the inquiry, there being no estate in the hands of the assignees. *Ex parte Neirincs*, 1 Deacon, 78; 2 Mont. & Ayr. 384. 293

The bankrupt, who was in partnership with W. P., borrowed money of him by way of personal loan, and upon the dissolution of the partnership, purchased the stock in trade for a stipulated sum. W. P. made out an account, entitled "Mr. H. P. (the bankrupt) in account with H. & W. P.:"—Held, that W. P. had a good petitioning creditor's debt, notwithstanding this mode of intitling the account. *Ex parte Richardson*, 3 Deac. & Chit. 244. 293

If a trader take the benefit of the Insolvent Debtors' Act, a creditor, whose debt is inserted in the schedule, may afterwards issue a fiat on that debt against the trader. *Ex parte Barrington*, 2 Mont. & Ayr. 255; 1 Deacon, 3. 293

*Substitution.*—Where a new petitioning creditor's debt has been substituted under the stat. 6 Geo. 4, c. 16, s. 18, it is sufficient to prove the petition to the chancellor for the substitution of the new debt, the chancellor's order referring the sufficiency of the debt, &c. to the commissioner, and the finding of the commissioner thereon. It is not necessary to produce the chancellor's order confirming such finding. *Batchelor v. Vyse*, 1 M. & Rob. 331—*Tindal*: S. C. not S. P. 4 M. & Scott, 552. 296

If, on an application to substitute a petitioning creditor's debt, by any other creditor, it appears that the original debt was proved under a mistake in law, and was reduced on legal grounds, and without fraud on the part of the original petitioning creditor, though he comes to substitute under such circumstances in *autre droit*. *Ex parte Rogers*, 4 Deac. & Chit. 637; 2 Mont. & Ayr. 153. 296

An order by the Lord Chancellor, under 6 Geo. 4, c. 16, s. 18, substituting a new petitioning creditor's debt for one alleged to be insufficient to support a commission, is invalid, if it direct the commissioners to inquire only as to the sufficiency of the new debt, and is silent as to the insufficiency of the old. *Muskett v. Drummond*, 5 M. & R. 210. 296

Whether a valid order under that section made *pendente lite*, would be evidence against a party who had no notice of such order, quære? *Id.*

On a petition for a substitution of a debt, in lieu of the petitioning creditor's debt, under the 6 Geo. 4, c. 16, s. 18, the costs of the proceeding must be paid by the petitioning creditor, and not out of the bankrupt's estate. *Ex parte Hayne*, 4 Deac. & Chit. 403. 296

The petitioning creditor issued the fiat on a debt of 700*l.*, but the greater part being contracted during the bankrupt's minority, and not for necessities, the debt was reduced below 100*l.*, and was therefore insufficient to support the fiat. But the petitioning creditor had also accepted bills for the accommodation of the bankrupt, which having been indorsed by the bankrupt to A., A. proved them under the fiat. The petitioning creditor subsequently paid these bills:—Held, that, on indemnifying A., and on presenting a petition in the name of A. for that purpose, the petitioning creditor was entitled, under 6 Geo. 4, c. 18, ss. 18, 52, as a surety paying the debt, to substitute the debt so proved on the bills by A., for the original petitioning creditor's debt, so as to support the fiat, notwithstanding the words "any other creditor" in the 18th sect. *Ex parte Rogers*, 4 Deac. & Chit. 623; 2 Mont. & Ayr. 153. 296

Costs of the application to substitute another debt for the debt of the petitioning creditor ordered to be paid by the petitioning creditor. *Ex parte Lloyd*, 2 Deac. & Chit. 506. 296

Where the commissioners find the petitioning creditor's debt insufficient to support the fiat, they should also expressly find, that the debt proposed to be substituted was incurred not anterior to the petitioning creditor's debt. *Ex parte Hunter*, 2 Deac. & Chit. 507. 296



## VII. DOCKET.

A. tendered docket papers, of which the affidavit of debt was sworn before the solicitor to the petitioning creditor; at the same time B. tendered papers not so sworn; they drew lots, and the lot fell to A., whose papers were entered: the court refused to interfere, to give the fiat to B. *Ex parte Darkins*, 1 Mont. & Ayr. 417. 298

A country fiat will be preferred to a London one, where the major part of the creditors, the witnesses to prove the requisites of the bankruptcy, as well as one of the bankrupts, reside in the country, and all the effects of the bankrupts are also there. *Ex parte Bolan*, 2 Deac. & Chit. 331. 299

The same creditor cannot strike another docket before the time for opening has expired. *In re Gerriah*, 2 Mont. & Ayr. 491. 299

## VIII. FIAT OR COMMISSION.

*Issuing and Form.*—If the fiat be lost, a new one must be issued. *In re Levett*, 1 Mont. & Ayr. 308; 3 Deac. & Chit. 567. 299

Where a bankrupt, who had been for some time residing in Brompton Square, was described in the fiat "of Arundel Street, in the county of Middlesex," where he had taken temporary lodgings only four days before the issuing of the fiat; the fiat was superseded, on the ground of misdescription. *Ex parte Tanner*, 2 Deac. & Chit. 563. 301

The instances in which commissions and fiats have been superseded on the ground of misdescription are either where the error was so gross as to mislead the creditors, or where, though not so gross, yet the petitioner undertook to issue a new fiat, or where two commissions existed, and the court supported that which contained the most accurate description. *Ex parte Mills*, 1 Mont. & Ayr. 310; 3 Deac. & Chit. 606. 301

A commission of bankrupt, describing the parties as "bankers, being traders according to the provision of the stat. 6 Geo. 4, intituled, &c." is good, though they had ceased to be bankers before that stat. passed; for the word "bankers" is descriptive of the persons only, and the word "traders" is a sufficient allegation that they were, as such, liable to the bankrupt laws. *Bernasconi v. Farebrother*, 5 M. & R. 364. 301

Such a commission may be supported by evidence of any species of trading carried on by the bankrupts after the passing of the statute. *Id.*

*Amending.*—Unopened fiat not amended. *Ex parte Hawes*, 1 Mont. & Ayr. 708. 302

Unopened fiat amended, by inserting the proper parish. *Ex parte Elliott*, 1 Mont. & Ayr. 664: S. C. nom. *In re Humphrey*, 4 Deac. & Chit. 484. 302

Docket papers and the fiat cannot be amended by inserting the bankrupt's place of business. *Ex parte Graves*, 1 Mont. & Ayr. 315. 302

Quære, if the docket be correct, and the fiat incorrect, through the error of the office? *Id.*

A fiat will not be amended by altering the date to let in a later act of bankruptcy, unless

under special circumstances. *Ex parte Jacobs*, 2 Mont. & Ayr. 102; 4 Deac. & Chit. 277: S. P. *In re Roberts*, 3 Deac. & Chit. 315. 302

Semble, that the name of one of the commissioners who has not acted under the fiat, being misspelt, is not such an error as to require amendment. *In re Bell*, 3 Deac. & Chit. 326. 302

Quære, whether the court of Review can direct an amendment of a fiat, without the approbation of the Lord Chancellor; and whether this can be done now, after adjudication. *Id.*

An unopened fiat was amended, by altering the description of one of the petitioning creditors, so as to make it agree with that in the docket papers. *Ex parte Jervis or Jarvis*, 4 Deac. & Chit. 27; 1 Mont. & Ayr. 619. 302

*Validity generally.*—A commission issued by one partner against another, not for the purpose of distributing the bankrupt's effects among his creditors, but for the sole purpose of dissolving the partnership, is supersedeable. *Ex parte Christie*, 2 Deac. & Chit. 465. Confirmed on appeal to the Lord Chancellor. *Ex parte Christie*, 2 Deac. & Chit. 488. 303

A commission held, under the circumstances, not supersedeable, though there were not the requisites to support it. *Ex parte Munk*, 1 Mont. & Ayr. 612. 303

Although a fiat is concerted, for the purpose of defeating an action brought by a creditor against the bankrupt for the recovery of his debt, yet, where the creditor proves his debt under the fiat, and lies by for ten months before he presents a petition to annul the fiat, the court will dismiss the petition. *Ex parte Mills*, 3 Deac. & Chit. 606; 1 Mont. & Ayr. 311. 303

*Second Commission.*—Operation of second commission. *Carew v. Edwards*, 1 Nev. & M. 632; 4 B. & Adol. 351; 2 Dowl. P. C. 613. 304

The person of a defendant is discharged by certificate, after prior insolvency, although 15s. in the pound were not paid. *Id.*

In such case the certificate being proved, but the verdict entered generally, the court will make use of affidavits to ascertain the fact of such proof. *Id.*

After such general finding, the defendant being taken in execution, he may at once apply to be discharged, without moving to restrict the judgment. *Id.*

The 6 Geo. 4, c. 16, s. 127, is retrospective, and applies to discharges by bankruptcy or insolvency before the passing of the act, as well as to discharges obtained subsequent to the passing of the act. *Elston v. Braddick*, 2 C. & M. 435; 4 Tyr. 122: S. P. *Ex parte Hawley*, 2 Mont. & Ayr. 436. 303

But not where the second commission was before the 6 Geo. 4, c. 16. *Ex parte Hawley*, 2 Mont. & Ayr. 426. 303

A., in the year 1815, was discharged under an insolvent act, and in 1830 obtained his certificate



under a commission of bankruptcy issued in 1829, under which commission his estate produced less than sufficient to pay his creditors 15s. in the pound. A., in the year 1832, opened an account with the Bank of England, and a sum of 254l. 15s. was deposited by him in the Bank:—Held, that an action for money had and received, brought by the assignees under the commission against the Bank of England, to recover the amount so deposited, was maintainable. *Elston v. Braddick*, 2 C. & M. 435; 4 Tyr. 122.

It is not of course to supersede a second commission against an uncertificated bankrupt, on the application of the assignees, &c. under the first. *Ex parte Devas*, 1 Mont. & Ayr. 420; 4 Deac. & Chit. 366. 303

Where a trader, after having obtained his certificate under three commissions of bankruptcy, under none of which any dividend had been paid, was arrested for a debt contracted between the second certificate and the third bankruptcy, the court refused to discharge him out of custody on finding common bail. *Fowler v. Coster*, 5 M. & R. 362. 305

And such third commission was said to be a nullity. *Id.*

If there have been two commissions, and no dividend, it is in the discretion of the court to allow or refuse the certificate. *Ex parte Green*, 2 Mont. & Ayr. 31. 303

A commission issued against the bankrupt in 1823, under which a creditor omitted to prove his debt, being informed there was no assets. A subsequent fiat was issued against the bankrupt in 1834, who had not then obtained his certificate under the former commission, when the court ordered the commission to be impounded. A petition by the creditor, praying that the commission might be delivered out of the office, to enable him to go in under it, and prove his debt, was dismissed with costs. *Ex parte Martin*, 1 Deacon, 44. 303

*Impeachment of Validity.*—Where a bankrupt petitions to supersede, and brings an action at the same time to dispute the bankruptcy, the court of Review declined compelling him to elect which proceeding he would continue, but ordered that the petition should stand over until the result of the action was known. *Ex parte Chambers*, 2 Deac. & Chit. 372. 306

The court of Review have jurisdiction to restrain the bankrupt from bringing actions to upset his commission. *Ex parte Davy*, 1 Mont. & Ayr. 293; 4 Deac. & Chit. 322. 306

The court of Review can stay any action brought by the bankrupt in any court, *semble*. *Id.*

After twenty-two years and acquiescence, the court of Review will restrain the bankrupt from bringing actions against purchasers under the commission. *Id.*

Long acquiescence is enough to refuse to supersede on the application of the bankrupt, but not alone enough to enable the court of Review to restrain him from bringing actions. *Ex parte Davy*, 1 Mont. & Ayr. 297. 306

Petitioning to enlarge the time for surrender is a slight act of acquiescence. *Id.*

Lying in prison under a commitment by commissioners, is a strong act of acquiescence. *Id.*

The court of Review would not restrain an action in which the bankrupt intended fairly to try the validity of the commission. *Id.*

If a bankrupt, having actions pending, petition to supersede, he must elect. *Id.*

Where the bankrupt petitions to supersede, having commenced actions, he must undertake to stay them, and not bring others without leave of the court of Review. *Ex parte Pownall*, 1 Mont. & Ayr. 314; 3 Deac. & Chit. 723, 726. 306

The bankrupt may petition to supersede without undertaking not to bring actions. *Ex parte Daly*, 1 Mont. & Ayr. 343; 3 Deac. & Chit. 728. 306

The certificate obtained under a fraudulent commission is no protection against a petition to supersede. *Ex parte Wyatt*, 1 Mont. & Ayr. 407; 3 Deac. & Chit. 665. 306

Where the bankrupt petitions to annul the fiat, on the ground that he has not committed an act of bankruptcy, the court of Review will order him to be furnished with copies of the depositions relating to the act of bankruptcy. *Ex parte Smith*, 3 Deac. & Chit. 101. 306

It requires a very strong case to restrain a bankrupt from disputing his commission. *Ex parte Chambers*, 2 Mont. & Ayr. 476. 306

A party is not bound by acquiescence when ignorant of his rights. *Id.*

Neither surrendering, interfering in the choice of assignees, interposing as to the disposition of the estate, passing the last examination, nor endeavoring to obtain the certificate, are acts of acquiescence. *Ex parte Chambers*, 2 Mont. & Ayr. 440. 306

A commission of bankrupt having issued against plaintiff, which was invalid for want of a sufficient petitioning creditor's debt, plaintiff applied to a commissioner to appoint an official assignee to investigate the sufficiency of the debt, and take care of the property: defendant having been appointed accordingly, without notice that the commission was disputed:—Held, that the application made by the plaintiff did not preclude him from suing the defendant for money received under the commission. *Munk v. Clark*, 2 Scott, 475; 2 Bing. N. R. 299; 1 Hodges, 310. 306

Perpetual injunction issued to restrain the bankrupt proceeding at law, to invalidate a commission issued ten years back, after actions and unsuccessful petitions, and acts of acquiescence. *Ex parte White*, 2 Mont. & Ayr. 104; 4 Deac. & Chit. 279. 306

Where the bankrupt knows he has committed an act of bankruptcy, his petition to supersede will be dismissed with costs. *Ex parte Thompson*, 2 Mont. & Ayr. 41; 4 Deac. & Chit. 634. 306

*Renewed and Auxiliary Fiat.*—A renewed fiat



must be taken out by or in the name of a creditor for 100*l.* Ex parte Maude, 1 Mont. & Ayr. 46; 3 Deac. & Chit. 365. 310

An auxiliary fiat was granted by the court of Review to examine witnesses in London, the original fiat being worked at Portsmouth. Ex parte Carter, 3 Deac. & Chit. 106. 310

Unless there are special circumstances, the court will never allow the petitioning creditor to take out a new fiat before the time for opening has elapsed. Ex parte Jacobs, 2 Mont. & Ayr. 102; 4 Deac. & Chit. 277. 310

A new fiat issued on the petition of the same petitioning creditor before the time for opening had expired, he having been unable to prove an act of bankruptcy before, but one having been since committed. Ex parte Llewellyn, 2 Mont. & Ayr. 298; S. P. In re Crawley, 3 Deac. & Chit. 251. 310

A petitioning creditor having become bankrupt before the 14 days for opening the fiat had elapsed; it was ordered that another creditor might take new docket papers into the office, and if the first fiat was not prosecuted, that he might then issue a fresh fiat. Ex parte Smith, 3 Deac. & Chit. 309. 310

Upon the loss by the petitioning creditor of his evidence to support the fiat, the court of Review will not, on a petition by another person for another fiat, order him to be exempt from paying the 10*l.* under section 45, and the 20*l.* under section 47. *Quære* whether the court of Review have jurisdiction? Ex parte Osborne, 2 Mont. & Ayr. 140; 4 Deac. & Chit. 298. 310

A fiat omitted to be opened within the time limited by the general order, is not, for that cause, absolutely superseded, but only supersedeable. Ex parte Smith, 3 Deac. & Chit. 761. 310

What is required to be stated in an affidavit on an application to enlarge the time for opening a fiat. *See id.*

The petitioning creditor, after issuing a fiat, found he could not support it, on account of his inability to prove the trading. The court refused to permit another petitioning creditor to issue a second fiat, before the time for proceeding in the first was expired. Ex parte Howes, 3 Deac. & Chit. 493. 310

Where the time for opening a fiat expires, and a second is then issued by another party, it is no ground for superseding the second, that it did not issue until after the first was actually opened, unless the party issuing the second knew that fact, or was guilty of some fraud. Ex parte Westall, 4 Deac. & Chit. 350. 310

Although the petitioning creditor goes abroad, after issuing a fiat, the court will not permit another creditor to issue a second fiat, until the time for proceeding in the first has expired. Ex parte Medley, 3 Deac. & Chit. 502; 1 Mont. & Ayr. 79. 310

Where a time for opening the town fiat is nearly run out, the court will not, at the instance of the petitioning creditor, supersede it and issue a

country fiat for an alleged convenience of creditors. Ex parte Bell, 4 Deac. & Chit. 481. 310

When a country fiat is superseded because the commissioners decline to act, and a new one issues to a London commissioner, this is not a "renewed" fiat under 1 & 2 Will. 4, c. 56, s. 47, and full fees must be paid. In re Wellman, 2 Mont. & Ayr. 293. 310

*Joint or separate Fiat.*—If the existence of two commissions creates inconvenience, one of them, probably the first, will be superseded. Ex parte Devas, 1 Mont. & Ayr. 436. 311

A joint fiat issued against two partners: then commissioners were appointed in pursuance of 1 & 2 Will. 4, c. 56, s. 14; a separate fiat against the third partner cannot be directed to the old commissioners. Ex parte Beague, 1 Mont. & Ayr. 445; 3 Deac. & Chit. 747. 311

An application to consolidate the joint and separate estates will not be granted, if one creditor dissents. Ex parte Sheppard, 3 Deac. & Chit. 190. 311

If the commissioners certify that a consolidation will be beneficial, the assignees need not be served. Ex parte Smith, 2 Mont. & Ayr. 60. 311

A separate fiat having issued against one of three partners, it was ordered that another separate fiat which was about to be issued against one of the other partners, should be directed to the same commissioners as those named in the first fiat. Ex parte Blake, 1 Deacon, 191; 2 Mont. & Ayr. 481. 311

The court will not annul a separate fiat, to give effect to a subsequent joint one, on the ground that the only witness who could prove the act of bankruptcy, is kept out of the way; nor will they for such cause, make an order for the inspection of the proceedings under the separate fiat, but will merely enlarge the time for opening the joint fiat. Ex parte Burdekin, 1 Deacon, 57. 311

#### IX. DECLARING PARTY A BANKRUPT.

Where a trader, against whom a fiat issues, swears that he owes no petitioning creditor's debt, and has committed no act of bankruptcy, the court of Review will stay the advertisement in the Gazette: a fortiori, if there does not appear to be a clear debt and act of bankruptcy on the proceedings. In re Fletcher, 2 Deac. & Chit. 327. 312

On such an application, it is not necessary that the court should inspect the proceedings. *Id.*

The application to stay the advertisement in the Gazette will not be heard unless the proceedings be in court, or, as it seems, unless there be a very strong affidavit of solvency. Ex parte Pownall, 1 Mont. & Ayr. 116; 3 Deac. & Chit. 723. 312

Where there are not the requisites to support a fiat, the Chancellor will recommend to the commissioner to hear counsel against the adjudication; and, if the bankruptcy be found, will stay



the insertion of the advertisement in the Gazette, and supersede. *Ex parte Nokes*, 1 Mont. & Ayr. 461. 312

Where the bankrupt, after the choice of assignees, petitions to reverse the adjudication under the 17th section of the 1 & 2 Will. 4, c. 56, the assignees are not prevented from adducing further evidence to establish the act of bankruptcy, upon which the adjudication of the commissioner proceeded. *Ex parte Jackson*, 2 Deac. & Chit. 601. 312

On the hearing of such a petition, the bankrupt is entitled to have copies of the depositions, to enable him fairly to dispute the bankruptcy. *Id.*

On an application for enlarging the time for opening a fiat, an affidavit must be made that the party bona fide intends to prosecute the fiat, that there is no composition deed pending or intended, and no connivance with the bankrupt. *Ex parte Smith*, 1 Mont. & Ayr. 473. 312

The court of Review will stay the insertion of the advertisement in the Gazette. *Ex parte Lavender*, 1 Mont. & Ayr. 699. 312

On a petition to reverse the adjudication, copies of the depositions will not be granted till the hearing. *Ex parte Smith*, 2 Mont. & Ayr. 75. 312

It is not of course on a petition to reverse the adjudication, to grant copies of the depositions before the hearing. *Ex parte Mathew*, 2 Mont. & Ayr. 74. 312

Without an affidavit that there is no collusion, copies will not be granted before the hearing. *Id.*

Where the commissioners were absent from the first meeting, the court will appoint another. *Ex parte Hall*, 2 Mont. & Ayr. 234. 312

The court cannot compel a commissioner to adjudicate a man a bankrupt; it can only order him to proceed. *Ex parte Johnson*, 2 Mont. & Ayr. 390. 312

### X. PROOF OF DEBTS.

*Attachments and Orders for Payment of Money.*—A person having been ordered to pay a sum into Chancery, became bankrupt without having done so; a supplement bill was filed against his assignees, but no order was made thereunder. Ordered, that a claim should be entered for that sum. *Ex parte Farden*, 1 Mont. & Ayr. 219; 3 Deac. & Chit. 477. 317

So, where the assignees did not appear. *Ex parte Hancock*, 1 Mont. & Ayr. 220; 3 Deac. & Chit. 523. 317

Interlocutory costs payable under an order of *Nisi Prius*, by a defendant previous to his bankruptcy, are proveable under the fiat, and therefore the certificate is a discharge from them, although an attachment has been obtained before the cer-

tificate is allowed. *Jacobs v. Phillips*, 2 Dowl. P. C. 716; 1 C. M. & R. 195; 4 Tyr. 652. 317

*Annuities.*—An annuity was given by a father on his daughter's marriage, by a letter to the intended husband in these words, viz.: "I promise you until it is convenient to me to do something better for you, to allow my daughter 100*l.* a year, which you can have as you may require."—Held, to be an annuity during the joint lives of the father and daughter; and though incapable of valuation, and there was no evidence of the genuineness of the latter, held to be provable—*Sir J. Cross*, dissent, upon the ground that the facts required further investigation. *Ex parte Annandale*, 4 Deac. & Chit. 511; 2 Mont. & Ayr. 19. 315

*Bills and Notes.*—A discounts for K. & Co., who afterwards become bankrupt, three bills drawn by them on D. & S.; one of the bills becomes due before the bankruptcy, and the two others afterwards: none of them are paid by the acceptors, and A. gives no notice to K. & Co. of their dishonor.—Held, that A. could not prove the first bill, but might prove the two others. *Ex parte Solarte*, 2 Deac. & Chit. 251; 1 Mont. & Ayr. 270. 312

K. & Co. also sent to A. five other bills drawn by them on D. & S., and received from him in return his acceptances for the precise amount, which they discounted with their own bankers; but none of which being paid by A., (who became bankrupt before they became due), they were proved by the holders under K. & Co.'s commission. A. having negotiated the five bills sent him by K. & Co.—Held, that A. having become bankrupt, his assignee could not prove them under K. & Co.'s commission. *Id.*

A. & B. exchange their acceptances of various bills drawn upon them respectively by C. and all three become bankrupt before any of the bills fall due. The acceptances of A. are negotiated by the drawer, C., and are proved by the holders under each commission, who receive dividends on their respective proofs.—Held, that A.'s assignees might prove the amount of B.'s acceptances, under B.'s commission, subject to a retention of the dividends, until it was ascertained what each estate would pay on the whole of their liabilities. *Ex parte Solarte*, 3 Deac. & Chit. 419. 317

If a party take bills for the price of goods, and it be agreed that the bills are to be paid out of the proceeds, and the acceptors become bankrupt, the indorsers of the bills, without notice of the agreement, are entitled to the benefit of it. *Ex parte Prescott*, 1 Mont. & Ayr. 316. 317

One of two partners accepts bills for a previous partnership liability, after his copartner has committed an act of bankruptcy.—Held, that these bills were, in the hands of a bona fide holder, proveable against the joint estate under a subsequent commission issued against both partners. *Ex parte Robinson*, 3 Deac. & Chit. 376. 317



**G. & Co.,** to secure a permanent loan from their bankers, **V. & Co.,** to the amount of 20,000*l.*, agree to deposit with them their joint note for that amount, and as collateral security, 10,000*l.* in bills not to be moved, and 10,000*l.* in bills to be with **G. & Co.** during the day, and also to leave a standing balance on the account every night of 4000*l.* In pursuance of this agreement, **G. & Co.** every evening delivered to **V. & Co.** bills of various amounts, but not less than 10,000*l.* on any occasion, unless their cash balance exceeded 4000*l.*, and every morning they received these bills back again from **V. & Co.**, which were either returned, or others of equal amount substituted, every evening. On the last day of dealing between the parties, **G. & Co.** informed **V. & Co.** that as they had drawn out the cash balance, which they ought to have left in their hands, they had given additional security to **V. & Co.** by lodging bills with them to a greater amount. The amount of the sum so overdrawn was, in fact 3000*l.*, and the amount of the bills then deposited was 22,666*l.*, including a note of hand of **B. & Co.** for 10,000*l.*, for which **B. & Co.** had only received a partial consideration from **G. & Co.**, but **V. & Co.** had no notice of such want of consideration attaching to this note. At the closing of the account between **G. & Co.** and **V. & Co.**, a balance was due to **V. & Co.** of 35,386*l.*, for which they held the deposit of the bills and note to the amount of 22,666*l.*, besides the note of **G. & Co.** for 20,000*l.* **G. & Co.** afterwards stopt payment, when **V. & Co.** gave them a letter of licence, which was, however, subsequently recalled. **B. & Co.** became bankrupt:—Held, that **V. & Co.** were entitled to prove the full amount of the note for 10,000*l.* against **B. & Co.**'s estate, but as the specified purpose of the deposit of the bills by **G. & Co.** with **V. & Co.** was not to secure any general balance, but merely the two loans of 20,000*l.* and 3000*l.*, the bills deposited were to be considered only as a collateral security for those two sums, and not for the amount of the whole debt due to **V. & Co.**; that the proceeds of the other bills, and of **G. & Co.**'s joint note, must therefore be deducted from the 23,000*l.*, and that **V. & Co.** were entitled to receive dividends on their proof against **B. & Co.**'s estate, until they should have received full payment of the unsatisfied balance of this latter sum. *Ex parte Vere*, 4 Deac. & Chit. 285; 2 Mont. & Ayr. 123. 317

**Bonds.]—**Bond of indemnity to sheriff. *Ex parte Marshall*, 3 Deac. & Chit. 120; 2 Deac. & Chit. 589; 1 Mont. & Ayr. 118, 145; 1 Mont. & Ayr. 242. 319

A bond is proveable, given by the bankrupt in consideration of his wife's fortune, that he, his heirs, &c., would, within three months from the marriage, on receiving notice from the trustees, pay them 1000*l.*, to be held on the trusts of the marriage settlement, though no notice was given before the bankruptcy. *Ex parte Hooper*, 1 Mont. & Ayr. 395. 319

**Debts compounded for.]—**By a deed of composition entered into by the bankrupt with his creditors, dated September 5, 1831, he agreed to pay them 10*s.* in the pound, by two instalments of 5*s.* each; in consideration of which the creditors covenanted to release him from his debts, as soon as both the instalments were paid. This deed was executed by the major part of the creditors. After the payment of the first instalment, on the 31st of October, 1831, a commission issued on an act of bankruptcy committed in June, 1831:—Held, that the creditors who had received the first instalments were entitled to prove for the residue of their debts, without refunding the amount of the instalment. *Ex parte Wood*, 2 Deac. & Chit. 508. 321

A composition creditor, who receives an assignment of a debt as security for the composition, is not, when the old debt revives, entitled to retain the debt on a question of proof—*Cross, J., diss. Ex parte Ellis*, 2 Mont. & Ayr. 370. 321

An insolvent compounds with her creditors for 13*s.* 6*d.* in the pound, but promises to pay one of her creditors the whole of his debt, in order to induce him to sign the composition deed. After paying him in full, she contracts a fresh debt with him, and then becomes bankrupt:—Held, that the payments made to the creditor above the composition of 13*s.* 6*d.* in the pound, were fraudulent and void, and that the creditor could not prove for the amount of his fresh debt contracted with the bankrupt, without first deducting these payments. *Ex parte Minton*, 3 Deac. & Chit. 658. 321

A creditor having agreed to accept a composition for his debt, takes bills for the amount of the composition, and also has a bond assigned to him as part security for the composition. The composition deed contained a clause, that in default in payment of the instalments, the composition should fall to the ground. Default is made, and subsequently a fiat issues:—Held, that the creditor might prove the balance of the original debt, and also retain the bond. *Ex parte Reay*, 4 Deac. & Chit. 525; 2 Mont. & Ayr. 33. 321

**Marriage Contracts.]—**Proof of marriage contracts. *Ex parte Shute*, 3 Deac. & Chit. 1; 1 Mont. & Ayr. 385. 322

The two trustees under the marriage settlement of **H.**, a bankrupt, advanced him, on the security of his bond, the amount of the trust fund, (which was his wife's fortune), for the purpose of being employed in his business; and one of the trustees afterwards entered into a parol agreement with **H.** and his partner that the loan should be considered a debt due from the partnership:—Held, that this subsequent agreement was in the nature of a collateral security, and that the trustees could prove both against the joint estate and the separate estate of **H.**, making their election afterwards from which estate they would receive dividends. *Ex parte Kedie*, 2 Deac. & Chit. 321. 322



What is sufficient evidence of a marriage contract to entitle the party to prove. See *Ex parte Annandale*, 2 Mont. & Ayr. 19; 4 Deac. & Chit. 511. 322

The bankrupt having received 550*l.* with his wife on his marriage, gave a bond to trustees conditioned for the payment of 1100*l.*, "on receiving notice from the trustees:"—Held, that although no notice was given to the bankrupt before his bankruptcy, this was nevertheless a contingent debt provable within the provisions of the 56th section of 6 Geo. 4, c. 16. *Ex parte Hooper*, 3 Deac. & Chit. 655. 322

By the terms of the bankrupt's marriage settlement, the wife's property was settled upon her, in case of the bankrupt's death, or the parties being divorced, but the bankrupt was entitled to the interest for his life; and in case he survived his wife, he was to have a certain share of this property:—Held, that the wife might, in the name of her trustees, make such proof as the commissioners might think she was entitled to. *Ex parte Saunders*, 3 Deac. & Chit. 568. 322

By will, the father-in-law of the bankrupt gave 4000*l.* in trust for his daughter for life, to her separate use, then to the bankrupt for life, and then to the issue of the marriage. The will reciting that the bankrupt was indebted to the testator 6000*l.* on bond, declared that so much of the debt on the bond as remained unpaid in the testator's lifetime, should go in redemption and satisfaction of the above bequest of 4000*l.* Prior to the bankruptcy, and subsequently, by means of dividends from his estate, 1069*l.*, part of the 6000*l.* bond, was paid off and invested in the funds. On petition of the assignees, claiming to be entitled to the interest of the 1069*l.* (the wife being dead), (Sir J. Cross, diss.):—Held, that until the 4000*l.* should be made up, the 1069*l.* should accumulate, after which the assignees were declared entitled to the interest for the bankrupt's life. *Ex parte Young*, 4 Deac. & Chit. 645; 2 Mont. & Ayr. 228. 322

One of several partners, previous to his marriage, agreed with his intended wife's trustees, that he would assign to them a portion of his capital in the business, to secure to them certain periodical payments of 500*l.*, on the trusts of his marriage settlement. In pursuance of this agreement, the partnership opened an account in their books with the trustees, in which they placed to the credit of the trustees the sum of 3000*l.*, and debited their partner with the same sum, giving the trustees notice that they had transferred this sum from their partner's private account. Default having been made in the payments of 500*l.*, and the firm having become bankrupt:—Held, that this was an acknowledgment of a present debt from the firm to the trustees, the consideration for which was the intended marriage. *Ex parte Hill*, 1 Deacon, 123. 322

The bankrupt previous to his marriage, entered into a bond that in case his wife should survive him, and should within two months after his death, release her dower, his heirs or executors should within three months after his death, pay to her 2000*l.* The wife survived the

bankrupt, but did not within two months after his decease release the dower, although she was always ready and willing to do so:—Held, that this bond was not provable, either under the first or the last part of the 56th section of the Bankrupt Act, inasmuch as the contingency had not happened, and no value could be set upon it. *Ex parte Davies*, 1 Deac. 115. 322

*Proof of sureties*.]—A., surety with B. for C., is compellable to pay the debt after the bankruptcy of B. The certificate of B. is no answer to the action of A. for contribution. *Clements v. Langley*, 2 Nev. & M. 269; 5 B. & Adol. 372. 327

The instalments of an annuity, for the payment of which a bankrupt is surety only, and which he covenants to pay in case of the default of the grantor, are not, where they become due after his bankruptcy, provable under a fiat against the surety. *Thompson v. Thompson*, 2 Bing. N. R. 168; 2 Scott, 266; 1 Hodges, 225. 327

If A. and B. give a joint and several promissory note for the debt of C., and B. becomes bankrupt, and A. pays the amount, he cannot prove against B. as a surety, under section 52. *Ex parte Porter*, 2 Mont. & Ayr. 281. 327

L. & Co. were the agents of H. S. A party accepted bills under the following document, given by H. S.:—"In consequence of your allowing Messrs. L. to draw on you to the amount of 12,000*l.*, I hereby guarantee to you that amount, it being understood that payment of these drafts is to be provided for by myself or Messrs. L., in direct discountable bills, 14 days at least before they fall due, &c." Messrs. L. accordingly accepted bills; H. S. became bankrupt before some of the bills became due:—Held, that there was a debt provable, the document being, not a guarantee, but an original undertaking. *Ex parte Simpson*, 1 Mont. & Ayr. 541; 3 Deac. & Chit. 792. 327

Seemle, it would have been provable if a mere guarantee. *Id.*

*Wages*.]—A clerk, though engaged at a weekly salary, is within the meaning of the 48th section of the Bankrupt Act. *Ex parte Humphrey*, 3 Deac. & Chit. 114; 1 Mont. & Bligh, 413. 328

A clerk, who had served more than six months, is entitled to the allowance, although the bankrupt was not, in fact, a trader for more than two months out of the six. *Ex parte Gough*, 3 Deac. & Chit. 189. 328

The contracts of a trader with his clerks and servants are not dissolved by the issuing of a commission of bankruptcy against him: therefore, the clerk of a trader, against whom a commission issues, may, after the bankrupt has obtained his certificate, recover his salary for the whole year. *Thomas v. Williams*, 3 Nev. & M. 545; 1 Adol. & Ellis, 685. 328

The guard of a stage coach, hired at weekly wages, is not a servant, within the meaning of the 6 Geo. 4, c. 16, s. 48. *Ex parte Skinner*, 3 Deac. & Chit. 332. 328



Under the 6 Geo. 4, s. 16, s. 48, it is not requisite to prove a hiring for a year certain, but it must be something more than a mere hiring by the week. Ex parte Collier, 4 Deac. & Chit. 530; 2 Mont. & Ayr. 29. Ex parte Skinner, 1 Mont. & Bligh, 417, corrected. 328

**Mortgage Debts.**—After an order for sale obtained by an equitable mortgagee, if the assignees delay the sale, semble, that the course is not to present a fresh petition for a sale, but to prosecute the former order. Ex parte Robinson, 3 Deac. & Chit. 103. 329

The court refused to postpone the sale on application by the assignees, where the mortgagee objects. Ex parte Belcher, 2 Deac. & Chit. 567. 329

Where an equitable mortgagee is also an assignee, a solicitor will be appointed to take the account, and conduct the sale. Ex parte Lees, 2 Deac. & Chit. 364. 330

Both freehold and leasehold may be included in an order of sale. Ex parte Leathes, 3 Deac. & Chit. 112. 330

A legal mortgage of an equitable estate, is within Lord Loughborough's order. Ex parte Attwood, 2 Mont. & Ayr. 24: S. P. Ex parte Aple, 1 Mont. & Ayr. 621. 329

The court will only interfere to order the sale of equitable mortgages in cases where there is no dispute. Id. 330

A bankrupt mortgagee of a term gave an equitable mortgage, and subsequently purchased the equity of redemption:—Held, that the equitable mortgagee was entitled to a sale of the equity of redemption, if it be rejected by the assignees. Ex parte Tuffnell, 1 Mont. & Ayr. 620; 4 Deac. & Chit. 29. 329

A coal mine was worked by several persons under a lease, the articles of partnership giving each a power of pre-emption, in case any partner wished to dispose of his share; a partner deposited an attested copy of the lease, in order to give an equitable mortgage on his share to a stranger:—Held, that the court of Review could not make the usual order for sale, &c., as the partnership accounts must first be taken, which that court has no jurisdiction to do, and the case was not free from doubt—Cross, J., diss. Ex parte Broadbent, 1 Mont. & Ayr. 635; 4 Deac. & Chit. 3. 329

The court will not interfere in making an order for the sale of mortgaged property, where the circumstances are suspicious, as to the mortgage being a fraudulent preference. Ex parte Dewdney, 4 Deac. & Chit. 181; 2 Mont. & Ayr. 72. 329

The court will not interfere between two adverse claimants—one claiming as equitable mortgagee, and the other under a prior lease made by the bankrupt of the same property,—when the estate of the bankrupt has no interest in the question. Ex parte Roysds, 3 Deac. & Chit. 292. 329

A memorandum in writing drawn up entirely by the clerk of an equitable mortgagee, and

which was not signed by the bankrupt, is not sufficient to exempt the mortgagee from paying the costs of the petition for the sale. Ex parte Emmerton, 3 Deac. & Chit. 654. 339

Letters sent subsequent to the deposit are sufficient memoranda to entitle to costs on a petition for sale of an equitable mortgage. Ex parte Reynolds, 2 Mont. & Ayr. 104; 4 Deac. & Chit. 278. 329

Slaves in Antigua could not be equitably mortgaged by a deposit of a registered title deed containing a schedule of slaves, if the memorandum accompanying the deposit, which is registered, do not contain a list of the slaves. Ex parte Borrowdale, 2 Mont. & Ayr. 398, reversing Ex parte Rucker, 3 Deac. & Chit. 704; 1 Mont. & Ayr. 398: S. P. contra. 329

The bankrupts deposited only one of their title deeds, which however was the principal conveyance of the property, with the petitioners as a security for a debt, leaving the other deeds in the hands of their own solicitors:—Held, that this was a good equitable mortgage. Ex parte Chippendale, 1 Deac. 67. 329

In equitable mortgages by deposit of title deeds without a memorandum, the mortgagee is not entitled to past advances, in opposition to the bankrupt's affidavit. Ex parte Martin, 2 Mont. & Ayr. 243; 4 Deac. & Chit. 457. 329

The bankrupt being indebted to the petitioners as the acceptor of two bills of exchange, entered into an agreement with them and W. L., that the bills should be paid out of the proceeds of certain property, the deeds of which were then in the hands of W. L. for sale: Held, that the petitioners might claim as equitable mortgagees, but subject to any prior lien of W. L. Ex parte Greenhill, 3 Deac. & Chit. 334. 329

If a legal mortgage is ordered to be sold by the commissioners, the assignees are entitled to the rents to the time of sale, unless the mortgagee makes an actual entry, or gives notice to the tenants to pay the rents to him. Ex parte Living, 2 Mont. & Ayr. 223; 1 Deac. 1. 230

An equitable mortgagee of leasehold property must satisfy a distress for rent out of the proceeds of the sale, and can only prove for the deficiency. Ex parte Cocks, 3 Deac. & Chit. 8. 330

Where there has been an order for the sale of mortgaged property, and the sale is afterwards deferred, the mortgagee is entitled to apply the rents and profits in reduction of the interest accruing subsequent to the order of sale, and up to the time of taking the account. Ex parte Ramsbottom, 4 Deac. & Chit. 198; 2 Mont. & Ayr. 79. 330

In general, an equitable mortgagee is not entitled to his rents, &c. prior to the date of the order for sale. But where, prior to the bankruptcy, the mortgagor absconds, and the equitable mortgagee of part of the property takes possession of that part from the agent, and a fiat issues against the mortgagor, and then the solicitor to the commission, on behalf of the creditors and the equitable mortgagee jointly, appoint the same agent to manage the whole property, which agent is



subsequently adopted by the assignees:—Held, that the mortgagee, though he was also petitioning creditor, was entitled to the rents, &c. from the time of his first taking possession. *Ex parte Bignold*, 4 Deac. & Chit. 359; 2 Mont. & Ayr. 16; 8 C. 2 Deac. & Chit. 398; 2 Mont. & Ayr. 214. 330

The court will not rescind a bona fide purchase by the mortgagee, because he had bid without leave. *Ex parte Ashley*, 1 Mont. & Ayr. 82; 3 Deac. & Chit. 510. 330

They will make an order nunc pro tunc. *Ex parte Pedder*, 1 Mont. & Ayr. 327; 3 Deac. & Chit. 622. 330

A mortgagee who bids must pay a deposit. *Ex parte Tatham*, 1 Mont. & Ayr. 335; 4 Deac. & Chit. 360. 230

A mortgagee, with a power of sale himself, put up the premises for sale, and then applied for leave to bid:—Held, that he could not be permitted, unless he waived the power, and had the property sold under the order of the commissioners. *Ex parte Davis*, 1 Mont. & Ayr. 89; 3 Deac. & Chit. 504. 330

A reserved bidding allowed to assignees, on the sale of an estate, which had been mortgaged by the bankrupt. *Ex parte Ellis*, 3 Deac. & Chit. 297. 330

Under what circumstances a reserved bidding will be refused to assignees on the property under an equitable mortgage. See *Ex parte Barnard*, 3 Deac. & Chit. 291. 330

On the usual petition of an equitable mortgagee for a sale, and leave to bid, the costs come out of the estate, though the assignees do not consent. *Secus* on an independent petition, to bid alone. *Ex parte Berkeley*, 2 Mont. & Ayr. 54. 330

An equitable mortgagee is not entitled to the costs of defending an extent in aid, or to be excused from paying a deposit. *Ex parte Stephens*, 2 Mont. & Ayr. 31. 330

The court of Review has jurisdiction to decree specific performance of an agreement to purchase mortgaged premises, sold before the commissioners under Lord Loughborough's general order. *Ex parte Barrington*, 2 Mont. & Ayr. 245; 4 Deac. & Chit. 461, confirming *Ex parte Sidebotham*, 3 Deac. & Chit. 818; 2 Mont. & Ayr. 146, 655. 330

*Property pledged.*—On the sale of property pledged, the assignees cannot have a reserved bidding. In *re Skinner*, 1 Mont. & Ayr. 81. 331

H., a money broker, was in the habit of depositing bills of exchange with B. & Co., as a security for advances, but he did not indorse the bills, nor were they negotiated by B. & Co., or ever presented for payment. Amongst other bills so deposited was one for 100*l.* accepted by C., who became bankrupt on the 5th of March, 1824, which was some time after the bill became due. He also became bankrupt on the 12th December, 1825, when B. & Co. proved the amount of the balance he owed them, excepting this bill as

a security; but made no attempt to prove the bill under C.'s commission, until January, 1826, when the commissioners rejected the proof:—Held, that the delivery of the bill by H. to B. & Co., must be taken to have been by way of pledge only, to secure the amount of the advances then due from H. to B. & Co.; and that the amount of those advances having been since paid, B. & Co. could not prove the bill under C.'s commission. *Ex parte Britten*, 3 Deac. & Chit. 35. 331

A claim or proof cannot be resisted because the creditor has property belonging to the estate in his possession;—that is only a ground to restrain payment of the dividends. *Ex parte Dobson*, 1 Mont. & Ayr. 666; 4 Dea. & Ch. 69. 331

The mere circumstance of a creditor coming in under the commission to prove, or claim a debt only gives the court jurisdiction as to the proof or claim, and not over any property in his possession, of which he claims the legal ownership. *Id.*

The petitioners, who were the factors of the bankrupt, held a large quantity of sugar in their hands at the time of the bankruptcy, on which they had a lien for 41,591*l.* 15*s.* 4*d.*, and interest in respect of previous advances. They had deferred the sale of the sugar at the request of the bankrupt before the bankruptcy, and of the assignees afterwards, in the expectation of a rising market; and the sugar was eventually sold to great advantage:—Held, that the petitioners were entitled to apply the proceeds of the sugar in payment of the interest of the debt accruing after the bankruptcy, and to prove for the balance of the principal, without any deduction being made in respect of the interest so received. *Ex parte Kensington*, 1 Deac. 58; 2 Mont. & Ayr. 300. 331

Where goods, in which the bankrupts were jointly interested with A. B., were pledged with a creditor to secure the payment of an acceptance of the bankrupts, and part of the proceeds were received by the creditor before he applied to prove:—Held, that he must deduct the amount so received before he could prove on the acceptance. *Aliter* if the goods had belonged to A. B. alone. *Ex parte Prescott*, 4 Dea. & Ch. 23. 331

Where property pledged by the bankrupt with a creditor is claimed by a third person, the creditor may enter a claim on the proceedings for the whole of his debt, till the legal right to the property is determined. *Ex parte Williams*, 4 Deac. & Chit. 180. 331

*By whom and how.*—Where a creditor, after the issuing of the fiat, assigns his debt, this does not give the assignee a right to prove it, but merely a right to call on the assignor to prove the debt, as a trustee for the assignee. *Ex parte Dickenson*, 2 Deac. & Chit. 520. 332

Proof by Bank of England. *Ex parte England (Bank)*, 1 Wils. C. C. 236; 1 Swans. 10; 1 Rose, 142. 333

Under a fiat against a banker, one person was allowed to prove on behalf of a large number of holders of *ll.* notes; not interfering as to the as-



signees or the certificate. *Ex parte Gordon*, 1 Mont. & Ayr. 292. 333

Where a creditor sent up the proper documents to prove his debt at a dividend meeting, and his solicitor forgot the day; another meeting was appointed, at his expense, to enable him to prove his debt, the payment of the dividend being ordered to be stayed in the meantime, and to be calculated afresh, in case he substantiated his proof. *In re Graham*, 2 Deac. & Chit. 554. 333

Where a creditor delayed proving her debt until after a dividend had been declared, having relied on the promise of the assignee to inform her of the progress of the commission, which he failed to do, the court of Review made an order that the creditor might prove her debt within a month, and that the payment of the dividend should be in the mean time suspended. *Ex parte Colton*, 3 Deac. & Chit. 194. 333

A party is not estopped from amending his deposition of proof, by making a second deposition contradictory to the first: the only question is, which is the most worthy of belief. *Ex parte Britten*, 3 Deac. & Chit. 35. 334

The court of Review ordered a bankrupt executor to prove against his own estate, and the assignees to pay the dividends into the hands of the accountant-general, to the credit of a cause pending for the administration of assets. *Ex parte Colman*, 2 Deac. & Chit. 564. 334

Where the commissioners have exercised their judgment with respect to the proof of a debt, and have refused to admit it, the successful petitioner against their decision is not entitled to costs; it being a general rule that costs cannot be given when commissioners exercise their jurisdiction. *Ex parte Millington*, 1 Mont. & Ayr. 114. 334

The costs of a petition to prove must be paid by the creditor, if he adduces new evidence. *Ex parte Price*, 1 Mont. & Ayr. 51. 334

If he succeed on evidence which was tendered before the commissioner and rejected, it seems he might be entitled to costs. *Id.*

A creditor tendered a proof for 3500*l.*, which the commissioners rejected in toto; and after presenting a petition against their decision, an order was made, by consent, that he should prove for 500*l.* The court of Review would not grant him costs out of the estate; but ordered each party to pay his own costs. *Ex parte Waterhouse*, 3 Deac. & Chit. 108. 334

Where an actuary embezzled various sums, rendering forty indictments necessary, and became bankrupt, and five indictments were preferred, which failed from technical reasons which would apply to any other indictment, the proof was allowed for the whole sum embezzled. *Ex parte Jones*, 2 Mont. & Ayr. 193; 3 Deac. & Chit. 525. 334

A proof, resting on a felony, cannot be made till after a prosecution, except where conviction is hopeless. *Id.*

Where one of two executors becomes bankrupt, the solvent executor may prove against the bankrupt's estate without an order. *Ex parte*

*Courtney*, 2 Mont. & Ayr. 227; 4 Deac. & Chit. 456. 332

A stranger to the commission obtained an assignment of the creditor's proofs, and therewith bought part of the bankrupt's estate from the assignees:—Held, that the court had no jurisdiction to set aside the purchase—*Cross, J., diss.* *Ex parte Holder*, 1 Mont. & Ayr. 518. 332

If a defective affidavit be produced, the commissioner should not reject, but adjourn the proof. *Ex parte Maberly*, 2 Mont. & Ayr. 23. 333

An affidavit in support of a deposition of proof on a bill must state the consideration. *Id.*

On a petition for leave to prove, and stay the bankrupt's certificate, the court will, where the circumstances are suspicious, direct a meeting to enable the creditor to prove, and will order the commissioners to review the certificate. *Ex parte Bray*, 3 Deac. & Chit. 495. 333

F., a partner in a banking house, transferred bank stock belonging to a customer, by a forged power of attorney; the proceeds were paid to the account of the partnership, and afterwards appropriated by F., who was subsequently executed for other forgeries, and a commission issued against the other partners, who were ignorant of the transaction, but with common diligence would have known it. *Quære*, whether the customer can prove for the value of the stock under the commission? *Ex parte Bolland*, 1 Mont. & Ayr. 570. 333

The Lord Chancellor ordered an action to try whether the partners were indebted to the customer. *Id.*

The customer could maintain an action against the partners for money had and received. *Marsh v. Keating*, 1 Mont. & Ayr. 582; confirmed on appeal, 1 Mont. & Ayr. 593. 333

The commissioners having improperly rejected a proof because the claim was merged in a felony, the petitioner was allowed costs out of the estate. *Ex parte Birks*, 2 Mont. & Ayr. 208, n. 333

*Reduction and expunging.*—Upon an application by assignees to expunge a proof upon a bill of exchange by the holder against the acceptor, because the bill had since been paid by a third party, the drawer must be served, notwithstanding the assignees have the bill in their possession. *Ex parte Greenwood*, 3 Deac. & Chit. 396; 1 Mont. & Ayr. 65. 338

The bankrupt, who was a tavern-keeper, had bought of petitioners large quantities of wines lying in the docks, which were sold to him by sample, for stipulated prices, and at long credit, and for which the petitioners delivered to him the usual transfer warrants. The assignees sold the wines by auction at a considerable loss, in consequence of which, the commissioner made a reduction in the petitioners' proof, on the ground that the prices charged for the wines were too high:—Held, that he was not justified in making the reduction. *Ex parte Reay*, 3 Deac. & Chit. 175. 338

The costs of the petitioners, under these cir-



cumstances, were ordered to be paid out of the estate. *Id.*

A., B., C. & D. contract a debt with W. for goods supplied to them on their joint account. A., B. & C. become bankrupts, and W. proves the amount of his debt under their commission, stating in his deposition that A., B. & C. only (without noticing D.) were jointly indebted to him, but he afterwards sues and recovers the amount of his debt against D., the solvent partner:—Held, that in consequence of the informality of his proof, W. must pay the costs of the application of the assignees to expunge it. *Ex parte Adams*, 3 Deac. & Chit. 623. 338

A person, before *ex parte* Moulton was decided, made a double proof, to which, according to that case, he was not entitled. After seven years, the court would not order the dividends to be refunded but made a prospective order. *Ex parte Soper*, 2 Mont. & Ayr. 55; 4 Deac. & Chit. 569. 338

A mere claim cannot be expunged. *Ex parte Dobson*, 1 Mont. & Ayr. 670; 4 Deac. & Chit. 69. 337

On an application by two creditors to the commissioners to expunge a proof, under the 6 Geo. 4, c. 16, s. 60, the commissioners have a discretionary power to adjudge to the creditor whose proof is sought to be expunged, such costs as he may think reasonable, including the costs of the meetings, as well as those of a creditor. And though the commissioners may have allowed rather too much to the creditor, this will not make the order bad for the whole allowance, but the party objecting may have the costs taxed. *Ex parte Kirkaldy*, 4 Deac. & Chit. 52; 1 Mont. & Ayr. 642. 338

The court can reverse the decision of a subdivision court on a matter of fact as to expunging a proof: that not being within s. 30 of 1 & 2 Will. 4, c. 56. *Ex parte Baldwin*, 1 Mont. & Ayr. 615. 338

Where, after the rejection of a proof by the commissioners, the creditor on petition succeeds in establishing a debt by the affidavit of witnesses, who were not tendered to the commissioners for examination, he pays his own costs. *Ex parte Price*, 3 Deac. & Chit. 489. 338

*Proof against Joint or Separate Estate.*—A testator indebted on bond devised his real estate to the bankrupt and two other trustees, for payment of his debts. The bond creditor, after the testator's death, brought an action against the bankrupt and the other devisees, and recovered a joint judgment against them:—Held, that he could not prove under the separate commission against the bankrupt, even for the purpose of voting in the choice of assignees. *Ex parte Pearce*, 2 Deac. & Chit. 451. 338

Proof cannot be made by the joint estate against the separate estate, except in the case of a fraudulent abstraction from the joint funds by one of the partners; and not then, if there has been any waiver of the tortious act by the other part-

ner, so as to reduce it to a matter of contract. *Ex parte Turner*, 4 Deac. & Chit. 169. 338

A., B. & C. agreed to dissolve partnership, and that A. should receive 550*l.* in discharge of his share in the concern, of which 50*l.* was agreed to be paid at the date of the agreement, and the remaining 500*l.* by five bills payable at future dates. Separate fiats were subsequently issued against A., B. & C., and the stock and effects, which originally belonged to the firm of the three, were taken in possession of and sold by the assignee under the separate fiat against B.:—Held, that the agreement of dissolution of the partnership was executed, and not executory; and that the joint creditors of A., B. & C. had no lien on such stock and effects for the payment of the debts owing to them at the time of A.'s retiring from the partnership. *Ex parte Clarkson*, 4 Deac. & Chit. 56. 338

A partnership of A., B. & C. was dissolved, A. & B. agreeing to pay all the partnership debts. D., a creditor of the whole firm, ignorant of the terms of dissolution, applied for payment, and A. & B. by letter begged time, and ultimately D. drew a bill on A., B. & C. which A. & B. accepted in the name of A., B. & C., but without C.'s authority. A. & B. also by letter signed by them alone promised payment of the bill. A. & B. became bankrupts; C. also became bankrupt:—Held, under the circumstances, that D. might prove the amount of the bill against A. & B.'s estate. *Ex parte Liddiard*, 4 Deac. & Chit. 603. 338

A testator, who was possessed of a large capital in a house of trade, in which he was a partner, bequeathed the residue of his estate to trustees, of whom A. B. was one, upon trust to permit A. B. to receive the annual produce for his life, and after his death to transfer the principal to his children; directing that if A. B. became a partner in the house of trade, the testator's whole capital should continue therein, A. B. and the other partners giving to his executors a joint bond for the amount; A. B. became a partner, the bond was given, and the firm became bankrupt, and the trustees proved the amount due against the joint estate:—Held, that the dividends on the proof should be invested in stock; and that the interest should accumulate until the loss occasioned by the bankruptcy was made good, and the whole of the principal sum then due was realised. *Ex parte King*, 1 Deac. 143. 338

*Proof on several Estates.*—If two proofs be made on a joint and several bond, against two separate estates, a subsequent consolidation of the estates does not affect the double proof. Costs given out of the estate, because the commissioners held the case doubtful. *Ex parte Fuller*, 1 Mont. & Ayr. 222; 3 Deac. & Chit. 520. 342

B. & G. carried on business at M., under the firm of T. B. & Co.; G. also carried on a separate business at N., under the firm of G. & Co., and was likewise a partner with J. in another business at L., under the firm of T. J. & Co., and in an other business at N., under the firm of S. R.



The firms of T. B. & Co. and G. & Co. became bankrupt:—Held, that the holders of a bill drawn by T. B. & Co., on T. J. & Co., and indorsed by G. & Co. and S. R., were not entitled to prove it against the joint estate of B. & G., and also against the separate estate of G., but must elect; notwithstanding they were ignorant that G. was a partner in the firm of T. B. & Co. Ex parte Moul, 2 Deac. & Chit. 419. 342

F. & Co. sold cochineal to John W., for which a small part of the price was paid in cash, and the remainder by two bills at four months, but the cochineal was to remain in the hands of F. & Co. as a security for the payment of the bills. The bills not being paid when due, John W. sent F. & Co. two other bills drawn by himself on Joshua W., for which no consideration was given to Joshua W., the acceptor. Before these bills fell due, both John W. and Joshua W. became bankrupts, and the price of cochineal had fallen so much in the market that F. & Co. afterwards sold it for not a third of the price at which John W. bought it, and they then proved for the deficiency under John W.'s commission:—Held, that they had also a right to prove the amount of the two bills under Joshua W.'s commission, without deducting the proceeds arising from the sale of the cochineal. Ex parte Fairlie, 3 Deac. & Chit. 285. 341

B. & Co., being largely indebted to R. & Co., indorsed to them various bills, which had been drawn or indorsed by C. & Co. for the accommodation of B. & Co. B. & Co. and C. & Co. respectively became bankrupt, and R. & Co. proved the bills under each commission:—Held, that the estate of C. & Co. was a security to make good the amount of principal and interest due to R. & Co. from B. & Co.; and that R. & Co. were entitled to receive dividends on their proof under C. & Co.'s commission, until not only the balance of the principal sum due from B. & Co., but also all interest thereon, was fully satisfied. Ex parte Read, 3 Deac. & Chit. 481. 341

*Proof by partners.*—A firm composed of A. & B. may prove against a firm composed of B. & C. Ex parte Thompson, 1 Mont. & Ayr. 334; 3 Deac. & Chit. 612. 344

A firm abroad drew bills on one of its own partners, trading on his own account in England, payable to an agent of the foreign government. The bills were not paid. Process of insolvency issued against the foreign firm, and a commission against the English partner:—Held, that the agent might prove under the commission, but would be restrained from receiving dividends unless he elected not to prove against the insolvency abroad. Ex parte Chevalier, Mont. & Ayr. 345. 344

A., B. & C. dissolved their partnership, by B. retiring from the concern, and assigning all his share in the partnership stock, debts, and effects to A. & C., but no notice of such assignment was given, individually, to the debtors of the partnership. A. & C. continued to carry on the business till the death of A. A fiat was then issued against B. & C. as surviving partners of

A. when some of the debts due to the firm of the three still remained uncollected:—Held, that the joint creditors of the firm of the three could not prove against the separate estates of B. & C., as the outstanding debts due to the three constituted joint property of that firm, existing at the time of the bankruptcy. Ex parte Leaf, 1 Deac. 176. 344

#### XI. ASSIGNMENT.

*Freehold Property.*—If the bankrupt refuses to join in the conveyance of any part of his estate, the court of review will make an order for him to do so, under the 6 Geo. 4, c. 16, s. 78. Ex parte Jackson, 2 Dea. & Chit. 458. 346

Quære, whether the commissioners can convey an estate tail after the death of the bankrupt? Ex parte Somerville, 1 Mont. & Ayr. 408; 3 Deac. & Chit. 668. 346

The commissioners would not do wrong in executing a conveyance to enable the question to be tried. Id.

A common bargain and sale to assignees passes an estate tail of which the bankrupt was possessed. Id.

Two estates were devised charged with legacies; the devisee mortgaged both, became bankrupt, and both were sold: the proceeds of one were sufficient to pay legacies and mortgage money; secus the other:—Held, that the legacies should be paid out of the former alone. Ex parte Hartley, 2 Mont. & Ayr. 497. 346

*Leasehold Property.*—An agreement for a lease is not annulled by the bankruptcy of the intended lessee. Morgan v. Rhodes, 1 Mont. & Ayr. 214. 346

Nor is it annulled by his insolvency. Crosby v. Tooke, 1 Mont. & Ayr. 215, n. 346

A., before his bankruptcy, agrees to take a lease of a cotton mill, and enters into possession. After his bankruptcy, one of his assignees takes possession, and agrees to accept the lease, a draft of which was sent to the assignee, containing covenants personally binding on them during the whole of the term, and one, in particular, to prevent them from assigning without the licence of the lessor:—Held, that the assignees were not bound to accept of such a lease; and even if they were, that the court of Review had no jurisdiction to compel specific performance of the agreement. Ex parte Lucas, 3 Deac. & Chit. 144; 1 Mont. & Ayr. 93. 346

In answer to an action by a landlord against the assignees of a bankrupt for rent, the latter may plead that the term did not vest in them; and to avoid the effect of 1 & 2 Will. 4, c. 56, s. 25, also, that it did vest, but that they abandoned it, and were not therefore liable. Thompson v. Bradbury, 3 Dowl. P. C. 147; 1 Scott; 279; 1 Bing. N. R. 327. 346

In an action for rent, for two years' use and occupation, judgment was signed for want of a plea, but was set aside on an affidavit of merits,



and pleading issuably, &c. The defendant pleaded that the two years' rent became due under a lease, and after a fiat had issued against him, and he had been declared a bankrupt; and that after the rent became due, he applied to the assignees to accept or decline the lease, and that the assignees declined the lease, and thereupon the defendant tendered the lease and possession to the landlord, who accepted the same. This plea was pleaded at the end of Trinity term, too late to be argued in that term. The court discharged the rule for setting aside the judgment, as they considered the plea as frivolous. *Worthington v. Prince*, 4 Dowl. P. C. 243. 346

The bankrupt agreed in writing to take a lease of a manufactory for a term of years, and the landlord agreed to erect at his own expense certain buildings upon the bankrupt paying, as an additional rent, 7l. 10s. per cent. upon the amount so expended. The buildings, however, were subsequently erected by the bankrupt, on the verbal assurance of the landlord, that the bankrupt might deduct the amount expended from the rent. The assignees elected not to adopt the agreement for the lease, but refused to deliver up possession to the landlord unless he allowed them the sum which the bankrupt had expended on the buildings:—Held, that as both the written and verbal agreement between the landlord and the bankrupt contemplated a continuance of the tenancy, which the assignees had themselves repudiated, they had no lien on the premises for the money expended by the bankrupt. *Ex parte Ladd*, 3 Deac. & Chit. 647. 346

The petitioner covenanted with the bankrupt that he would procure a lease to be granted to him of certain premises by a third person:—Held, that this was an agreement for a lease, within the 76th section of the Bankrupt Act; and that the petitioner was entitled to call on the assignees to elect whether they would accept or decline such agreement. *Ex parte Benecke*, 1 Deac. 186. 346

*Chooses in Action.*—An equitable mortgagee of two policies of assurance, which the bankrupt had effected on his own life, writes to the insurance office, saying, "I am holder of the undermentioned policies," stating particulars of the policies in question, and inquiring what sum the office would give if they were delivered up to be cancelled:—Held, that this was a sufficient notice of a change of ownership. *Ex parte Stright*, 2 Deac. & Chit. 314. 355

A. made advances to B., a trader, and afterwards took from him as a security, an assignment of an equitable life interest in stock and other property, standing in the name of and vested in three trustees under a marriage settlement. There being rumors about the solvency of B., A., in the course of conversation, subsequently to the assignment, and not with a view of giving validity to his security, mentioned to one of the trustees, who was not the acting trustee, that he was secured by the assignment:—Held, that this communication was a sufficient notice to prevent the interest of B. passing to his assignees on his bankruptcy, as property in his

order and disposition. *Smith v. Smith*, 2 C. & M. 231; 4 Tyr. 52. 356

*Reputed Ownership.*—A., tenant in fee of a cotton mill, in which there was a steam-engine, boilers, &c., mortgaged the mill, engine, boilers, &c. to B. but remained in possession until his bankruptcy. The entablature plate of the engine, which, however, formed no part of the working apparatus, was fixed to the freehold of the mill; every other part of the engine was secured by bolts and screws, and might be removed without injury to the buildings:—Held, that the steam-engine was not in the order and disposition of A. at his bankruptcy. *Hubbard v. Bagshaw*, 4 Sim. 326. 357

Upon the assignment of a simple contract debt, the assignor must be considered as having the order and disposition of the debt with the consent of the true owner, until the debtor has notice of the assignment. Such debt will therefore pass to the assignees under a bankruptcy, by virtue of 6 Geo. 4, c. 16, s. 72, and to the assignees under the Insolvent Debtors' Act, 7 Geo. 4, c. 57, s. 31. *Buck v. Lee*, 3 Nev. & M. 580. 357

Where A. took the lease of a house and premises for a term of years, and took the tenant's fixtures in the house at a valuation from the landlord, and afterwards assigned the term to B. by way of mortgage, expressly including the fixtures, and subsequently became bankrupt:—Held, that the fixtures were not goods and chattels within the order and disposition of the bankrupt, and did not pass to his assignees. *Boydell v. M'Michael*, 1 C. M. & R. 177; 3 Tyr. 974. 358

The assignees who removed and converted them were liable in trover by the mortgagee to pay the value of the fixtures while fixed on the demised premises. *Id.*

A coal merchant, at the time of his bankruptcy, had in his possession barges which bore his own name and number, and were registered in his name under the Waterman's Act. These barges he had hired of defendant, it being the custom for coal merchants to hire barges, and to paint on them the name of the hirer. Upon a question whether the barges passed to the coal merchant's assignees under his bankruptcy:—Held, that it was properly left to the jury to find whether the custom was generally notorious in the coal trade; and that it was not necessary to direct them to inquire whether the custom was notorious to the world at large. *Watson v. Peach*, 1 Scott, 149; 1 Bing. N. R. 327. 358

Goods were sold under an invoice which expressed that they remained at rent. The vendee subsequently accepted a bill drawn by the vendor for the price, which was negotiated by the vendor. Whilst the bill was running, the vendee sold a part, which, by his direction, was delivered by the vendor to the sub-vendee, whom the vendor charged with warehouse rent for the part, which he paid. Subsequently the vendee became bankrupt, and the bill was dishonored:—Held, that the assignee of the bankrupt vendee could not without paying the price maintain trover against the vendor for the residue of the goods which



had remained in his hands. *Miles v. Gorton*, 2 C. & M. 504; 4 Tyr. 235. 358

By the custom of trade in Liverpool, the transfer of a delivery order from the vendor to the vendee of goods, enables the latter to go into the market and dispose of such goods. In a case where the vendee had thus disposed of part which had been delivered according to his order, and then became bankrupt, the rest of the goods remaining in the warehouse of the vendor:—Held, that the latter was entitled to retain them; the giving of the delivery order not operating as between the original vendor and vendee as a complete transfer of the goods. *Townley v. Crump*, 5 Nev. & M. 606; 1 Har. & Woll. 564. 358

Goods, under such circumstances, are not in the order and disposition of the bankrupt vendee, at the time of his bankruptcy, within the operation of 6 Geo. 4, c. 16, s. 72. *Id.*

In trover by assignees for timber, an arbitrator, to whom the cause was referred, found that the bankrupt, before his bankruptcy, had on behalf of an unnamed principal (the defendant) taken in exchange a quantity of timber, to be delivered free on board; and that he had at the same time bought other timber of the same party on his own account; that the timber was delivered to the bankrupt, and lay, till after the bankruptcy, on a common, mixed with other timber of the bankrupt, and in his actual possession; that the defendant, after the bankruptcy, but more than two months before the commission issued, wrote to the vendor, stating himself to be the principal, adopting the contract as to the goods taken in exchange, (but no others), and directing that the bankrupt should not be suffered to take them; and that the vendor accepted him as purchaser accordingly. The arbitrator also found, that before the commencement of the two months, the defendant had required the bankrupt to deliver the timber belonging to him, (the defendant), and that the bankrupt had proposed to make up a deficiency in the quantity by delivering some of his own timber; that no contract of sale was made as to the latter, nor did anything further pass respecting the timber till within two months before the commission, when the bankrupt made a formal delivery to the defendant of part of the sold and part of the exchanged timber, lying on the common as above mentioned; and that the whole of the timber belonging to the defendant was in the order, possession, and disposition of the bankrupt, with the consent of the true owner, till after the bankruptcy:—Held, (assuming the court could review the arbitrator's finding as to the above facts), 1. That he was warranted in finding a delivery of the timber to the bankrupt, though it was not shipped. 2. That the timber remained in the bankrupt's apparent possession, with the owner's consent, up to the time of the above delivery. 3. That the delivery to the defendant of the timber belonging to the bankrupt was not referable to any contract protected by sect. 81 of the Bankrupt Act. *Shaw v. Harvey*, 1 Adol. & Ellis, 920. 358

A., in France, employed B., in England, to sell wines on commission, as well as to purchase other

wines on A.'s account, in London, for which he furnished him with letters of credit. The wines were generally bought and sold by B. in his own name. Part of the wines consigned by A. were in the dock warehouses, standing in B.'s name, and part formed one indiscriminate stock in B.'s cellar. A. closed connection with B., and required him to deliver up all the wines; but B. neglected to comply with this requisition, and shortly afterwards became bankrupt:—Held, first, that the court had jurisdiction to order the assignees of B. to deliver up these wines to A.; secondly, that it was not a case of reputed ownership; thirdly, that A. might sue the purchasers of the wines, in the name of B., or his assignees. But fourthly, that no order could be made for the payment to A. of any monies, the produce of the wines, if mixed with the other monies of B. at the time of his bankruptcy. *Ex parte Moldant*, 3 Deac. & Chit. 351. 358

A. was in the habit of sending skins to B.'s tannard to be dressed, with an account, as of a sale, of each parcel of skins to B.; and B. rendered an account of the dressed leather, as being sold by him to A. This mode of dealing was only practised by B. with A., nor was B. in the habit of dressing skins for any other persons:—Held, that a quantity of these skins, which were mixed with B.'s general stock at the time of his bankruptcy, passed to his assignee, on the principles of reputed ownership. *Ex parte Batten*, 3 Deac. & Chit. 325. 358

Slaves, being real property in the island of Antigua, could not be considered as within the order and disposition of a bankrupt at the time of his bankruptcy. *Ex parte Rucker*, 3 Deac. & Chit. 704; 1 Mont. & Ayr. 398. 358

If A., the true owner of goods in the order and disposition of B., demand them from B. before an act of bankruptcy, they will not pass to B.'s assignees under 6 Geo. 4, c. 16, s. 72. *Smith v. Topping*, 2 Nev. & M. 421; 5 B. & Adol. 674. 359

To entitle the assignees of a bankrupt, under the 72nd section, it is not sufficient to show that the goods were in the order and disposition of the bankrupt, with the consent of a party who was permitted by the true owner to deal with them as his own, but that the consent must move directly from the true owner to the bankrupt. *Frazer v. Swansea Canal Comp.* 3 Nev. & M. 391; 1 Adol. & Ellis, 354. 359

Where goods are delivered to a bankrupt to sell in the name of another, his selling them in his own name does not place them in his reputed ownership. *Ex parte Carlow or Carlon*, 2 Mont. & Ayr. 39; 4 Deac. & Chit. 120. 359

Furniture, the separate property of one partner, used by the firm, is not in the reputed ownership of the firm, ut semble. *Ex parte Hare*, 2 Mont. & Ayr. 478; 1 Deac. 16. 359

M. & A., partners, were consignees of a West India estate, and in that character became creditors to the estate. By deed, long prior to the bankruptcy, the estate was conveyed to trustees, M. being one of them, on trust to apply the



proceeds to certain purposes, one of which was to pay off the debt due to M. & A. M. & A. assigned their debts to S. & Co. M. & A. became bankrupt; but, prior thereto, they received ten hogsheads of sugar, which remained in the docks, each marked in their name, at the time of the bankruptcy. 'Shortly after the bankruptcy, 74 hogsheads arrived, consigned by the bill of lading to the bankrupts, which were received by the assignees, who also took out the other ten hogsheads:—Held, that the sugar came to the hands of M. & A., clothed with a trust to pay the proceeds to M., as trustee, and was not in the reputed ownership of M. & A., but must be applied to pay off the debt assigned to S. & Co., and in discharge of the other trusts of the deed, M., as trustee, being affected with notice to M. & A. of the assignment of their debt. *Ex parte Smith, 4 Deac. & Chit. 579.* 359

Held, also, a case within the principle of *Ex parte Waring, 14 Vesey. 1d.*

The furniture of a coal mine is property of which the party who works the mine is the reputed owner, and which upon his bankruptcy, will vest in his assignees under 6 Geo. 4, c. 16, s. 72. *Coombs v. Beaumont, 2 Nev. & M. 235; 5 B. & Adol. 72.* 362

A steam-engine erected for the purpose of working a colliery, to be used by the lessee of such colliery during his term, but to be held as the property of the landlord, subject to such use, will not pass to the assignees of the tenant on his bankruptcy, for it does not come within the description of "goods and chattels" in 6 Geo. 4, c. 16, s. 72, nor had the bankrupt the actual or apparent ownership. *Id.*

A bankrupt becoming the owner, as well as occupier, of a freehold cotton-mill, gave the petitioners an equitable mortgage on it, "together with the steam-engines, and also all and singular other the moveable and fixed machinery, and steam-pipes then in, upon, about, and belonging to the said steam-mill and premises, or occupied or used therewith;" and the bankrupt continued in possession of the mill and fixtures up to the period of his bankruptcy:—Held, that all parts of the machinery and fixtures, which were so attached to the premises as to be legally affixed to the freehold, were not to be considered as goods and chattels within the 72nd section of the Bankrupt Act, and that the assignees had no right to them, as against the equitable mortgagee. *Ex parte Wilson, 4 Deac. & Chit. 143; 2 Mont. & Ayr. 61.* 362

By the rules of a joint-stock company, only principals could become subscribers. The petitioner purchased forty shares in the name of the bankrupt, who verbally declared that he held them as a trustee for the petitioner, and the certificates of the shares were kept in the possession of the petitioner, but no notice was given to the company of the trust, nor did the bankrupt sign a written declaration of trust until seven days before the fiat was issued:—Held, that the shares were in the order and disposition of the bankrupt as reputed owner, and passed to the assignees. *Ex parte Orde, 1 Deacon, 166.* 362

A., in consideration of money advanced and to be advanced by B. & Co., assigned all the freight to arise from the ship N., under any existing or future charter-party or other contract, "for or in respect of her intended voyage to India and back to England." After the freight had been earned and ascertained, A. became bankrupt:—Held, that such assignment was good, and that the assignees of the bankrupt were not entitled to sue for the freight. *Leslie v. Guthrie, 1 Scott, 683; 1 Bing. N. R. 697; 1 Hodges, 83.* 362

Notice of the assignment to the defendant being averred:—Held, that the freight did not remain in the reputed ownership of the bankrupt within the cases decided on 21 Jac. 1, c. 19, ss. 10 & 11. *Id.*

A mortgage was made of premises and machinery, which included a steam-engine, &c. erected for trade purposes, and fixed to the freehold; the mortgagor continued in possession:—Held, first, the steam-engine might be removed; second, it was well mortgaged, and not in the reputed ownership. *Ex parte Lloyd, 1 Mont. & Ayr. 494; 3 Deac. & Chit. 765.* 362

The owner of the freehold gave a mortgage for a term of years, but remained in possession; while in possession he added fixtures:—Held, the fixtures were not in his reputed ownership. *Ex parte Belcher, 2 Mont. & Ayr. 160.* 362

If the mortgagee be himself a trustee, to whom notice must be given; the transaction itself is notice enough to prevent reputed ownership. *Ex parte Smart, 2 Mont. & Ayr. 60.* 362

Where shares of a company stand in the name of the bankrupt, who is on all occasions the only apparent owner, and has possession of the certificates of the shares, but the shares belong to another person, in whose favor there exists a secret declaration of trust, the shares are not in the reputed ownership of the bankrupt. *Ex parte Watkins, 2 Mont. and Ayr. 349; 4 Deac. & Chit. 87.* 362

That one of the directors and an actuary knew the shares not to be the bankrupt's, is not sufficient to prevent reputed ownership. *Id.*

*Ex parte Watkins, 1 Mont. & Ayr. 685; reversed. Id.*

Where shares of an insurance company are held in the name of the bankrupt as trustee, they are not in his reputed ownership. *Ex parte Watkins, 1 Mont. & Ayr. 689.* 362

What is notice to the office. *Id.*

If the owner of shares in an insurance company assign them by way of mortgage, and give notice to the company, but owing to an informality in the assignment the company do not recognize the mortgagee's title, and the shares still stand in the bankrupt's name, the shares are not in his reputed ownership. *Ex parte Masterman, 2 Mont. & Ayr. 209.* 362

In deposits of shares of insurance companies, where the parties are partners thereof, the transaction itself is sufficient notice to prevent reputed ownership. *Ex parte Waithman, 2 Mont. & Ayr. 364; 4 Deac. & Chit. 412.* 362



A bankrupt deposits with the petitioner, by way of equitable mortgage, an assignment which had been made to the bankrupt, of a reversionary interest under a will; no notice of the assignment having been given to the executors, either by the bankrupt or by the petitioner:—Held, that the property was not within the order and disposition of the bankrupt, as reputed owner. *Ex parte Newton*, 4 Deac. & Chit. 138; 2 Mont. & Ayr. 52. 362

On a deposit of a policy of assurance, by way of equitable mortgage, the onus does not lie on the mortgagee, to show that notice of the deposit was given to the office before the act of bankruptcy, but with the assignees, to show that it was not. *Ex parte Stevens*, 4 Deac. & Chit. 117. 362

A party, to whom the bankrupt had assigned a policy of assurance, sends an agent to the office for the purpose of paying the annual premium, who, in the course of conversation with one of the clerks in the office, tells him of the policy having been so assigned:—Held, that this was not sufficient notice to the insurance office. *Ex parte Carbis*, 4 Deac. & Chit. 354. 362

By the rules of an insurance company, no person, except a director, was permitted to hold more than two shares in his own name; but no rule prevented a person from being beneficially entitled to more than two shares by holding them in the name of another party. A proprietor, who was already a holder of two shares, having purchased two others, caused them to be entered in the name of the bankrupt, in the company's books, with the knowledge of one of the directors and the actuary. The bankrupt signed a declaration of trust, that he held the shares as trustee for the proprietor; but no notice of the trust was taken in the books of the company, and the bankrupt held the certificates of the shares, and continued to receive the dividends thereon, accounting for them from time to time to the proprietor up to the period of his bankruptcy, when the shares were still standing in his name, during all which time he was treated as owner by the company, had notice of meetings served upon him, attended the meetings of the shareholders, and voted as a shareholder:—Held, on appeal, that this was such a secret trust as was not within the 79th section of the Bankrupt Act, and that the shares were in the order and disposition of the bankrupt as reputed owner. *Ex parte Burbridge*, 1 Deac. 131. 362

A debenture for a tontine annuity was deposited by an intestate with his bankers, one of whom received the dividends, and placed them to the credit of the intestate's account. The intestate died in 1801, and a commission issued against the bankers in 1810; notwithstanding which the same partner continued to receive the dividends, and pay them to the intestate's widow up to the period of his own death, which happened in 1822; some time after which the assignees of the bankers claimed a lien on the debenture, for a debt due from the intestate to the banking-house:—Held, that after so long an abandonment of any claim of lien, the assignees could not now support such claim; and the debenture, also, could not be considered as having

been left in the order and disposition of the bankers, having been deposited in the nature of a trust. *Ex parte Douglas*, 3 Deac. & Chit. 310. 362

A., on behalf of the owner of a ship, entered into a charter-party with B., by which B. agreed to pay to A., on behalf of the owner, a certain sum for the freight of the ship, by two instalments, one to be paid on the sailing of the ship, and the other on the completion of the voyage. The owner being indebted to C., ordered, in writing A. to pay to C. all monies he might receive under the charter-party, and accordingly A. paid over the first instalment to C. The owner then assigned by deed, the remainder of the freight to C., who gave notice of the assignment to A. but not to B. The vessel completed her voyage, and afterwards the owner became bankrupt:—Held, that the remainder of the freight was not in his order and disposition at his bankruptcy. *Gardner v. Lachlan*, 6 Sim. 417. 362

By a clause in the deed of settlement of a banking company, it was stipulated that the company should have a lien on the shares of such proprietors as were customers, and indebted to the bank, and that no share should be transferred without the consent of the directors; and an abstract of these provisions was indorsed on the certificate of the share held by each proprietor. The bankrupt at the time of his bankruptcy, was the owner of thirty of these shares, and had in his possession the certificates of ownership thus indorsed, being then largely indebted to the bank for advances:—Held, that these shares did not pass to his assignees under the clause of reputed ownership in the Bankrupt Act, so as to defeat the lien of the bank, which had been provided for in the deed. *Ex parte Plant*, 4 Deac. & Chit. 160. 362

Goods sold but not delivered. *Carvalho v. Burn*, 1 Nev. & M. 700; 4 B. & Adol. 382. 363

The assignees of a bankrupt do not take under the assignment, property, the equitable title to which has been transferred before the bankruptcy. *Burn v. Carvalho*, (in error), 4 Nev. & M. 889; 1 Adol. & Ellis, 883. 363

But such equitable transfer must have been complete before the bankruptcy; it must have been a transfer of the whole, or an ascertained part of specific property, and absolute, not contingent. *Id.*

A., at L., having consigned goods to B., at K., for sale on his (A.'s) account, draws bills on B. to be paid out of the produce of the consignment. A. negotiates the bills with C. in M. Upon B.'s refusing to pay the first of the bills, C. writes to A. as follows:—"I request you to write to B., by the first vessel, with orders that, in case he does not pay your drafts, he shall immediately hand over such property as he may have of yours of an equivalent value to the bills not paid by him, to D., my agent at K." A. answered:—"Agreeably to your instructions, I will write to B., by brig W., directing him to hand over to D. property of mine in his hands to cover the amount of the bills that may eventually not be paid." A. accordingly wrote to B. this



letter, which was not communicated to C.:—"I have engaged to C. that you shall pass into the hands of D., his agent, all the property which may exist in your hands for my account; you will arrange with D. the mode," &c. Before this letter reached K., A. became bankrupt; D. afterwards receiving goods from B. to an amount somewhat less than the bills unpaid, sold them, and remitted the produce to C.:—Held, that C. had not, at the time of the bankruptcy, such an equitable interest in the goods as would prevent A.'s assignees from recovering in trover. *Id.*

Dubitatur, whether the last of the above letters was admissible in evidence; but held that, whether admitted or not, the assignees might recover. *Id.*

A landlord distrained for rent arriere before the bankruptcy of his tenant, and when the goods were appraised, left them on the premises for the use of the bankrupt's wife, the bankrupt himself being in prison. After the bankruptcy the landlord distrained again for the very same arrears of rent:—Held, that the second distress was void, and that the goods passed to the assignees as being in the order and disposition of the bankrupt at the time of his bankruptcy. *Ex parte Shuttleworth*, 1 Deac. & Chit. 223. 365

W., a horse contractor, lets out a cart horse on hire to N. & Co., who have it in their possession more than twelve months, and then become bankrupt:—Held, that it does not pass to their assignees, as being in their reputed ownership. *Ex parte Wiggins*, 2 Deac. & Chit. 269. 365

On a petition by the owner for redelivery of the horse, and a viva voce examination of witnesses, the bankrupt is an incompetent witness. *Id.*

The court of Review will not interfere, by ordering the messenger to withdraw from the possession of goods which he has seized under the bankruptcy, in any case of reputed ownership. *Ex parte Harling*, 2 Deac. & Chit. 389. 365

F. accepted bills to enable C. to make shipments to S. on an agreement (known at S.) to apply the return proceeds in payment of the bills. On the last shipment, C. sent notice to S. to send the proceeds direct to F., and gave the same notice to a partner of the S. house, who happened to be in London. Before the notice arrived at S. the return proceeds were sent off to C., who became bankrupt, and his assignees received them:—Held, not in his reputed ownership, and F. entitled thereto. *Ex parte Flower*, 2 Mont. & Ayr. 224; 4 Deac. & Chit. 449. 365

Furniture, settled to the separate use of a wife, the possession being consistent with the settlement, is not in the reputed ownership of the husband. *Ex parte Massey*, 2 Mont. & Ayr. 173; 4 Deac. & Chit. 405; S. P. *Ex parte Elliston*, 2 Mont. & Ayr. 365. 365

*Bankrupt a Trustee.*—Where a testator bequeaths the whole of his property to trustees for the payment of an annuity and other purposes, and the trustees become bankrupt, the trust fund must be set apart for the payment of the whole

annuity, without regard to the interests of the persons entitled to the residue. *Ex parte Rothwell*, 2 Deac. & Chit. 542. 365

The court of Review will order a bankrupt trustee to be removed, and to convey the trust property to a new trustee, under the 79th section of the Bankrupt Act; but there is no necessity for the assignees to join in the conveyance, as the trust estate does not pass to the assignees. *Ex parte Painter*, 2 Deac. & Chit. 584. 365

Where a trustee becomes bankrupt, a new one may be appointed, on petition, without any reference to the master; although the bankrupt had no portion of the trust property in his hands. *Ex parte Buffery*, 2 Deac. & Chit. 576. 365

Where a conveyance by way of mortgage is made to a trustee for the mortgagee, in trust to sell, and the trustee becomes bankrupt, the mortgagee should join in the application for the appointment of another trustee. *Ex parte Orgill*, 2 Deac. & Chit. 413. 365

The surviving trustee under a marriage settlement becomes bankrupt, and is outlawed. On the application of the cestui que trusts, the court of Review ordered the assignees to transfer the trust stock to new trustees. *Ex parte —*, 3 Deac. & Chit. 24. 365

If a trustee becomes bankrupt the court will appoint a new trustee, without a reference, if there be an affidavit of solvency, fitness, &c. *Ex parte Walton*, 2 Mont. & Ayr. 242; S. P. *Ex parte Beveridge*, 4 Deac. & Chit. 455. 365

Where a trustee becomes bankrupt, the general rule is, that the court will not appoint a new trustee, under 6 Geo. 4, c. 16, s. 79, without a reference, unless all parties are before the court. The smallness of the estate may furnish an exception. *Ex parte Whish*, 2 Mont. & Ayr. 214. 365

By the terms of a devise, the interest of a sum was payable to a bankrupt for life, remainder to his children; the trustees (of which the bankrupt was one) were authorized to lend the principal to the bankrupt firm, which they did. On bankruptcy, and proof against the firm:—Held, the dividend on the proof should be invested in stock, the interest of which was to accumulate, in the first instance, till the principal sum was made good again. *Ex parte King*, 2 Mont. & Ayr. 410. 365

*Other Cases.*—Where a testator directs his trade to be carried on after his death, that part of his property only will be liable, in case of bankruptcy, which he has directed to be embarked in the trade. *Thompson v. Andrews*, 1 Mylne & K. 116. 367

A. bequeathed a house to B. for the residue of a term of years, if B. should so long live, and continue to inhabit therein; and after B.'s decease, or giving up the possession, A. bequeathed the house to C., the wife of B., for the remainder of the term, in case she should so long live therein and remain the widow of B., with further limitations to the issue of B. B. entered, with the assent of the executors of A. B., being in



insolvent circumstances, went to sea for six months; C. continued to occupy the house and to carry on B.'s trade therein. During the absence of B., a commission of bankruptcy issued against him. After his return, B. continued the occupation and the business until the house was sold by his assignees, when B. & C. were turned out of possession by the vendee. B. died. C., remaining a widow, demanded possession:—Held, that the bequest to C. did not, in equity, enure as a limitation to her separate benefit, and that her executory estate passed to the assignees of B., as being such an interest as B. could "lawfully depart withal." *Doe v. Shaw v. Steward*, 3 Nev. & M. 372; 1 Adol. & Ellis, 300. 368

B.'s going to sea on account of insolvency was not a ceasing to inhabit or a giving up of possession so as to defeat his life estate. *Id.*

Nor his being turned out of possession, *semble*. *Id.*

A. procures goods, which he agrees with B. & C. shall be shipped on the joint adventure of the three, and then draws bills on B. & C. for the amount of the costs of the goods, which they accept, A. engaging to renew the bills until the return of the proceeds for the goods are received. B. & C. manage the shipment, and direct the consignee to forward the account of the return sale to themselves. A. then applies to D. to discount two of these bills; and to induce him to do so, undertakes that the proceeds of the goods shall be applied in liquidation of the bills, which undertaking, D., after discounting the bills, communicates to B. & C. All the parties become bankrupt; and part of the return proceeds come to the hands of the assignees of B. & C.:—Held, that the proceeds were clothed with a trust for the payment of the bills, and that the assignees of B. & C. were bound to pay over such proceeds to the assignees of D. *Ex parte Copeland*, 3 Deac. & Chit. 199; 2 Mont. & Ayr. 177. 363

A. supplies goods to B. & C. at his own costs, which it is agreed shall be shipped on the joint account of the three; and that A. shall draw bills on B. & C. on account of the return proceeds, he undertaking to renew the bills until funds come round, so as to keep B. & C. out of cash advances. B. & C. accept the bills, and consign their goods to their correspondent abroad, with directions to transmit the account of sales and the proceeds to themselves. A. discounts the bills with parties who have no knowledge of the bills being drawn on account of the joint shipment, and are not made acquainted with that circumstance until after the respective bankruptcies of A. and of B. & C.:—Held, that the bill holders have, nevertheless, a lien on the return of the proceeds of the shipment, which came to the hands of the assignees of B. & C. subsequently to their bankruptcy.—*Sir J. Cross dubitante*. *Ex parte Prescott*, 3 Deac. & Chit. 218. 363

A London banker, having a branch bank at Edinburgh, stops payment on the 2nd of January, and writes to his agent at Edinburgh, apprising him of the fact, and directing the business of the

branch bank to be discontinued. On the 4th of January, before this notice reaches the agent, the petitioner pays into the Edinburgh bank 306*l.* 15*s.* in notes and cash, to be remitted to the house in London; but after the news reaches Edinburgh, and whilst the notes were still in the agent's possession, gives him notice not to part with them; and they remained in his hands on the 26th of January, when a fiat issued against the banker in London. The agent at Edinburgh having a lien on the funds in his hands, the assignees permitted him to retain the 306*l.* 15*s.* in part satisfaction of his lien:—Held, that the assignees were bound to refund this sum to the petitioner. *Ex parte Cunningham*, 3 Deac. & Chit. 58. Confirmed on appeal to the Lord Chancellor. *Ex parte Belcher*, 3 Deac. & Chit. 87. 365

So held, also, where the notes delivered to the agent were not identified. *Ex parte Solomans*, 3 Deac. & Chit. 77. 365

So, also, where the notes were paid in by the customer on the 3rd January, to a sub-agent of the banker at Glasgow, who remitted them on the 4th to the banker's managing agent at Edinburgh. *Ex parte Wylie*, 8 Deac. Chit. 83. 365

The bankrupt was insolvent in 1818, and a commission issued in 1832, under which he obtained his certificate, previous to 6 Geo. 4, c. 16:—Held, that the interest in an agreement entered into by the bankrupt subsequently to the certificate did not pass to the assignees under the commission. *Ex parte Hawley*, 3 Mont. & Ayr. 426. 365

A bankrupt sequestrator will be restrained from receiving any proceeds adversely to the assignee. *Ex parte Hall*, 2 Mont. & Ayr. 392. 365

## XII. ASSIGNEES.

*Official Assignees.*—Although the court of Review has a controlling power in the appointment of an official assignee by the commissioner, yet the court will not interfere, unless the commissioner has exercised an unsound discretion in the appointment. *Ex parte Bramston*, 2 Deac. & Chit. 375. 368

Action against official assignee. *Munk v. Clarke*, 3 M. & Scott, 463; 10 Bing. 102. 369

If an official assignee be included in an order for payment of costs, the order may be enforced against him alone. *Ex parte Murray*, 1 Mont. & Ayr. 475. 369

The court of Review has jurisdiction to revise the allowance made by a commissioner to an official assignee; but, it seems, that that court will only exercise it in extreme cases. *Ex parte Tip-lady*, 1 Mont. & Ayr. 162; 3 Deac. & Chit. 570. 371

Where an official assignee made default in not accounting for monies received, the court permitted the creditor's assignee to use the name of the chief registrar in suing the sureties upon the bond. *Ex parte Topham*, 1 Deac. 192; 2 Mont. & Ayr. 453. 369



An official assignee ought not, except under very peculiar circumstances, to present a petition to the court in his own name. *Anon.* 1 Deac. 106. 369

*Choice of Assignees.*—A person authorized by a special power of attorney may vote for the Bank of England in the choice of assignees. *Ex parte England (Bank), 1 Wils. C. C. 226; 1 Swans. 10; 1 Rose, 142.* 372

Where the interest of the joint creditors appears, *prima facie*, adverse to the separate creditors, the court will, on the application of the latter, appoint an inspector to take care of their interests. *Ex parte Dawson, 3 Deac. & Chit. 12.* 373

Where two assignees were elected, one of whom was chosen without his own consent, and refused to serve, the court directed a new choice altogether. *Ex parte Cattaral, 1 Deacon, 193.* 373

*Removal of Assignees.*—Mere poverty is not ground for removing an assignee. *Ex parte Copeland, 1 Mont. & Ayr. 306; 3 Deac. & Chit. 561.* 373

If the creditors who elect an assignee be relations, and their debts *prima facie* of a doubtful nature, the assignee may be removed without serving the creditors. *Id.*

Assignees are not removable merely because the commissioners improperly reject the proofs of creditors, who would have been entitled to vote in the choice of assignees, if they had been permitted to prove their debts, unless, indeed, their proofs are fraudulently procured to be rejected. *Ex parte Milner, 3 Deac. & Chit. 235.* 373

On a petition by an assignee for his removal, admitting misconduct, he cannot be ordered to pay costs incurred by such misconduct without a cross petition. *Ex parte Angle, 2 Mont. & Ayr. 28; 4 Deac. & Chit. 118.* 373

Where an assignee purchases part of the estate without leave, the general rule is to remove him. *Ex parte Alexander, 2 Mont. & Ayr. 492.* 373

If an assignee purchase part of the bankrupt's estate, and improve, the estate must be resold, and put up at the price given by the assignee, adding the sum laid out in improvements. *Ex parte Hewit, 2 Mont. & Ayr. 477. See Ex parte Bennett, 10 Ves. 400.* 373

An assignee, who was also a mortgagee of the bankrupt's freehold property, having purchased it for himself when it was put up for sale, the estate was ordered to be resold, subject to any claims of the assignee by virtue of his mortgage. *Ex parte Turvill, 3 Deac. & Chit. 346; 1 Mont. & Ayr. 666.* 373

The examination of the assignee before the commissioner, as to the sale of the property, was permitted to be read, as evidence of the assignee's misconduct—the petition praying to discharge him for misconduct—although it did not pray a resale. *Id.*

*Appointment of new Assignees.*—Where the assignees refuse to bring an action for the reco-

very of property, which a creditor alleges to have belonged to the bankrupt, the court will not order a new election of assignees, but will permit the creditor to bring the action in the name of the assignees, upon entering into a proper indemnity. *Ex parte Ryland, 2 Deac. & Chit. 392.* 374

If a sole assignee be very poor, and is alleged to be in insolvent circumstances, and elected by suspicious votes, a co-assignee may be appointed. *Ex parte Copeland, 1 Mont. & Ayr. 305; 3 Deac. & Chit. 561.* 374

Upon a new choice of assignees, there is no necessity to vacate the assignment under a commission issued prior to 1 & 2 Geo. 4, c. 56. *Smith v. De Tastet, 1 Mont. & Ayr. 370; 4 Deac. & Chit. 360.* 374

*Right Authority and Duty.*—Assignees are entitled to travelling expenses, bona fide incurred for the benefit of the estate. *Ex parte Lovegrove, 2 Mont. & Ayr. 4; 3 Deac. & Chit. 763.* 375

Assignees are entitled to the expenses of journeys solely and properly undertaken for the benefit of the estate. *Ex parte Joyner, 2 Mont. & Ayr. 1; over-ruling Ex parte Elsee.* 375

The assignees can never ground a title on the fraud of the bankrupt. *Ex parte Carlow or Carlon, 2 Mont. & Ayr. 40; 4 Deac. & Chit. 120.* 375

The court of Review will not interfere to direct assignees how to sell the estate. *Ex parte Belcher, 1 Mont. & Ayr. 478; 4 Deac. & Chit. 1.* 376

On the application of a tenant of the assignees, a reference was made to the commissioner, who reported that the rent should be reduced; which was done. On the application of some creditors, one of whom offered higher rent, the court refused to interfere. *Ex parte De Begnis, 1 Mont. & Ayr. 277; 4 Deac. & Chit. 225.* 376

The court of Review will not order a sale by private contract, the commissioners having power so to do. *Ex parte Ladbroke, 1 Mont. & Ayr. 384.* 376

The court will make no order on a petition by assignees to sell any portion of the bankrupt's property by private contract, it being a matter on which they must use their own discretion. *Ex parte Hurly, 2 Deac. & Chit. 631.* 376

The court of Review will not confirm a purchase of part of the bankrupt's estate made by an assignee without leave, because a meeting of creditors has consented. *Ex parte Thwaites, 1 Mont. & Ayr. 323.* 376

A., an assignee, purchases, as trustee for B., some shares which the bankrupt had in certain mines, and, after retaining them in that character a twelvemonth, re-purchases them from B. for his own use:—Held that the transaction was void, on the general principle that an assignee cannot purchase any part of the bankrupt's property, either for himself or for another; and that A. must be considered a trustee of the shares for the benefit of the general creditors. *Ex parte Grylla, 2 Deac. & Chit. 280.* 376

One S. was indebted to the defendant, an at-



torney, who had a lien on an indenture of lease relating to premises belonging to S., as a security for his debt. A commission of bankruptcy issued against S., and an assignee being appointed, the defendant acted as solicitor to the commission: a petition was presented to supersede the commission, on the ground that there was no valid petitioning creditor's debt, and the defendant, with notice of that fact, joined the assignee in an assignment of the said lease to a purchaser; out of the purchase money the assignee paid the defendant the debt due from the bankrupt, and also a part of the amount of his bill as solicitor to the commission; the defendant also received, by the authority of the assignee, certain sums of money accruing from the rents of the premises, in part liquidation of the debts due to him; after these facts occurred, the commission was superseded, and the plaintiffs were appointed assignees under a new fiat which was issued:—Held, that the plaintiffs could recover the sums received by the defendant in an action for money had and received; for by parting with the lease the defendant was guilty of a conversion, and the plaintiffs were therefore entitled to waive the tort and sue in assumpsit; and that as to the rents received by the defendant, it was money received to the use of the plaintiffs after notice of an act of bankruptcy; and as the first assignee was not assignee de jure, his assent to the payments made no difference. *Clark v. Gilbert*, 2 Scott, 520; 2 Bing. N. R. 343; 1 Hodges, 347. 376

The assignees having made an arrangement concerning the payment of the creditors, a reference was ordered to the commissioners whether it were beneficial. *In re Hyslop*, 2 Mont. & Ayr. 289. 377

The sanction of the court was given to a pecuniary arrangement by the assignees affecting the estate. *Ex parte Prater*, 2 Mont. & Ayr. 364; 4 Deac. & Chit. 214. 377

A reference was ordered to the commissioner, to inquire whether an arrangement, in regard to a portion of the bankrupt's property, which was approved of at a meeting of the creditors, would be beneficial to the estate. *Ex parte Kirby*, 6 Deac. & Chit. 400; 2 Mont. & Ayr. 142. 377

A reference was made to the commissioner, to report whether a pecuniary arrangement by the assignees would be beneficial to the estate. *Ex parte Bradstock*, 2 Mont. & Ayr. 490. 377

The court will not interfere, on the application of the assignees to sanction an arrangement made by them for the satisfaction of a claim of the bankrupt's wife. The assignees must use their own discretion. *Ex parte James*, 3 Deac. & Chit. 290. 377

A bankrupt did not disclose a life-interest which he possessed in certain property, when he passed his last examination; and after the lapse of more than twenty years, when four of the commissioners were dead, he petitioned for a fiat to be issued to fresh commissioners, and that the assignee might be ordered to account. The court, under these circumstances, allowed the bankrupt to issue a new fiat in the name of a cre-

ditor, but thought that, after this concealment, he was not entitled to an inquiry against his assignee. *Ex parte Holder*, 3 Deac. & Chit. 276. 377

The court of Review will not take a trust deed out of the possession of the bankrupt's assignees. *Id.*

Order refused for an assignee to bid for the bankrupt's property, although the assignee obtained the consent of a meeting of the creditors, such meeting having been only attended by half in value of the creditors. *Ex parte Beaumont*, 3 Deac. & Chit. 549. 377

Where a sole assignee wishes to bid, for the benefit of the estate, he must be removed, or a quasi co-assignee appointed to protect the estate. *Ex parte Molineux*, 2 Mont. & Ayr. 245; 4 Deac. & Chit. 460. 376

Before an assignee applies for leave to bid at the sale of the bankrupt's property, he must call a meeting of the creditors for the purpose of assenting to or dissenting from such proposed bidding. *Id.*

*Liability of Assignees.*—One of the assignees, having the sole charge of paying the dividends, pays the dividend of a creditor to a person who is not duly authorized to receive it. The two other assignees are equally responsible to the creditor for the amount of the dividend. *Ex parte Winnall*, 3 Deac. & Chit. 22. 376

Although a commissioner has no power, under the 106th sect. of the 6 Geo. 4, c. 16, to charge the assignees with monies, which, but for their wilful default, they might have received, yet, where he charged them with certain sums as received "by themselves or their solicitors," the court of Review referred it back to him to ascertain the amount which the assignees, or any person for them, had received, or which, but for their default, might have been received. *Ex parte Keys*, 2 Deac. & Chit. 633. 378

After there has been a change of assignees, and a long period of time has elapsed, the court will not refer the accounts of the assignees for examination, for the purpose of charging the new assignees with the default of the former assignees. *Ex parte Richards*, 4 Deac. & Chit. 183; 2 Mont. & Ayr. 75. 378

An uncertificated bankrupt cannot petition that his assignees may be ordered to account, without alleging that his estate will produce a surplus after paying 20s. in the pound. *Ex parte Ryley*, 4 Deac. & Chit. 50. 378

An order of dividend, stating that a certain balance was in the hands of one of the assignees, was made to divide the same among the creditors:—Held, that the other assignee, having never interfered with the trust fund, was not liable to the creditors for the payment of the dividend. *Ex parte Dawson*, 4 Deac. & Chit. 130. 376

Quære whether the 76th section of 6 Geo. 4, c. 16, applies to a contract relating to land and



personalty? *Ex parte Hawley*, 2 Mont. & Ayr. 434. 378

Commissioners cannot open the audited accounts of assignees, without previous permission from the court of Review. *Ex parte Benham*, 2 Mont. & Ayr. 272; 1 Deacon, 26. 378

The commissioner cannot charge both assignees with 20 per cent. where only one had the money, unless he finds that the other "knowingly permitted" it. *Id.*

*Actions by and against Assignees.*—Parties in actions by assignees. *Baker v. Neave*, 1 C. & M. 112; 1 Dowl. P. C. 616; 3 Tyr. 233. 381

The assignees of a bankrupt partner and a solvent partner opened an account at their bankers, and paid in 900*l.* to discharge a debt on an old account, which carried interest. The solvent partner then became bankrupt:—Held, that the assignees of the two could not recover this sum. *Woodbridge v. Swann*, 4 B. & Adol. 633; 1 Nev. & M. 725. 381

Where one member of a partnership becomes bankrupt, the solvent partner may use the names of the assignees of the bankrupt in bringing actions against the debtors of the firm. *Whitehead v. Hughes*, 2 C. & M. 218; 4 Tyr. 92. 381

The assignees are entitled to an indemnity against the costs, when they apply for it. *Id.*

Assignees under a joint commission against A. and B. may, as such, maintain an action for the use and occupation of premises which belonged to A., without describing themselves as the assignees of the separate estate of A., where the rent becomes due for occupation subsequent to the bankruptcy, the assignment passing the reversion to the assignees by virtue of the joint commission. *Pepper v. Molony*, 1 Alcock & Napier, 63. (*Irish*). 381

In an action by the assignees of a bankrupt, the court will allow the bankruptcy to be put in issue if the fact be doubtful, along with a plea of mutual credit and payment into court. *Atkinson v. Duckham*, 4 Dowl. P. C. 327. 381

The rule is absolute in the first instance. *Id.*

The sheriff seized goods belonging to a bankrupt, and, after keeping them for a considerable period, and after an action of trover in the usual form had been brought against him by the assignees, he delivered up the goods to them:—Held, that the assignees were not entitled to proceed in an action, and to recover as damages a quarter's rent which had been paid for the house where the goods were kept whilst in the possession of the sheriff, or the costs of keeping their messenger on the premises during the same period. *Moon v. Raphael*, 2 Scott, 489; 2 Bing. N. R. 310; 7 C. & P. 115; 1 Hodges, 269. 381

In debt by assignees of an insolvent or bankrupt, it need not be stated that the plaintiffs sue "as assignees;" it is enough if it sufficiently appears that they are assignees. *Ferguson v. Mitchell*, 2 C. M. & R. 687; 4 Dowl. P. C. 513. 381

Assignees may declare in the debt and detain, and the omission of the queritur is immaterial. *Id.*

To a declaration in trover by the assignees of a bankrupt, to recover damages for goods, chattels, and fixtures alleged to be in the possession of the bankrupt at the time of his bankruptcy, and to have been since converted by the defendants, they pleaded, that before the bankruptcy the bankrupt assigned the goods to them by deed, and that before the bankruptcy, they took possession of them, and kept and retained such possession afterwards; the plaintiffs replied that the defendants did not take possession of the goods before the bankruptcy: issue was joined thereon, and a verdict found for the plaintiffs upon it:—Held, that the issue was immaterial, because the assignment by deed conveyed the property in goods to the defendants, and the continued possession of the assignor only amounted to evidence of fraud. *Carr v. Burdiss*, 1 C. M. & R. 782; 5 Tyr. 309. 381

Seem, that the "possession" of the assignees was not sufficiently averred to be an exclusive possession. *Id.*

An injunction will be granted to restrain assignees from proceeding in an action, where they have not an equitable as well as a legal right. *Ex parte Booth*, 4 Deac. & Chit. 211; 2 Mont. & Ayr. 93. 318

*Suits by Assignees.*—An assignee can have leave to file a bill under very special circumstances only. *Ex parte Beaumont*, 1 Mont. & Ayr. 304. 383

The consent of a meeting of some of the creditors is not sufficient. *Id.*

The court of Review will not compel the official assignee to join the other assignees in a suit. *Ex parte Evans*, 1 Mont. & Ayr. 335; 3 Deac. & Chit. 470. 383

If he improperly refuse to join, and is made defendant, he may have to pay his own costs. *Id.*

If the assignees continue to defend a suit instituted against the bankrupt, which is decided in favor of the plaintiff with costs, and they have no assets, they are not personally liable, unless they vexatiously continued the defence. *In re Kindersley Castle*, 1 Mont. & Ayr. 479, n. 383

If a bill in equity by assignees be dismissed with costs, they must apply to the commissioner in the first instance to allow them out of the estate. *Ex parte Gibson*, 1 Mont. & Ayr. 479. 383

If a bill filed by assignees be dismissed with costs, the Lord Chancellor has no jurisdiction to order costs to be retained by the assignees out of the bankrupt's estate. *Turner v. Hibbert*, 1 Mont. & Ayr. 226. But see *Ex parte Keys*, 1 Mont. & Ayr. 226. 383

The court of Review will not lend its sanction to a compromise of a suit by the assignees, though the master reports it would be for the be-



neft of all parties. *Ex parte Williams*, 1 Mont. & Ayr. 689. 338

The consent of the creditors of a bankrupt to the institution of a suit by his assignees, though filed amongst the proceedings in the bankruptcy, must be proved. *Smith v. Biggs*, 5 Sim. 391. 383

### XIII. PROTECTED TRANSACTIONS.

*Preference.*—A preference by an insolvent trader to a particular creditor is not fraudulent, if originating bona fide in the urgency of the creditor; as it is necessary, in order to avoid it, to show a contemplation of bankruptcy as well as insolvency. *Morgan v. Brundrett*, 2 Nev. & M. 280; 5 B. & Adol. 289. 385

Personal property may be transferred for a sufficient consideration without writing, if the possession be also transferred; and a debtor may prefer one creditor to another, if the debtor be not a trader; but if he be a trader, he cannot prefer one creditor to another, unless he be pressed. *Scott v. Thomas*, 6 C. & P. 611—*Parks*. 385

Where a bankrupt, in contemplation of bankruptcy, pays money to A., his banker, to redeem bills of exchange in his hands, for the payment of which B. is ultimately responsible, with a view to make a fraudulent preference of B., the assignees cannot recover back the amount from A. *Abbott v. Pomfret*, 1 Scott, 470; 1 Bing. N. R. 463; 1 Hodges, 24. 385

The defendants, bankers, discounted for B., a customer, two bills, one of which was accepted by L. for B.'s accommodation, and the payment of the other guaranteed by L., due respectively the 8th and 10th of January. On the 3rd of January, B., who was in a state of insolvency, went to the defendant's banking-house, accompanied by L., and paid in to his account with them a sum sufficient to cover the two bills, and then drew and gave to L. two cheques for the amount of the bills, which cheques L. handed over to the defendants in satisfaction of the bills. B. committed an act of bankruptcy on the 9th of January:—Held, that this was not a fraudulent preference of the defendants, so as to entitle the assignees of B. to maintain an action against them for money had and received; the preference, if any, being given to L. *Id.*

In order to constitute a fraudulent preference, so as to avoid a payment made by a trader, it must be a voluntary preference, and made in actual contemplation of bankruptcy; it is not enough to show that the party was in such a state of insolvency and embarrassment as to render bankruptcy a probable event. *Atkinson v. Brindall*, 2 Scott, 369; 2 Bing. N. R. 225; 1 Hodges, 336. 385

The court of Review has not jurisdiction to order property alleged to have been given as a fraudulent preference to be delivered up, because the party has claimed. *Ex parte Dobson*, 1 Mont. & Ayr. 666. 385

*Mortgages.*—M., a trader engaged in extensive concerns, was in perilous circumstances, and

likely to become bankrupt, although not suspected, from January, 1831, to January, 1832, when he actually became bankrupt. Among others, he owed his son 12,000*l.*, which debt, upon his son's marriage, was settled on the son's wife. In May, 1831, some of M.'s property in Middlesex was released from mortgage, and M., at the request of his son, on the 1st of July, 1831, conveyed it to the trustees under his son's marriage settlement, as a security for or in discharge of the debt due from him to his son. The transfer was not registered or otherwise made public till after M.'s bankruptcy. A jury having found that it was not made voluntarily by way of fraudulent preference, or in contemplation of bankruptcy, the court refused to grant a new trial. *Belcher v. Prittie*, 4 M. & Scott, 295; 10 Bing. 408. 387

*Transfer of Goods.*—R., having committed a secret act of bankruptcy, assigned chattels to the defendant, as a security for money lent him by the defendant, in trust to permit R. to use them till March, 1833, and then to sell them in discharge of the debt, if unpaid. In October, 1832, within two months of this assignment, a commission of bankruptcy was issued against R.:—Held, that the assignment was not protected by the 82nd sect. of 6 Geo. 4, c. 16. *Cannan v. Denew*, 3 M. & Scott, 761; 10 Bing. 292. 389

A case that is within the 71st sect. of 6 Geo. 4, c. 16, is excluded from the operation of the 82nd—*Per Alderson*. *Id.*

*Payments by Bankrupts.*—A., after a secret act of bankruptcy, buys goods of B., to be paid for at a future day. On that day A. delivers to C. undue bills for the amount, requesting C. to pay B. C. discounts the bills, and pays B. by a check on his bankers. This payment is protected by 6 Geo. 4, c. 16, s. 32, against the assignees under a commission issued subsequently to such payment, on the antecedent act of bankruptcy. *Shaw v. Batley*, 1 Nev. & M. 761; 4 B. & Adol. 801. 392

A., after the bankruptcy of his partner B., believing the firm to be solvent, pays in partnership money to C., their banker, to meet current engagements, and the money is so applied. A. afterwards becomes bankrupt also. This payment is valid, and C. is not liable for the amount to the assignees of B. and of A. *Woodbridge v. Swan*, 1 Nev. & M. 725; 4 B. & Adol. 633. 394

One of two partners, after committing an act of bankruptcy, handed over a bank post bill and some silver to the agent of the drawer of a bill of exchange, accepted by the partners, and which was just about to become due, for the purpose of protecting such bill. Such handing over was found a fraudulent preference, and to have been in contemplation of bankruptcy. On the same day, but a few hours later than the time of handing over the note and the money, the other partner committed an act of bankruptcy:—Held, that the act of the partner who had committed the act of bankruptcy before he handed over the property



was not binding, and that the assignees of the two partners might recover the value of the property. *Burt v. Moulst*, 1 C. & M. 525; 3 Tyr. 564. 394

One of two partners, on the 4th of January, committed a secret act of bankruptcy. On the 5th of January, the other partner accepted bills in the name of the partnership firm, in favour of one of the creditors of the partnership, all of which bills were ante-dated before the 4th of January. These bills were afterwards indorsed for a valuable consideration to R., who had no notice of the bankruptcy. On the 10th of January a joint commission issued against both partners:—Held, that the holder of the bills could not prove them against the joint estate, as the solvent partner could not bind the joint property by accepting bills after the act of bankruptcy of his co-partner. *Ex parte Wynn Ellis*, 2 Deac. & Chit. 555. 394

A. on being arrested gave a bail-bond to the sheriff, but did not perfect bail, by which the sheriff became fixed. Proceedings having been taken on the bail bond, a judge at chambers made an order, on an application by the bail, that proceedings should be stayed on payment of debt and costs, which were accordingly paid by A.'s attorneys on the 27th of October. A. had supplied his attorneys with a sum of money towards the payment of the debt and costs on the 10th of October, and on the 14th he became bankrupt:—Held, that this was a payment under process of law, and that the assignees of A. had no right to recover the money back from the party to whom it was paid. *Belcher v. Mills*, 2 C. M. & R. 150; 1 Gale, 142. 394

A. and B., creditors of a trader, who had committed a secret act of bankruptcy, pressed him for payment, when he offered goods, if a customer could be found. The creditors procured the defendant to whom they were indebted, to purchase the goods, who with the assent of the trader, credited A. and B. in account. In assumption by the assignees of the trader for the price of these goods, it was held, that if the appropriation of money to A. and B. was merely in consequence of the direction, it was revocable, and the plaintiffs might recover; but if it was part of the contract that the payment should not be revocable, it was then a question whether this was a payment within the 6 Geo. 4, c. 16, s. 82, which, semble, it was not. *Bradbury v. Anderton*, 1 C. M. & R. 486; 5 Tyr. 152. 394

In trover by the assignees of S. against the London Dock Company, to recover certain engines, machinery, implements, and materials, the cause having been referred by order of Nisi Prius, the arbitrator found that a contract had been entered into between S. the bankrupt, and the London Dock Company, to execute certain works required for the formation of an entrance to the docks, and to provide the materials for that purpose, in consideration of 52,000*l.*, and of being allowed to appropriate certain materials to his own use. The engineer of the company was to be the sole judge of the works, and to have the

power of rejecting any materials or work not in his opinion conformable to the plans and specifications, and to provide other materials in lieu of those rejected, and to employ competent persons to perform the work, if S. failed to do so; in which case the costs or amount thereof was to be deducted from the sum to become due to him under that contract. The directors were to be at liberty to alter the plans, and thereby add to or diminish any part of the works, in which case a proportionate addition or deduction was to be made to or from the sum to be paid to S., according to the schedule of prices contained in the specification. S. commenced the works, and placed on the premises steam-engines, railroads, materials, and implements, necessary for carrying on the works. The company's engineer superintended the works, and examined the materials brought upon the premises by S., and rejected such as he thought were not proper for the purpose. The whole of the premises where the works were carried on, and upon which the machinery and materials were placed, belonged to the company. During the progress of the works, advances were made by the company to S., on application, beyond the sums he was entitled to receive: he referring them by letter to the engines, rail roads, implements and materials lying on the premises, and stating the particulars of which they consisted, as their security for those advances, and agreeing that all the engines, implements, and materials upon the premises should be as security for such advances. S. became bankrupt before the works were completed, upon which the dock company erased S.'s name from the implements, &c., and took possession of the engines, materials, implements, &c. then on their premises. The company were always in advance to S. to an amount exceeding the value of the property on the premises:—Held, first, the arbitrator having awarded that the dock company were entitled to prove against the estate of S. for the sum advanced to him beyond what he was entitled to for the work done, and materials furnished by him, and the value of the engines, &c., that the arbitrator had no authority to award on that matter, and that the award as to that ought to be set aside:—Held, secondly, that the plaintiffs were not entitled to recover for the extra work done by the bankrupt, that being still work done under the contract, and the work done under the contract having been overpaid:—Held, thirdly, that the defendants were entitled to insist on the lien given to them on the engines, materials, &c. as a security for their advances, and that there was a sufficient possession by the defendants to support the lien; and that the plaintiffs were not entitled to recover such engines, materials, &c., but that they were entitled to recover for such of the materials as were brought upon the defendant's premises after the bankruptcy:—Held, fourthly, that payments made to the bankrupt by the defendants, subsequent to the time when the latter materials were brought on the premises, could not be considered as payments for those particular goods in the course of business, but merely as general advances only, and that the defendants were not entitled to the protection of the 6 Geo. 4, c. 16,



a. 82. *Crowfoot v. London Dock Company*, 2 C. & M. 637; 4 Tyr. 967. 396

A custom of exchanging acceptances existed between the bankrupt and other houses, through the agency of B.; notes were sent by the petitioner to B., but never exchanged, as bankruptcy intervened, and they were stolen from B. and never formed any item in any settlement of the accounts between B. and the assignees:—Held, the petitioner could not recover the value of the notes from the assignees. *Ex parte Watson*, 1 Mont. & Ayr. 685; 4 Deac. & Chit. 45. 395

M. and the Scotch bank mutually exchanged their notes at stated times. M. became bankrupt, his agent B. having notes of the Scotch bank in his hands. The assignees subsequently allowed B. to retain these notes in his account with them, he having claims against M.:—Held, that the Scotch bank could recover these notes against the assignees. *In re Scotland (Bank)*, 1 Mont. & Ayr. 644; 4 Deac. & Chit. 32. 395

On the 3rd of January, the petitioner paid a sum of money to the bankrupt's agent at Edinburgh, for the purpose of being remitted to London to retire a bill; on the 4th of January, the agent received notice that his principal had stopped payment on the 2d of January: and he did not therefore remit the money to London. On the 6th of January the petitioner required the agent to return the money, which he declined. On the 26th of January a fiat was issued against the principal, and the assignees in stating an account with the agent, allowed 2000*l.* to remain in his hands on account of a counter claim he had against the bankrupt, and received a balance from the agent:—Held, (*Erskine, C. J. dissent.*), that under these circumstances, the presumption was, that the assignees had received the money so paid to the bankrupt's agent, which having been paid on a trust, and for a particular purpose, which had failed, the assignees were bound to restore to the petitioner, unless they could prove that the money never actually came to their hands. *Ex parte Simpson*, 1 Deac. 47; 2 Mont. & Ayr. 295. 395

#### XIV. OPERATION OF EXECUTIONS.

Judgment on warrant of attorney. *Crossfield v. Stanley*, 1 Nev. & M. 668; 4 B. & Adol. 87. 398

Where a defendant gives a cognovit for debt and costs, as between attorney and client, and before judgment signed he becomes bankrupt, his certificate is a bar to the plaintiff's claim. *Metcalf v. Watling*, 2 Dowl. P. C. 552. 398

A. & B., being partners in trade, fraudulently concurred in the issuing of an execution against A., under which the goods of both were sold by the sheriff, to C.; B. subsequently to the sale committed an act of bankruptcy. In an action by the assignees of A. & B., under a joint commission:—Held, that nothing passed by

the sale to the vendee. *Johnson v. Hamill*, 1 Alcock & Napier, 86. (Irish). 398

A sheriff who seizes and sells the goods of a bankrupt under a *fi. fa.* before commission, but after an act of bankruptcy, without notice of the act of bankruptcy, is liable in trover—*Dissentientibus*, Denman, C. J., Bayley, B., Vaughan, B., and Bolland, B. *Garland v. Carlisle* (in error), 2 C. & M. 31; 4 M. & Scott, 24; 3 Tyr. 705. 399

A bankrupt is discharged by his certificate from interlocutory costs, ordered by the court at Nisi Prius to be paid by him, on a trial in a cause in which he was defendant, being postponed at his instance on account of the absence of a material witness, if such costs have been taxed before the bankruptcy. *Jacobs v. Phillips*, 1 C. M. & R. 195; 2 Dowl. P. C. 716; 4 Tyr. 652. 400

An execution having issued against a trader, his goods were seized and sold under it, after he had committed an act of bankruptcy. The assignees brought trover:—Held, that the jury in assessing the damages might deduct the expenses of the sale from the proceeds of the goods. *Clark v. Nicholson*, 1 C. M. & R. 724; 5 Tyr. 233. 400

An order was made to prevent the bankrupt from availing himself of a sequestration obtained by him before his bankruptcy of the rents and profits of a rectory. *Ex parte Hull*, 1 Deacon, 87. 400

#### XV. SET-OFF AND MUTUAL DEBTS.

Where there are cross acceptances, and the right of set off clear, the court will restrain the assignees from bringing an action. *Ex parte Clegg*, 1 Mont. & Ayr. 91; 3 Deac. & Chit. 505. 402

Plaintiff, being liable to defendant for the costs of a nonsuit, issued a fiat of bankruptcy against the defendant: the court refused to stay defendant's proceedings in the action. *Eicke v. Nokes*, 2 Dowl. P. C. 820; 4 M. & Scott, 586; 1 Bing. N. R. 69. 402

The defendants were the holders of a bill of exchange, accepted by one M., for 760*l.*, which was indorsed to them by the commercial bank of Scotland, and they were also the acceptors of a bill drawn by the commercial bank in favor of M. The former bill became due on the 6th of January, and was dishonored, M. having stopped payment. On the 7th the defendants debited the commercial bank in their account with the 760*l.*, and wrote a receipt on the back of the bill, and returned it protested to the commercial bank. The latter, hearing of the failure of M., on the 6th wrote to the defendants, requesting them to keep the 760*l.* bill, and set off the amount against the 1000*l.*, their acceptance, which would become due on the 12th. In an action by the assignees of M. (who afterwards became bankrupt) against the defendants, as acceptors of the 1000*l.* bill:—Held, that they were not entitled to set off



the 760*l*. *Belcher v. Lloyd*, 3 M. & Scott, 822. 407

Payments improperly made, as the consideration for signing a composition deed, may be deducted or set off from a proof made under a subsequent fiat for a subsequent debt. *Ex parte Minton*, 1 Mont. & Ayr. 440. 407

In an action by assignees of a bankrupt, the defendant is entitled under 6 Geo. 4, c. 16, s. 50, to set off a debt due to him from the bankrupt, if when he gave credit to the bankrupt, he had no notice of a prior act of bankruptcy, though he had notice that the bankrupt had stopped payment. *Hawkins v. Whitten*, 5 M. & R. 219. 406

Held that a defendant might set of a debt due to him from a bankrupt for money lent, &c. against a claim by the bankrupt's assignees on him for not accepting, pursuant to agreement, a bill of exchange by way of part payment for goods sold and delivered by the bankrupt to himself. *Gibson v. Bell*, 1 Scott, 712; 1 Bing. N. R. 743; 1 Hodges, 136. 406

A plea of set-off to an action by the assignees of a bankrupt, must show that it is pleaded to a debt to which it is strictly applicable. *Groom v. Mealey*, 2 Scott, 171; 2 Bing. N. R. 138; 1 Hodges, 212. 406

To a count in debt by the assignees of a bankrupt for money had and received by the defendant to the use of the plaintiffs as assignees, (not stating whether received before or since the bankruptcy), the defendant pleaded a set-off for money due to him on an account stated with the bankrupt before the bankruptcy:—Held, that the plea was bad, for that it did not show that the debts were mutual. *Id.*

J. apprenticed his son to the bankrupt two years before the bankruptcy, and agreed to pay a premium of 200*l*. J. was in partnership with T., and the bankrupt owed them a joint debt exceeding the amount of the apprentice fee due from J. to the bankrupt:—Held, that J. could not set off the apprentice fee against the joint debt due from the bankrupt to J. & T.—The court, under these circumstances, ordered 100*l*. to be paid by J. to the assignees, together with the costs of the petition. *Ex parte Soames*, 3 Deac. & Chit. 320. 407

## VII. DIVIDEND.

Quere whether, on distributing unclaimed dividends, any further assets should at the same time be set apart on account of the same proof? *Ex parte Mowbray*, 1 Mont. & Ayr. 300; 3 Deac. & Chit. 552. 410

After an order was made for the distribution of unclaimed dividends, fresh assets came to the hands of the assignees, which enabled them to make a further dividend:—Held, that the further dividend ought to be declared on the debts of all the creditors, including those who had not claimed the former dividends, unless in the in-

terim any of the non-claimants had renewed their proofs, in which case they must be placed *pari passu* with the other creditors. But the commissioners ought not, out of the further assets, to lay aside a sum equivalent to the dividends already unclaimed, as a fund in reserve to meet any future renewal of the proofs. *Id.*

If the solicitor to the fiat have dividends in his hands received from the assignees under a pretended authority from the creditor, the court has jurisdiction to order him to pay them over to the creditor. *Ex parte Story*, 2 Mont. & Ayr. 54; 4 Deac. & Chit. 504. 410

On a dividend being withheld, the assignees were ordered to pay it, with 5 per cent. interest from the time of application to them for payment. *Id.*

A dividend having been declared twenty-eight years ago, and the amount invested, the creditor was now held entitled to the interest which had accumulated. *Ex parte Halford*, 2 Mont. & Ayr. 289. 410

Unclaimed dividends can only be ordered to be divided among all the other creditors generally, and not among a particular class of creditors. *Ex parte Lackington*, 3 Deac. & Chit. 331. 410

When the omission to prove a debt proceeds from a creditor's own laches, the court will not order a dividend to be stayed, until his petition to prove can be heard. *Ex parte Brees*, 3 Deac. & Chit. 283. 410

Where the order of dividend states that a particular assignee is not liable, he will not be included in an order to pay the dividend. *Ex parte Dawson*, 2 Mont. & Ayr. 94. 410

Seemle, that the unclaimed dividends of joint creditors can only go to the joint creditors, and those of separate creditors to the separate creditors. *Ex parte Fedden*, 2 Deac. & Chit. 379. 410

The court will not order unclaimed dividends to be distributed among the creditors, unless the creditors, on whose debts they are payable, have ample notice that they have been declared; and more especially when a long period has elapsed before any dividend has been made. *Id.*

Where bills of exchange proved under a fiat have been lost by the creditor, and he therefore cannot produce them for the purpose of receiving his dividends, and an application to this court becomes necessary to receive them, the creditor must pay the costs of the application. *Ex parte Trust*, 3 Deac. & Chit. 750. 410

Where a party purchases of a creditor all his right to the dividends and interests, on his proof; seemle, that such party cannot proceed against the assignees by petition for an order to pay to him the dividends on the proof, but must be left to the ordinary means of enforcing the contract by action at law, or suit in equity. *Ex parte Richards*, 4 Deac. & Chit. 190. 410

The 132nd section of the 6 Geo. 4, c. 16, which directs the payment of interest to creditors in



case of a surplus, has not a retrospective operation. *Ex parte Phillips*, 4 Deac. & Chit. 81. 410

Where the holder of bills which were deposited with him by the bankrupts as a collateral security for a debt, proved the amount of the balance due, excepting the bills as a security, and some of the bills were afterwards paid in full:—Held, that the amount of the bills so paid must be deducted from the proof, and the dividends calculated only upon the residue of the debt. *Ex parte Brunskill*, 4 Dea. & Ch. 442; 2 Mont. & Ayr. 220. 410

The interest made by the investment of unclaimed dividends, does not belong to the general estate, but is divisible among the creditors claiming the hitherto unclaimed dividends. *Ex parte Renshaw*, 4 Deac. & Chit. 483. 410

H. and P. drawers of a bill on and accepted by P. and Co. for 2000*l.* indorsed it to A. for his accommodation. W. and Co. discounted it for A., together with another bill drawn by A. for 2000*l.* upon and accepted by S. and Co. A., and H. & P. and S. & Co. severally became bankrupts, W. and Co. received dividends from S. and Co.'s acceptance; also 750*l.* from H. and P.'s estate on the bill drawn by them. They also proved against A.'s estate for 333*l.* 6*s.* 8*d.* as the amount of H. and P.'s bill, and balance of A.'s bill on S. and Co., after deducting the 666*l.* 13*s.* 4*d.* received from S. and Co., and received 277*l.* 15*s.* 6*d.* dividend thereon, 166*l.* 13*s.* 4*d.* being in respect of the proportion of proof on H. and P.'s bill. P. and Co. stopped payment, and under a composition deed W. and Co. received 1000*l.* in respect of H. and P.'s bill. Total in respect of H. and P.'s bill, 1916*l.* 13*s.* 4*d.*, leaving a balance of 83*l.* 6*s.* 8*d.* Semble, (W. and Co. claiming to have a right to retain H. and P.'s bill, in order to work out remedies against A. in respect of A.'s bill), that the assignees of H. and P., although they tendered the balance 83*l.* 6*s.* 8*d.*, could not compel W. and Co. to deliver up H. and P.'s bill. *Ex parte Dickson*, 4 Deac. & Chit. 614; 2 Mont. & Ayr. 99. 410

Quære whether the court has jurisdiction on a subject of litigated title such as this? *Id.*

As W. and Co. were not bound to receive the 83*l.* 6*s.* 8*d.*, the petition was premature at all events till the bill was fully paid off. *Id.*

### XIX. BANKRUPT.

*Surrender and Commitment.*—A surrender at a prior meeting is sufficient, where the bankrupt becomes unable, by illness, to surrender at the last meeting. *Ex parte Thomas*, 3 Deac. & Chit. 234. 412

If a bankrupt be examined before one commissioner, and committed to the custody of the messenger, and after a short time brought before two commissioners, who ask him a few questions and then commit him, the committal is bad. *Ex parte Lampon*, 1 Mont. & Ayr. 245; 3 Deac. & Chit. 751. 413

The subdivision court cannot commit on an adjourned examination, after merely asking, "do you abide by your former answers;" the party

must be re-examined. *Ex parte Bardwell*, 1 Mont. & Ayr. 193. 413

The application to commit must be made on the same day the certificate is made. *Ex parte Myers*, 2 Mont. & Ayr. 87. 413

Every step towards commitment must be mentioned to the court. *Id.*

The order of committal, after the fourth day order, must be on petition. *Id.*

To justify a committal of a bankrupt for not answering satisfactorily, the commissioners should point out the unsatisfactory answers, and press those points. *Ex parte Lee*, 2 Mont. & Ayr. 15. 413

If commissioners of bankrupt issue a warrant to apprehend a bankrupt, and direct the warrant "To J. A. and W. S., our messengers and their assistants," &c.; this warrant does not justify the apprehension of the bankrupt by any one who is not in the presence, actual or constructive, of J. A. or W. S., and therefore B., who was the assistant of W. S. in his business of a sheriff's officer, is not justified in apprehending the bankrupt, in the absence of W. S. and J. A., although B. has the warrant in his possession. *Rex v. Whalley*, 7 C. & P. 245—Williams. 413

*Privilege from Arrest.*—Examination adjourned. *Ex parte Simpson*, 2 Wils. C. C. 127; Buck, 424. 417

Where, from unavoidable accident, the commissioners are prevented from meeting to take the bankrupt's last examination, the court of Review will appoint another day for that purpose. *Ex parte Wilson*, 2 Deac. & Chit. 388. 417

A bankrupt is protected from arrest on an attachment for contempt for non-payment of money, on his return home from passing his last examination. *Ex parte Jeyes*, 3 Deac. & Chit. 764. 417

*Allowance.*—After the choice of assignees, the court of Review will not make an order as to the bankrupt's allowance for maintenance. *Ex parte Hall*, 1 Mont. & Ayr. 450. 419

If the assignees distribute a sum without an order of dividend, and the bankrupt subsequently obtain his certificate, he is entitled to his allowance, as if they still had that sum in their hands. *Ex parte Lomas*, 1 Mont. & Ayr. 437; 3 Deac. & Chit. 681. 419

One of two assignees admits in the audit paper, previous to a dividend, that a certain sum was reserved by the assignees, applicable to future claims. The bankrupt, on a petition for his allowance, after the death of this assignee, is entitled to an inquiry whether any part of that sum ever came into the hands of the surviving assignee. *Ex parte Coombes*, 2 Deac. & Chit. 319. 419

Under a joint and separate fiat, the bankrupt's allowance is to be calculated on the amount of his separate estate, together with his share of the



joint estate, not on the gross amount of the joint estate. *Ex parte Lomas*, 1 Mont. & Ayr. 525; 4 Deac. & Chit. 240. 419

Though the assignees with the concurrence of the commissioners have ordered an allowance for maintenance (under 6 Geo. 4, c. 16, s. 114), till the bankrupt has passed his last examination, which order remains on the proceedings, yet if the assignees afterwards withhold the maintenance on the ground of the final examination being adjourned sine die, the court has no power to interfere, either as to the maintenance or the passing of the examination. *Ex parte Thomas Hall*, 4 Deac. & Chit. 530. 410

The wife a bankrupt has a right to a reasonable provision out of the property which she brought her husband on her marriage; and the court of Review has jurisdiction, on petition in bankruptcy, to order the assignees to make such provision for her, whether the property consists of real or personal estate. *Ex parte Thompson*, 1 Deac. 90. 419

An allowance of 200*l.* out of a net income of 225*l.* was deemed excessive, and reduced to 175*l.* per annum. *Id.*

*Future Property.*—The price of goods sold by an uncertificated bankrupt may be recovered by him against the vendee, his assignees not interfering. *Hayllar v. Sherwood*, 2 Nev. & M. 401. 421

After the bankruptcy of A., and before his certificate, B., one of his creditors, purchased goods from him. In an action brought by A., after he had obtained his certificate, for the price of the goods, the old debt cannot be set off, being barred by the certificate. *Id.*

## XX. CERTIFICATE.

A joint certificate is, upon the death of one of the bankrupts, a separate certificate. *Ex parte Carter*, 1 Mont. & Ayr. 115; 3 Deac. & Chit. 549. 423

It seems that a sole executor who becomes bankrupt may sign his own certificate. *In re Lawrence*, 1 Mont. & Ayr. 453. 423

A power of attorney from a creditor residing abroad to sign the bankrupt's certificate, is sufficiently authenticated by the attestation of a notary public, without any affidavit to verify the signature. *Ex parte Myers*, 2 Dea. & Chit. 406. 424

So, if attested by the British consul. *Ex parte Williamson*, 2 Deac. & Chit. 585. 424

A petition to stay the certificate, charging that the bankrupt admitted that he had lost 25*l.* in one sitting, is demurrable; it ought positively to allege the fact, and that the money was lost in one day. *Ex parte Crouch*, 2 Deac. & Chit. 17. 427

Fraud in obtaining a certificate. *Horn v. Ion*, 1 Nev. & M. 627; 4 B. & Adol. 78. 427

A certificated bankrupt cannot be discharged

from arrest for a debt covered by his certificate till it has been inrolled pursuant to 6 Geo. 4, c. 16, s. 96. *Jacobs v. Phillips*, 1 C. M. & R. 186; 2 Dowl. P. C. 716; 4 Tyr. 652. 428

Seemle, that a creditor who has signed the certificate by attorney, cannot stop the certificate by subsequently withholding an affidavit verifying his signature to the power. *Ex parte Dunstan*, 1 Mont. & Ayr. 619; 4 Deac. & Chit. 30. 423

On a petition to stay the certificate, by a creditor at whose suit the bankrupt is in custody, the bankrupt must be discharged before the petition can be heard. *Ex parte Green*, 4 Deac. & Chit. 112; 2 Mont. & Ayr. 31. 425

The rule on such petitions is, that the party objecting to the certificate must himself make out a case to stay it; the bankrupt is not bound to answer mere allegations founded on information and belief. *Id.*

The non-payment of any dividend is not of itself a sufficient reason to stay the certificate. *Id.*

The certificate cannot be stayed for misconduct before the fiat issued. *Ex parte Gordon*, 2 Mont. & Ayr. 30. 425

The certificate will be stayed to enable a creditor to prove, when the reasons for his not proving was a belief that no dividend would be paid. *Ex parte Perring*, 2 Mont. & Ayr. 486. 425

The certificate will not be stayed on a petition alleging information and belief, though supported by an affidavit swearing to the fact positively—*Sir J. Cross*, diss. *Id.*

If a fiat be worked before one commissioner, and in his absence from London in vacation, the certificate be signed by another commissioner who acts for the absent commissioner, the court will refer the certificate back to be signed by the commissioner who had been absent. *Ex parte Burn*, 2 Mont. & Ayr. 483; 1 Deac. 194. 424

That the bankrupt has not given up some of his property is no ground to stay the certificate. *Id.*

An allegation that the bankrupt has not fully disclosed his estate is not sufficient, in ordinary cases, to stay the certificate. In extreme cases the court would order first an issue. *Id.*

The omission of a year in the date to a signature of certificate by a creditor, where the date was properly attached to the preceding signature, was rectified. *In re Buckley*, 4 Dea. & Ch. 504. 423

The officer was ordered to pass such certificates in future without putting parties to the expense of a petition. *Id.*

On petition to stay a certificate, it must appear from the petition itself that the party applying is a creditor; but if it appear merely inferentially, that is sufficient. *Ex parte Robinson*, 4 Deac. & Chit. 499; 1 Mont. & Ayr. 705. 425

If it merely so appear from the affidavits in support, that is insufficient. *Id.*

No amendment of a petition to stay is allowed. *Id.*



A former partner, there being partnership debts unpaid, cannot petition to prove the balance of accounts: a fortiori not to stay the certificate. *Id.*

Under the Bankruptcy Court Act, the bankrupt is not bound to pay the fee for the signature of the commissioner to his certificate, but the assignees, *comme semble*, are now liable for the payment of it. *In re Dawson*, 3 Deac. & Chit. 317. 424

## XXI. SUPERSEDEAS AND ANNULING.

In cases of *supersedeas* the great seal has a substantive power, independent of that on appeal. *Ex parte Keys*, 1 Mont. & Ayr. 226; 3 Deac. & Chit. 263. But see *Ex parte Harwood*, 3 Deac. & Chit. 252. 430

If, on a petition to supersede, the Lord Chancellor order a trial, which is in favor of the commission, the court of Review cannot supersede, on a petition for costs, and a cross petition for a new trial brought on by way of further directions. *Id.*

Where a petitioning creditor becomes bankrupt before the fourteen days for opening the fiat have elapsed, the court will not supersede on the petition of another creditor who is prepared to issue a new fiat. *Ex parte Smith*, 1 Mont. & Ayr. 78. 431

After a fiat had issued, the bankrupt makes certain proposals to his creditors to prevent the prosecution of it, to which proposals the solicitor for one of the creditors promises to give an answer at a certain time on the following day (the sixteenth after the date of the fiat); but before that day arrives, he strikes a second docket, for non-prosecution of the first, under the general order:—Held, that this was a breach of faith, and a petition to annul the first fiat was dismissed with costs. *Ex parte Baker*, 2 Deac. & Chit. 362. 431

After a lapse of twenty years, and the deaths of the petitioning creditor and the bankrupt, the court of Review will not entertain a petition for a *supersedeas*, on the ground of fraud. *Ex parte Granger*, 2 Deac. & Chit. 459. 432

Where the bankrupt is ready to pay all his creditors in full, and the only creditor whose consent is wanting to the *supersedeas* is abroad, the bankrupt may apply to pay the amount of the creditor's debt into court, in order to prevent any delay in obtaining the *supersedeas*. *Ex parte Hamilton*, 2 Deac. & Chit. 519. 432

All the creditors assented to a *supersedeas* but one, for *M. 14s. 2d.*, who was abroad. The court of Review granted the *supersedeas* on that sum, and a sufficient sum to meet the expense of taking it out of court being deposited with the registrar. *In re Brooknell*, 1 Mont. & Ayr. 80. 432

A petition to supersede with consent of creditors cannot be entertained without the usual certificate of the commissioners, nor unless it is set down in the paper for hearing. *Ex parte Croker*, 3 Deac. & Chit. 9. 432

A *supersedeas* by consent must have the con-

sent of all the assignees of a bankrupt creditor. *In re Leader*, 1 Mont. & Ayr. 244. 432

On a petition to supersede, by consent of creditors, the official assignee need not sign the petition. *Ex parte Parker*, 3 Deac. & Chit. 112. 433

A petition to supersede a joint commission, on consent of creditors, cannot be entertained as to any one of the bankrupts who has not surrendered. *Ex parte Knowles*, 3 Deac. & Chit. 191. 433

The court will supersede where all the creditors consent, and the bankrupt has paid 20s. in the pound, though his examination has been adjourned *sine die*. *Ex parte Gudge*, 1 Mont. & Ayr. 341; 4 Deac. & Chit. 358. 433

A *supersedeas* was applied for, upon consent of all the creditors but one, who died insolvent, and no administration taken out, but his son signed the consent:—Held, that the *supersedeas* could not issue without a limited administration for this purpose. *Ex parte Hall*, 1 Mont. & Ayr. 54; 3 Deac. & Chit. 44. 432

Any party who can show that he sustains a grievance from a fiat, may petition to supersede it, notwithstanding he claims adversely to it. A trustee, therefore, under a trust deed, which the fiat would overreach, may petition for this purpose. *Ex parte Jones*, 3 Deac. & Chit. 697. 433

A person whose debt is alleged to be usurious, cannot petition to annul the fiat for fraud, or to stay the certificate. *Ex parte Jarman*, 2 Mont. & Ayr. 119; 4 Deac. & Chit. 393. 433

The court will not annul a fiat on the bankrupt's petition, though consented to by the petitioning creditor, on the ground that the bankrupt had made an arrangement for payment of the petitioning creditor's debt without being satisfied that there were no other creditors of the bankrupts, or that if there were any such, they consented to the application. *Ex parte Farr*, 1 Deac. 77. 433

A petitioner to annul a fiat, will not be allowed copies of the depositions, before there is an office copy of the affidavit in support of the petition. *Ex parte Matthew*, 2 Mont. & Ayr. 73. 433

Where a fiat has not been filed, the court, on an application of another creditor, will not order it to be annulled, but merely that the creditor may issue a new fiat. *Ex parte Gerthwohl*, 2 Deac. & Chit. 48. 433

Where a creditor gave a power of attorney in general terms, but without power to consent to a *supersedeas*, and the signature of the creditor himself to such consent was easily attainable:—Held, that his own signature ought to be procured. *In re Sampson*, 3 Deac. & Chit. 196. 432

A petition to supersede by a creditor, presented a year after the bankrupt has received his certificate, cannot be heard, unless the delay be accounted for. *Ex parte Wyatt*, 1 Mont. & Ayr. 400; 3 Deac. & Chit. 665. 431

Where an action has been fairly tried, and the verdict is against the commission, and the bankrupt is abroad, the fiat may be superseded on the



petition of the petitioning creditor, though the bankrupt has not surrendered. *Ex parte Foulger*, 1 Mont. & Ayr. 457. 433

If an order, upon a petition by assignees to supersede an invalid commission, does not, through mistake, include the assignees' expenses of prosecuting the commission, the error cannot be rectified by a petition of rehearing. *Ex parte Burnell*, 1 Mont. & Ayr. 38. 433

Quære, whether the petitioning creditor is liable? *Id.*

Where a fiat is annulled after adjudication, for an insufficient act of bankruptcy, it is always at the costs of the petitioning creditor. *Ex parte Fletcher*, 2 Deac. & Chit. 374. 433

Quære, whether simple contract creditors be barred by the statute of limitations after a supersedeas? *Ex parte Davy*, 1 Mont. & Ayr. 300. 434

On a petition for a supersedeas with consent of creditors, where one of the creditors could not be found, an order was made for the supersedeas, the petitioner undertaking to pay into court the amount of the debt of the outstanding creditor. *Ex parte Crowther*, 4 Deac. & Chit. 31. 432

Seemle, this court has no jurisdiction to order the commissioner to certify the consent of creditors to a supersedeas, especially when he objects, because fees payable under 1 & 2 Will. 4, c. 56, ss. 45, 46, are not paid. *In re Hawker*, 4 Deac. & Chit. 569. 432

On a petition to annul a fiat, on consent, under 6 Geo. 4, c. 16, ss. 133, 134, the assignees must be served. *Ex parte Race*, 2 Mont. & Ayr. 242. 432

When the commissioner appoints two meetings under 1 & 2 Will. 4, c. 56, s. 20, the fiat cannot be annulled with consent of the creditors under 6 Geo. 4, c. 16, ss. 113, 134, till after the second meeting. *Ex parte Boardman*, 2 Mont. & Ayr. 209. 432

Supersedeas with consent of nine-tenths allowed, though the commissioner's certificate did not state what proportion the creditors assenting bore to those who proved. *Ex parte Hinton*, 2 Mont. & Ayr. 361; 4 Deac. & Chit. 351. 432

Petition for supersedeas with consent of creditors; one dies insolvent after proof, and his executor does not prove his will:—Held, that his brother-in-law might sign the consent. *Ex parte Leader*, 3 Deac. & Chit. 468. 432

Another creditor becomes bankrupt, and one of his assignees is abroad:—Held, that the signature of the other assignee was sufficient, with an affidavit of the consent of the absent assignee. *Id.*

Another creditor, who had proved a debt as the continuing partner of a firm that dissolved their partnership, died before his retiring partner:—Held, that his executrix might sign the consent. *Id.*

### XXIII. COMMISSIONERS.

The court of Review will in all cases uphold

the general order of Lord Loughborough, which directs that in country commissions there must be inserted the names of two barristers. *Ex parte Kilsby*, 2 Deac. & Chit. 19. 435

Where a bankrupt has sold goods to a party for a price considerably lower than what he gave for them, the purchaser, when summoned before the commissioner for examination, is bound to answer the question, "to whom did you subsequently sell these goods;" for it materially concerns the estate of the bankrupt to ascertain whether the sale by him were bona fide. *In re Falk*, 2 Deac. & Chit. 415. 437

A barrister cannot petition to have his name inserted in a commission. *Ex parte Ward*, 2 Mont. and Ayr. 219, n. 435

The quorum commissioners named in a fiat, are entitled to be summoned. If not summoned, the court of Review will interfere. *Ex parte Douglas*, 2 Mont. and Ayr. 218. 435

Where the last examination of the bankrupt has been adjourned sine die, the court will not order the commissioners to appoint a time, unless misconduct be charged against them, or the bankrupt can show that serious injury will accrue. *Ex parte Perkins*, 1 Mont. and Ayr. 594. 435

When there is no charge against commissioners, they need not appear. *Id.*

If more than the statutable fees are taken by the commissioners, they are perpetually disqualified from acting under any future fiat. *Ex parte Carter*, 3 Deac. & Chit. 678. 435

Two travelling fees, for attending two meetings on the same day, under the same bankruptcy, are beyond the fees allowed by the statute. *Id.*

Where both the quorum commissioners are unable to attend to open a fiat, the court cannot make an order that the other three commissioners may open it; but the proper course is to annul the fiat, and take out a new one. *In re Sutton*, 1 Deac. 43. 435

Where unfounded charges of corruption were brought against commissioners by a petitioner, who appeared to be the tool of other parties, the court ordered the commissioners their "costs, charges, and expenses," and suspended the order until the attorney for the petitioner should show cause why he should not personally pay the costs. *Ex parte Williams*, 3 Deac. & Chit. 103. 435

Commissioners of bankrupt have no authority to commit an examinant for refusing, upon request, to read an entry in a book. *Isaac v. Impey*, 5 M. & R. 377. 438

An examinant being requested by the commissioners to read an entry in a ledger, and refusing to do so, was by them committed, "for refusing to answer a question:—"—Held, that the request to read was neither in form nor substance a question; that the commitment was illegal; and that an action of trespass against the commissioners for the imprisonment was maintainable. *Id.*

A commissioner of bankruptcy sitting alone, under 1 & 2 Will. 4, c. 56, s. 7, has no power to fine or imprison for a contempt. *Rex v. Faulkner*,



1 Gale, 210; 1 C. M. & R. 525; 2 Mont. & Ayr. 311. See 5 & 6 Will. 4, c. 29, s. 25. 438

Semble, that he is not liable to an action for any thing done by him as commissioner. *Id.*

The court has a general jurisdiction to entertain questions on the legality of a commitment by commissioners upon petition without habeas corpus, and without the warrant of commitment being before it: especially where the objections to the committal would not appear on the face of the warrant—*Dubit.* Sir J. Cross as to the production of the warrant. *Ex parte Jones*, 4 Deac. & Chit. 536; 2 Mont. & Ayr. 41. 438

Quære, whether the court has any jurisdiction to issue the writ of habeas corpus? *Id.*

An application to be discharged from custody, on the ground of the insufficiency of the commissioner's warrant, must be by petition. *Ex parte Jones*, 1 Mont. & Ayr. 704. 438

A recital on a warrant that the party was "suspected to have obtained part of the bankrupt's goods by means of fictitious sales," is not objectionable. *Ex parte Bardwell*, 1 Mont. & Ayr. 300. 439

The warrant need not set out the precise answers with which the commissioners were dissatisfied. *Id.*

On habeas corpus, the party may object that a question was illegal, though he did not object when before the commissioner. *Id.*

A party regularly committed by a commissioner to the messenger, and subsequently irregularly committed by the subdivision court, is not, on a discharge under habeas corpus, remanded to the custody of the messenger. *Ex parte Bardwell*, 1 Mont. & Ayr. 214. 439

#### XXIV. SOLICITOR.

The court of Review will not depart from the general rule, that the solicitor to the commission shall not be allowed to purchase any part of the bankrupt's property. *Ex parte Farley*, 3 Deac. & Chit. 110. 440

The solicitor to the fiat cannot have leave to bid at a sale of the bankrupt's property unless under very peculiar circumstances. *Ex parte Brown*, 3 Mont. & Ayr. 29; S. C. nom. *Ex parte Towne*, 4 Deac. & Chit. 519. 440

There is jurisdiction in the court of Review to reach any part of the estate in the hands of the solicitor to the fiat. *Ex parte Benham*, 2 Mont. & Ayr. 280; 2 Deac. 26. 440

On an agreement for dissolution of partnership between two solicitors, the remaining partner agreed to pay the partnership debts. The assignees, knowing this agreement, continued to employ the remaining partner:—Held, the court would not, on the application of the assignees, interfere to charge the outgoing partner. A petition for this purpose must be served on the continuing partner. *Ex parte Gould*, 2 Mont. & Ayr. 48; 4 Deac. & Chit. 547. 440

The solicitor to the fiat must bear any expense which his neglect would cause the estate. *Ex*

*parte Bennett*, 2 Mont. & Ayr. 308; 1 Deacon, 70. 440

In 1825, an assignment from the provisional assignee to the assignees was prepared, but, through neglect of the solicitor, never executed. The provisional assignment was ordered to be vacated, and a new assignment executed by the commissioners. It seems, the 25th section of 1 & 2 Will. 4, c. 56, does not apply to such a case. *Id.*

The solicitor having been paid for the assignment must refund. *Id.*

Independently of the provisions in the acts of parliament, the court of Review has a general jurisdiction to refer the bill of any solicitor of that court for taxation. *Ex parte Copeland*, 1 Deac. & Chit. 86. 440

Where the petitioning creditor's bill, after being taxed by commissioners, had been paid, and the assignee's accounts had been audited for the space of six years, the court refused to order a re-taxation of it by the registrar. *Ex parte Cristy*, 4 Deac. & Chit. 414. 440

It is a matter of course for any creditor who has proved to the amount of 20*l.*, to apply within a reasonable time, under the 14th section of 6 Geo. 4, c. 16, for a re-taxation of any bill of the solicitor to the commission, but not where a period of three years has been suffered to elapse after payment of such bill. *Id.*

But where the creditor applies to the general jurisdiction of the court, and points out objectionable items, the court will then refer the bill to its proper officer to review the former taxation. *Id.*

Where, however, a bill has been already taxed by the proper officer of the court in which the business has been done, the court of Review will not in such case, disturb the taxation. *Id.*

What are objectionable items in the solicitor's bill for business connected with the meetings of the commissioners. See *Id.*

Where an assignee applies to have a solicitor's bill taxed, for business done before the choice of assignees, which is not included in the bill taxed by the commissioners, the petition should state the nature of the business, and when it was done, and the proceeding should also be in court. *Ex parte Cass*, 4 Deac. & Chit. 273. 440

The costs of proceedings in the court of Review, under a London fiat, are to be deputed to the deputy registrar for taxation; the duty of the commissioner being merely to tax the petitioning creditor's costs and the costs of the assignees. *Ex parte Reay*, 2 Deac. & Chit. 586. 440

Where an order has been made for the taxation of the solicitor's bill of costs, semble, that a subsequent petition for the costs of the taxation cannot be heard until the master has made his certificate, nor unless the original petition is also set down in the paper. *Ex parte Elsee*, 2 Deac. & Chit. 332. 440

An assignee was removed and ordered to account; pending that order, the new assignees petitioned for the taxation of the bill of the soli-



citors employed by the discharged assignee, and that they might be ordered to account for money charged to have been improperly received by them with the privity of the former assignee:—Held, that the petition was premature, during the pendency of the former order; but the court of Review retained it, under the circumstances, until the result of the pending account was known. *Ex parte Carter*, 2 Deac. & Chit. 626. 440

Although the solicitor's bill has been paid, yet it will be ordered to be taxed on application of the assignees, without any special reason being assigned for the taxation. *Ex parte Pickering*, 2 Deac. & Chit 387. 440

On a petition by creditors, to tax the bills of several solicitors who had been successively employed by the assignees, the court made the order as prayed, notwithstanding the bills had been previously taxed by the commissioners, and paid by the assignees. *Ex parte Brown*, 3 Deac. & Chit. 496. 440

Solicitor's bills, though allowed by the commissioners and paid by the assignees, were ordered to be taxed, where objectionable items were pointed out. *Ex parte Jourdain*, 3 Deac. & Chit. 637. 440

After a solicitor's bill has been long paid, it cannot be taxed without special reasons. *Ex parte Hutchinson*, 2 Mont. & Ayr. 35; 3 Deac. & Chit. 829; 4 Deac. & Chit. 530. 440

A. & B. sued out a commission as solicitors to the petitioning creditors, and the assignees afterwards appointed C. to act as solicitor; but it was agreed between him and A. & B., with the privity of the assignees, that all three should jointly act as solicitors and share the profits, and the assignees afterwards recognized the acting of A. & B. as such joint solicitors:—Held, 1st, that this amounted to a retainer by the assignees, of A. & B. as joint solicitors with C.; 2ndly, that the court of review had jurisdiction, on the petition of A. & B. (C. having been served with it,) to enforce the payment, by the assignees, of the solicitor's bill of costs. *Ex parte Coates*, 3 Deac. & Chit. 626; 1 Mont. & Ayr. 328. 440

Where the solicitors to the commission received the amount of their bill of costs, which had been bona fide incurred for defending a suit in Chancery brought against the assignees; and the major part of the creditors, and the official assignees applied for an order on the solicitors to refund the amount, on the ground that the commissioner had certified that the suit was improvidently defended, and that he had disallowed the amount of the costs in the assignee's accounts; the petition was dismissed with costs, except as against the official assignee. *Ex parte Benham*, 1 Deac. 26; 2 Mont. & Ayr. 280. 440

Where the amount of a bill appears on the face of it to be excessive, objectionable items need not be pointed out, on the application by a creditor to have it taxed. *Ex parte Copeland*, 4 Deac. & Chit. 86. 440

A motion may be made that the registrar may review his certificate of taxation of costs. *Ex parte Richardson*, 1 Mont. & Ayr. 377. 440

A petition may be necessary to oppose or amend it. *Id.*

Non payment of the taxed costs into court is not a preliminary objection to the motion. *Id.*

It is not necessary to obtain leave to except to the registrar's certificate of taxation. *Ex parte Crockwell*, 1 Mont. & Ayr. 378, n. 440

Where several bills are taxed, the one-sixth is calculated on the aggregate amount. *Ex parte Barrett*, 1 Mont. & Ayr. 447. 440

The court of Review can order the bill of costs subsequent to the choice of assignees to be paid, though the assignees have no assets in their hands. *Ex parte Coates*, 1 Mont. & Ayr. 328; 3 Deac. & Chit. 626. 442

*Anon. Buck*, 475; overruled, *semble. Id.*

Creditors may petition to tax the solicitor's bill, though paid, the assignees having been guilty of dereliction of duty in not filing the bills with the proceedings. *Ex parte Castle*, 1 Mont. & Ayr. 665. 440

## XXV. MESSENGER.

In an action brought by a messenger against a sole assignee of a commission of bankruptcy, under 6 Geo. 4, c. 16, for the costs of advertising a meeting of the creditors, and for the hire of the room in which the meeting was held:—Held that it was not necessary for him to prove an employment by the assignee, nor any express recognition of him as messenger, as the fact of his having acted as a messenger and of the expenses incurred must have been known to the assignee. *Hamber v. Purser*, 2 C. & M. 209; 4 Tyr. 41. 443

After the lapse of five years a messenger's bill cannot be taxed without a charge of fraud lately discovered. *Ex parte Willment*, 1 Mont. & Ayr. 45; 3 Deac. & Chit. 364. 443

## XXVI. EVIDENCE IN BANKRUPTCY.

*Depositions.*—In a case within the 92nd section of the Bankrupt Act, (6 Geo. 4, c. 16), where the assignees went into evidence of the trading in consequence of a notice to dispute, without adverting to the section or relying upon the depositions, and, having failed to establish the trading, were nonsuited: the court refused to set the nonsuit aside. *Johnson v. Piper*, 2 Nev. and M. 672. 446

Depositions taken before commissioners of bankruptcy, and inrolled by the assignees according to 6 Geo. 4, c. 16, s. 96, are not evidence against them in an action brought to dispute the commission, by disproving the act of bankruptcy on which it is founded. *Chambers v. Bernasconi* (in error), 1 C. M. and R. 347; 4 Tyr. 531. 446

In all actions by assignees of a bankrupt, which the bankrupt himself might have maintained, if no bankruptcy had occurred, the depositions taken before the commissioners are conclusive evidence of the trading, &c., although at the time of bankruptcy the cause of action may not have been complete. *Kitchener v. Power*, 4 Nev. & M. 710; 3 Adol. & Ellis, 232; 1 Har. & Woll. 174. 446



And the question, whether the action is of such a nature, must be decided by a reference to the facts of the case, (which the judge may collect from the opening of the plaintiff's counsel), and not from a strict reference to the cause of action appearing on the record. *Id.*

A bankrupt sold goods before his bankruptcy to the defendant for cash, but after they were delivered, the defendant refused to pay for them, and claimed to set off against the value the amount of some remaining acceptances of the bankrupt in his hands. The assignees treating the purchase as a fraud, sued the defendant in trover, alleging the conversion to be after the bankruptcy. Notice to dispute the act of bankruptcy, and petitioning creditor's debt having been given:—Held, that the depositions were conclusive evidence of these facts. *Id.*

In an action by the assignees of A., where the petitioning creditors are the assignees of B., the proceedings under B.'s commission are not evidence, under 6 Geo. 4, c. 16, s. 92, of the bankruptcy of B. *Muskett v. Drummond*, 5 M. & R. 210. 446

Upon a bankrupt's petition to supersede, the depositions of the trading and act of bankruptcy must be read in court so as to give him an opportunity of answering them. *Ex parte Laverder*, 4 Deac. & Chit. 426. 446

In trespass, the defendant, after alleging that M. had been declared a bankrupt, and that they had been appointed his assignees, justified taking goods as belonging to them in their capacity of assignees; the plaintiff replied that the goods belonged to him and not to defendants;—Held, that upon this issue it was not incumbent on the defendants to give formal proof of M.'s bankruptcy, and their appointment as assignees. *Jones v. Bowman*, 1 Scott, 453; 1 Bing. N. R. 484; 1 Hodges, 33. 446

Semble, that an objection taken by the plaintiff, after the judge has summed up, as to the want of evidence of the title of the assignees, came too late. *Id.*

*Other things.*—If in trover by the assignee of a bankrupt, the plaintiff's title as assignee be put in issue; the fiat of bankruptcy inrolled, the certificate of the appointment of the plaintiff as assignee inrolled, and the appointment itself (also inrolled) are sufficient proof that the plaintiff is assignee. *Scott v. Thomas*, 6 C. & P. 611—Parke. 445

A written statement, made by a bankrupt before his bankruptcy, of his debts and credits, is evidence as showing that he knew of his own insolvency. *Id.*

In trover, brought by a bankrupt against his assignees, to try the validity of the commission:—Held, that secondary evidence of the assignment might be given, after proving that it was lost before it was entered of record, as directed by 6 Geo. 4, c. 16, s. 96, and 2 & 3 Will. 4, c. 114, s. 7. *Giles v. Smith*, 1 C. M. & R. 462; 5 Tyr. 15. 445

Semble, proof of the plaintiff's acquiescence

in the defendant's acts as assignee, and dealing with him in that character would render proof of the assignment unnecessary. *Id.*

On a petition by assignees disputing the right of a creditor to a lien on certain property of the bankrupt, the examination of the bankrupt's clerk, taken by the commissioners behind the creditor's back, is not receivable in evidence. *Ex parte Dobson*, 4 Deac. & Chit. 69. 444

On petition by assignees, to expunge a proof, the examination of the bankrupt before the commissioner, taken at the time the proof was admitted, is receivable in evidence. *Ex parte Freeman*, 4 Deac. & Chit. 404. 444

In a suit, by the assignees of an uncertificated bankrupt, for the recovery of property fraudulently delivered by him to the defendants, the plaintiffs read the examination of one of the defendants taken before the commissioners on the first day, but declined to read the examination taken on the second day:—Ruled, that the whole must be read. *Smith v. Biggs*, 5 Sim. 391. 444

If, on a viva voce examination, witnesses are ordered out of court, the petitioner, being a witness, has a right to remain in court. *Ex parte Dugard*, 2 Mont. & Ayr. 84. 444

The examinations of the bankrupt and other persons before the commissioners may be read in evidence, after notice has been given to the other side of the intention to read them, and may then in all respects be treated as affidavits. *Ex parte Crosley*, 1 Deacon, 107; S. C. nom. *Ex parte Crosbie*, 2 Mont. & Ayr. 397. 444

*Notice to dispute*].—The notice of disputing the petitioning creditor's debt, the trading, or the act of bankruptcy, as required in certain cases by sec. 90 of the Bankrupt Act, 6 Geo. 4, c. 16, must be given, although under the new rules of pleading the denial of the bankruptcy may appear upon the record. *Moon v. Raphael*, 2 Scott, 489; 2 Bing. N. R. 310; 7 C. & P. 115; 1 Hodges, 289. 447

In an action by assignees of a bankrupt for goods sold and delivered by the bankrupt before his bankruptcy, the plea denied their title as assignees, and a notice to dispute the trading, &c. was given, pursuant to 6 Geo. 4, c. 16, s. 90. Letters from the defendant to one of the assignees, and to the solicitor to the commission, deprecating proceedings against him, are prima facie evidence of the admission of the plaintiff's title to sue as assignees, without regular proof of the bankruptcy. *Inglis v. Spence*, 1 C. M. & R. 432; 5 Tyr. 8. 447

*Witnesses.*—If a creditor of a bankrupt agree to release the estate on an undertaking by one of the assignees to pay him what should appear to be justly due, he is a competent witness on the part of the assignees. *Sinclair v. Stevenson*, 1 C. & P. 582; 10 Moore, 46; 2 Bing. 514. 449

In an action by the assignees of a bankrupt, in which the bankruptcy is in dispute, a son of the bankrupt who was held out as a partner with him, but who was in fact not so, is not a competent



witness for the assignees. *Holland v. Reeves*, 7 C. & P. 36—Alderson. 449

A. was examined before commissioners of bankrupt, and on his re-examination he produced a machine copy of a letter he had sent to R. While A. was before the commissioners, Mr. E., the solicitor to the assignees, made a copy of the machine copy of the letter produced by A.:—Held, that in an action by the assignees of the bankrupt against A., the copy of the letter made by Mr. E. was not admissible in evidence against A., without reading his examination, although notice had been given to A. to produce the machine copy. *Id.*

A party made a composition with his principal creditors, paying the smaller ones in full. He afterwards became bankrupt, and did not pay 15s. in the pound:—Held, that (having obtained his certificate, and released his surplus) he was a competent witness to support an action by his assignees. *Roberts v. Harris*, 2 C. M. & R. 292; 1 Gale, 231. 449

On a *viva voce* examination on a petition to supersede, a creditor is not a competent witness. *Ex parte Lavender*, 1 Mont. & Ayr. 702; 4 Deac. & Chit. 487. 449

The drawer of a bill accepted by the bankrupt, but which had been indorsed over, and which was not yet proved against the estate, swore to a deposition in support of the fiat, stating himself therein not to be a creditor:—Held, in the face of that statement, that his deposition could not be rejected on the ground of his being a creditor. But being subsequently examined *viva voce*, and admitting the facts:—Held, that as he might be called on to pay the bill, and would have the option to prove against the estate, he was an interested party, and therefore not examinable. *Id.*

Where a petitioner filed no affidavits in support, but two days before the hearing served notice to examine witnesses on the respondent twenty miles from London, the court refused an application of the respondent to postpone the hearing till after the petitioner's witnesses were examined, so as to procure witnesses in answer. *Id.*

### XXVIII. PRACTICE IN BANKRUPTCY.

*Practice in Court of Review.*—The court of Review are reluctant to grant an issue on the application of the assignee. *Ex parte Patrick*, 1 Mont. & Ayr. 391. 453

After an order to pay within a specified time, the next order is to pay within four days or stand committed: this is of course at the office, but if circumstances render an application to the court necessary, notice must be given to the other side. *Ex parte Solomons*, 1 Mont. and Ayr. 269, n. And see *Ex parte Malachy*, 1 Mont. and Ayr. 267. 453

If an order of committal be asked, the affidavit must state that the money is still due and owing, and that the party has not paid, nor any person on his behalf; but the same strictness is not required on any intermediate order. *Ex parte Murray*, 1 Mont. and Ayr. 478. 453

A previous order of the Vice-Chancellor, which had been omitted to be drawn up, ordered to be entered up *nunc pro tunc*, if the Vice-Chancellor should think fit. *Ex parte Lewis*, 3 Deac. & Chit. 198. 453

A special case sent from a commissioner must be brought on upon petition. *Ex parte Johnston*, 1 Mont. & Ayr. 622. 453

A formal objection to a motion is waived by the party appearing, and requesting further time to oppose. *Ex parte Morland*, 3 Deac. & Chit. 248. 453

In bankruptcy, the objection of multifariousness is not considered as conclusive. *Ex parte Brown*, 3 Deac. & Chit. 456; S. P. *Ex parte Devas*, 4 Deac. & Chit. 366. 453

No application can be made in the matter of a petition, before an office copy is taken to the affidavit filed in support of it. *Anon.* 4 Deac. & Chit. 141. 453

On an abandoned notice of motion, the application for costs and affidavit of service may be on a future day. *Ex parte Stone*, 2 Mont. & Ayr. 503. 453

Before a motion is made that the petition of the bankrupt for a supersedeas shall be dismissed, on the ground of his being out of the jurisdiction of the court, the respondent should serve the bankrupt's agent with notice of the motion, having previously obtained an order that service on the agent shall be good service. *Ex parte Drake*, 3 Deac. & Chit. 284. 453

A party objecting to the master's report should either present a petition to except to it, or give notice to the other side of the nature of the objection. *Ex parte Millard*, 3 Deac. & Chit. 243. 453

Where a warrant is issued against a bankrupt for non compliance with an order of the court, and the warrant is lost, the court will renew the warrant or grant a copy of it, as a matter of course. *Ex parte Giles*, 3 Deac. & Chit. 620. 453

An order of the Lord Chancellor, made in a suit brought by the assignees, was, on their application, ordered to be registered in the court of Bankruptcy. *Ex parte Williams*, 4 Deac. & Chit. 110. 453

When all is regular, the four day order to pay, &c. or stand committed, is of course at the office. *Ex parte Smith*, 2 Mont. & Ayr. 213. 453

Order for four days' order, towards commitment, must be prayed by petition, not motion; and certificate of registrar of the nonconformity should be dated the very day of the application for the short order. *Ex parte Myers*, 4 Deac. & Chit. 579. 453

Order for committal for disobedience to order to pay into court will not be stayed under any circumstances, unless party has paid the money in, or is ready to do so. *Ex parte Birkett*, 4 Deac. & Chit. 503. 453

Application for warrant of commitment for disobedience of a four-day order is *ex parte*, and quite of course. *Ex parte Hunt*, 4 Deac. & Chit. 500. 453



The court will not issue an attachment in the long vacation, unless there is fear of the party absconding. *Id.*

Where an application is made to rescind an order, on the ground of irregularity, the party ought to state in his notice of motion what the irregularity is. *In re Walker*, 1 Deac. 88; 2 Mont. & Ayr. 267. 453

Quere, whether such an application should not be made by petition? *Id.*

*Signature and Attestation of Petition.*—An objection to the attestation of a petition is not sustainable after an order has been already made upon it. *Ex parte Tanner*, 2 Deac. & Chit. 563. 454

Where such an objection is taken to the attestation of a petition for a supersedeas, it may be amended *instanter*; but not if the petition is to stay a certificate. *Id.*

Where an attestation was in the following form, "Signed by the petitioners, A. B. and C. D., in the presence of T. S., acting as solicitor for A. T., solicitor for the petitioners in this matter," and it appeared that A. T. was not a solicitor of the court: *semble*, nevertheless, that the attestation was good, the petitioners having appeared by counsel. *Id.*

It is no objection to a petition, that the official assignee has signed it, his signature being merely surplage. *Ex parte Belcher*, 2 Deac. & Chit. 507. 454

A special order had been obtained for an agent of the petitioner, who was abroad, to sign the petition on her behalf:—Held, that this might be done under the general order of the 12th August, 1809; and the special order was therefore discharged with costs. *Ex parte Moore*, 2 Deac. & Chit. 369. 454

A petition of assignees is informal, if signed by only one. *Ex parte White*, 3 Deac. & Chit. 366. 454

*Semble*, that such strictness is not now required as formerly, with respect to the attestation of a petition by the solicitor. *Id.*

A libellous handbill, published by the bankrupt, against the assignees and the solicitor to the commission, is not a sufficient ground for discharging an order which allowed the bankrupt to petition in forma pauperis. *Ex parte Morland*, 3 Deac. & Chit. 248. 454

If there be four assignees, and a petition to stay the certificate be presented by three, stating themselves to be "three of the assignees," but the attestation is bad as to two, the petition may be heard as the petition of the one. *Ex parte Burn*, 2 Mont. & Ayr. 483; 1 Deac. 194. 454

The signature of one of three assignees to a petition was attested by the solicitor, who presented the petition under the word "witness," without stating him to be solicitor in the matter of the petition:—Held a sufficient attestation. *Id.*

*Affidavit.*—The office of affidavits is to explain allegations of the petition, and cannot supply the

want thereof. *Ex parte Wyatt*, 1 Mont. & Ayr. 408. 455

Where affidavits in support of a petition are very voluminous, the court of Review will give the respondent time to answer them, upon payment of costs, although the petition is in the paper for hearing, and twelve days have elapsed since the affidavits were filed. *Ex parte Williamson*, 2 Deac. & Chit. 317. 455

On a petition by creditors to supersede, on the ground of fraudulent collusion between the petitioning creditor and the bankrupt, the bankrupt's affidavit detailing the particulars of fraud is admissible in evidence. *Ex parte Arnsby*, 3 Deac. & Chit. 10. 455

Where affidavits are referred to the registrar for scandal, and one of the parties means to except to his report, the exceptions must be taken immediately the registrar certifies. *Ex parte Williams*, 2 Deac. & Chit. 392. 455

An affidavit, though not filed, may be read, upon an undertaking to file it. *Ex parte Baker*, 2 Deac. & Chit. 362. 455

All affidavits filed are considered as read, on the question of costs. *Ex parte Lucas*, 1 Mont. & Ayr. 405. 455

An affidavit, after being filed, cannot be withdrawn so as to prevent the other side from making use of it, on the hearing of the petition. *Ex parte Labrey*, 3 Deac. & Chit. 232. 455

On the hearing of exceptions to the Master's report, those affidavits only in support of or against the original petition can be read which were used in evidence before the Master. *Ex parte Grylls*, 2 Deac. & Chit. 290. 455

An affidavit sworn before the petition is filed cannot be read, but the petition will stand over to have it resworn. *Ex parte Taylor*, 2 Mont. & Ayr. 36. 455

It is an objection to the hearing of a petition, that the affidavits in support of it were sworn before the petition was presented; but the court will sometimes discountenance such an objection by allowing the petitioner to reswear his affidavits, and ordering the petition to stand over for that purpose, and also by refusing the costs of the day to the respondent. *Ex parte Brown*, 3 Deac. & Chit. 496. 455

The motion to confirm a report as to scandal in affidavits, is a motion of course. *Ex parte Hetherington*, 4 Deac. & Chit. 223. 455

It is no objection that an affidavit is sworn before a Master in Chancery. *Id.*

Contrary to *Ex parte Pelham*, (Mont. 211), held, that any party may apply to refer affidavits for scandal, and that the application need not be by the party scandalized. *Id.*

Affidavits are referred for scandal on a motion of course. *Id.*

*Form.*—A petition to stay the certificate, and to prove, was presented:—Held, 1st, that it need not state that the petitioner is a creditor; 2nd, that it need not state when the debt was rejected; 3rd, that it need not state what debt was rejected.



*Ex parte Robinson*, 1 Mont. & Ayr. 705; 4 Deac. & Chit. 499. 454

In order to fix the executor of the petitioning creditor with costs, the petitioner must pray costs against him in his character of executor. *Ex parte Harwood*, 3 Deac. and Chit. 261. 454

Multifariousness is not a sufficient cause for the absolute dismissal of a petition: aliter where the defect is want of proper parties. *Ex parte Devas*, 4 Deac. and Chit. 366: *S. P. Ex parte Brown*, 3 Deac. and Chit. 496. 454

It is no objection to a petition to tax a solicitor's bill, that it contains allegations reflecting on the conduct of the solicitor: for if such allegations are improper, they may be referred for scandal. *Ex parte Wells*, 1 Deac. 69. 454

*Who may Petition.*—Assignees did not prove a debt, owing to their becoming bankrupt, under another commission. The bankrupt is a creditor, who may petition to supersede the other commission if his assignees do not interfere. *Ex parte Taylor*, 2 Mont. & Ayr. 36. 454

In cases of fraudulent fiats the court will not dismiss a petition to supersede, on a preliminary objection that the petitioner is not a creditor. *Ex parte Taylor*, 2 Mont. and Ayr. 37. But see *Ex parte Jarman*, 2 Mont. and Ayr. 119; 4 Deac. and Chit. 393. 454

*Service of Petition.*—The court of Review refused to make an order, that service of a petition against an attorney, for an order to pay certain costs for which he had been declared liable, by leaving a copy at his chambers, should be deemed good service. *In re Sandys*, 3 Deac. and Ch. 34. 456

The petition of an equitable mortgagee must be served upon the assignees; service on the solicitor is irregular. *Ex parte Cooks*, 3 Deac. and Chit. 24. 456

The court of Review directed special service of a petition to annul a fiat, where the petitioning creditor was not to be met with. *Ex parte Pappin*, 2 Deac. and Chit. 361: *S. P. In re Sell*, 2 Deac. and Chit. 333. 456

Where a petition is permitted to stand over to enable the petitioner to be prepared with an affidavit of service, the respondent must have notice of the day when the petition is to be brought on. *Ex parte Mucklow*, 3 Deac. and Chit. 25. 456

A petition to be heard on a particular day should be placed at the head of the paper of that day. *Id.*

It seems that a party may depose *viva voce* to having been served. *Ex parte Tull*, 1 Mont. and Ayr. 225. 456

The court of Review will not advance a petition not yet served. *Ex parte Harding*, 1 Mont. and Ayr. 115. 456

If the sole assignee be a creditor, and sign the consent to a supersedeas, he need not be served with the petition. *Ex parte Ramsay*, 1 Mont. and Ayr. 708. 456

Semble, that the rule, that a bankrupt cannot waive the necessity of personal service of a peti-

tion to stay his certificate, does not apply when a professional person is interposed. *Ex parte Hetherington*, 1 Mont. & Ayr. 607; 4 Deac. & Chit. 218. 456

Where, on a petition to stay the certificate, the bankrupt's solicitor requests delay, and undertakes to serve the petition on the bankrupt, the latter cannot afterwards have the petition called on, out of turn, to be dismissed for want of personal service, according to *Ex parte Moore*, 1 Gl. & J. 253; and *Ex parte Brenchly*, 1 Mont. & Gregg. 161. *Id.*

A petition cannot be advanced before it is served. *Ex parte Matthew*, 2 Mont. & Ayr. 74. 456

The affidavit, on a motion for substituted service, must state that the party wilfully keeps out of the way to avoid service, and is not to be found. *Ex parte Blandy*, 2 Mont. & Ayr. 24; 4 Deac. & Chit. 518. 456

Semble, that service, substituted by order, is tantamount to personal service *eo nomine*. *Id.*

If a fiat is impounded on the application of A., a petition for its delivery out, presented by B., must be served on A. *Ex parte Martin*, 2 Mont. & Ayr. 293. 456

The service of a petition to dismiss a petition for taxation of costs, need not be personal; secus the order for payment of the costs. *Ex parte Stephens*, 2 Mont. & Ayr. 483. 456

When a petition stands over by arrangement, an affidavit of service is not necessary. *Ex parte Ward*, 2 Mont. & Ayr. 391; 1 Deac. 86. 456

A petition to supersede need not be personally served on assignees. *Ex parte Hanks*, 2 Mont. & Ayr. 383. 456

When a petition is not served within the proper time, it must be reanswered. *Id.*

If the time has not elapsed, it may be enlarged. *Id.*

When a petition has been half heard, it cannot be amended, on payment merely of the common costs of the day. *Ex parte Turville*, 3 Deac. & Chit. 346. 456

The respondent not appearing when a petition was called on for hearing, the petitioner took such order as he could abide by. The court refused the application of the respondent, on a subsequent day, to restore the petition to the paper, where the only cause assigned for the respondent's non-appearance was, that his agent had overlooked the entry of the petition on the former occasion. *In re Wilks*, 3 Deac. & Chit. 338. 456

The court will not reanswer a petition for a more distant day, because the respondent has not been served four days before his attendance on it is required. *Ex parte Bicknell*, 3 Deac. and Ch. 551. 456

A party is not entitled to an order on his petition, on the default of the respondent's appearance, if he is not prepared with an affidavit of the service of the petition, notwithstanding the respondent has given an undertaking to appear. *Ex parte Kirkaldy*, 4 Deac. & Chit. 52. 456



A petitioner, claiming a portion of the bankrupt's property, has no right to call for the production of a case stated by the assignees for counsel's opinion, for the purpose of showing that the bankrupt has prevaricated in his statements. *Ex parte Collier*, 4 Deac. & Chit. 364. 456

*Hearing of Petition.*—The objection that the petitioner is not a creditor is not strictly preliminary. *Ex parte Wyatt*, 1 Mont. & Ayr. 406; 3 Deac. & Chit. 665. 456

A petition to except a report is heard before a petition to confirm it, notwithstanding the latter petition stands first in the paper. *Ex parte Cox*, 3 Deac. & Chit. 11. 457

The petition must specify the exceptions. 1d. 457

The master should not draw conclusions of law, but leave the legal result to the court of Review. 1d. 457

Quære whether the court of Review has power to hear a case in private, if they think a public hearing will be detrimental to the interests of justice? In re Chambers, 2 Deac. & Chit. 395. 457

Where a petition stands over to have a viva voce examination, that side begins with whom the affirmative lies. *Ex parte Daly*, 1 Mont. & Ayr. 304. 457

A petition will not be answered *nunc pro tunc* where affidavits have been sworn. *Ex parte Peake*, 1 Mont. & Ayr. 309. 457

The court of Review will allow a petition to be restored to the paper, when it appears that through mistake, &c. the parties were ignorant that the petition was coming on. *Ex parte Thompson*, 1 Mont. & Ayr. 326. 457

Where a petition is in the paper for hearing on Monday, and the respondent only files his affidavits on the previous Saturday, the petitioner is entitled to an order for time to answer them. *Ex parte Gladdish*, 2 Deac. & Chit. 331. 457

Notice must be given of a motion for time to answer an affidavit, unless the motion is made when the petition is called on. *Ex parte Binns*, 3 Deac. & Chit. 189; S. P. *Ex parte Grazebrook*, 3 Deac. & Chit. 199. 457

On an application to adjourn the hearing of a petition, for the purpose of answering affidavits filed in opposition, the court will first hear the petition and affidavits read. *Ex parte Crouch*, 3 Deac. & Chit. 17. 457

The court of Review will not order a petition to stand over, to enable a respondent to file affidavits in rejoinder, without first hearing the affidavits in reply read, to see whether they require an answer. *Ex parte Todd*, 3 Deac. & Chit. 57. 457

Where a party on the hearing of a petition, makes use of an affidavit to prove his case, the court of Review will not, because the affidavit does not go far enough for his purpose, adjourn the hearing of the petition to a future day, to enable him to examine the deponent viva voce, unless the other party consents to such adjournment; for the deponent ought to have been in attendance, if it was likely that his personal examina-

tion would be necessary. *Ex parte Dickenson*, 2 Deac. & Chit. 520. 457

Semble, that when a petitioner obtains a conditional order of the court of Review, he is bound to prosecute such order, under peril of paying costs to the other party. *Ex parte Austin*, 2 Deac. & Chit. 384. 457

Where a petitioner, the respondent not appearing, takes such order as he can abide by, the other side may open the order at any time within six months. *Ex parte Thompson*, 1 Mont. & Ayr. 325. 457

An official assignee not served appeared:—Held, if the commissioner actually directed him to appear, he might take his costs out of the estate; *secus*, if only leave were given. *Ex parte Patrick*, 1 Mont. & Ayr. 393. 457

Where a petition stands over to serve a necessary party, costs of the day are not of course. *Ex parte Thompson*, 1 Mont. & Ayr. 312. 457

If a petition, to confirm a report, stands in the paper before a petition excepting to it, the counsel for the first petition has a right to begin by stating the facts of his petition, before the counsel for the second petition proceeds to state and argue the exceptions. *Ex parte Morley*, 2 Deac. & Chit. 506. 457

To support an objection to the hearing of a petition, on the ground of the costs not having been paid by the petitioner, as directed by a former order, there must have been a personal demand of the costs. *Ex parte Wyatt*, 3 Deac. & Chit. 665. 457

The bankrupt's petition to supersede, for want of the requisites, cannot be heard till he has surrendered, though he be living in America. *Ex parte Kirkman*, 1 Mont. & Ayr. 709. 457

If affidavits have been filed on both sides, the court will read them in the first instance. *Ex parte Dugard*, 2 Mont. & Ayr. 26; 4 Deac. & Chit. 524. 457

A petition is not to stand over to answer affidavits when there is laches. *Ex parte Sidebottom*, 2 Mont. & Ayr. 79. 457

An application for a petition to stand over should be made the day before the petition appears in the paper. *Ex parte Telfourd*, 2 Mont. & Ayr. 389. 457

Where no sufficient advantage will be gained by a viva voce examination, the court will not, after a petition has been opened, and the petitioner has filed affidavits in reply, order the petition to stand over, on his application for that purpose. *Ex parte Jarman*, 4 Deac. & Chit. 393; 2 Mont. & Ayr. 119. 457

*Viva voce Examination.*—An application to examine viva voce, should be made before the petition is heard on affidavit. *Ex parte Baldwin*, 1 Mont. & Ayr. 617; *Ex parte Armsby*, 2 Deac. & Chit. 120; and *Anon.* 2 Deac. & Chit. 140, corrected. 457

Upon a prima facie case, a viva voce examination was ordered, and the advertisement of adjunction postponed. *Ex parte Lavender*, 4 Deac. & Chit. 486. 457



In general, the court will not grant a viva voce examination after hearing a petition on affidavits; but this rule is not inflexible. The party is not estopped by not applying before the hearing. *Ex parte Thompson*, 2 Mont. & Ayr. 40; 4 Deac. & Chit. 534; *Ex parte Baldwin*, corrected. 475

If both parties agree, a viva voce examination is of course; if they do not, the party asking must show cause. *Ex parte Dugard*, 2 Mont. & Ayr. 27; 4 Deac. & Chit. 524. 457

If a viva voce examination be desired by the petitioner, he should state facts on his petition to show the necessity, and make a preliminary application. *Id.*

*Appeal and Rehearing.*—The court of Review has no jurisdiction to dispense with the signature of the petitioner to a petition of appeal under the 1 & 2 Will. 4, c. 56, s. 32, the Lord Chancellor being the proper authority to apply to for that purpose. *Ex parte Robinson*, 2 Deac. & Chit. 583. 458

Semble, that the period of a month, limited by the statute for presenting the petition of appeal, cannot be extended. *Id.*

The court will not vary the minutes of an order, on the application of persons not parties to or bound by it. *Ex parte De Begnis*, 1 Mont. & Ayr. 879. 458

An appeal to the Lord Chancellor from the court of Review does not lie where the point determined is a mere matter of fact; but only where it involves a matter of law or equity, or is connected with the refusal or admission of evidence. *Ex parte Hinton*, 2 Deac. & Chit. 407. 458

Therefore, where the question is merely whether a party is or is not a trader, this is not the subject of an appeal. *Id.*

It is not discretionary in the court of Review to grant a special case, where a party is entitled to an appeal; but he has a right to it if his facts are properly stated. *Id.*

An appeal pending is not a sufficient ground for staying proceedings, more especially when it is plain that the appeal is brought for the purpose of delay. *Id.*

The Lord Chancellor has still a substantive control in cases of supersedeas, or annulling a fiat, although the question may not come before him by way of appeal. *Ex parte Keys*, 3 Deac. & Chit. 263; 1 Mont. & Ayr. 226. 458

Whether the matter appealed against be one of law or fact, the Lord Chancellor will not determine before he hears the petition through. *Id.*

The order to hear an appeal on petition is *ex parte*. *Id.*

Quære, if the court of Review can entertain a petition of appeal from the rejection by the commissioner of a proof of debt on a question of fact? *Ex parte Turner*, 1 Mont. & Ayr. 357, confirming *Ex parte Turner*, 1 Mont. & Ayr. 54. 458

An objection that the court of Review had no jurisdiction cannot be taken on appeal, if not taken below. *Id.*

An application for a rehearing must be by petition, and not by motion. *Ex parte Cunningham*, 3 Deac. & Chit. 70. 459

Where a petition for rehearing states new facts, it should be in the nature of a supplemental petition; and the original petition should be set down for hearing at the same time. *Id.*

On a petition for a rehearing, the party who presents such petition opens the case. *Id.*

On an appeal in bankruptcy, the appellant's counsel are entitled to open the case. *Ex parte Belcher*, 3 Deac. & Chit. 87. 458

A petition cannot be heard to vary a former order merely as to costs; more especially when that order was made a twelvemonth ago, and was drawn up by the very parties who apply to vary it. *Ex parte Burnell*, 2 Deac. & Chit. 640. 458

Although six months is the time limited by the court of Review for presenting a petition for rehearing, semble, that under special circumstances, it may be dispensed with. *Ex parte White*, 2 Deac. & Chit. 334. 458

The rule that no petition for rehearing is allowed for costs only, does not apply (come semble) to a petition for a rehearing on the ground of an erroneous decision on the merits, although the material defect of such decision may be to render the party liable for costs. *Id.*

Where an order made in bankruptcy reserves further directions and costs, a subsequent application to the court of Review as to the costs merely may be entertained by motion; but if it is by way of further direction, it must be by petition. *Ex parte Shadbolt*, 2 Deac. & Chit. 286. 458

The solicitor for the respondents ought to have notice of such an application, as well as the respondents themselves. *Id.*

It is the practice in bankruptcy for the petition for a rehearing and the petition itself to come on at the same time. *Ex parte Thompson*, 1 Mont. & Ayr. 326. 458

A petition of rehearing in bankruptcy is not limited to six months. *Ex parte Greenwood*, 1 Mont. & Ayr. 65; 3 Deac. & Chit. 398. 458

A petition for rehearing need not state the ground upon which the rehearing is sought. *Id.*

The court will not order a petitioner residing out of its jurisdiction to give security for, or pay into court, a sum of money which he had been declared entitled to by a previous order, merely because the respondent intends to appeal against the order, if there is no probability of a different decision on the appeal. *Ex parte Davidson*, 3 Deac. & Chit. 447. 458

The rehearing of a former petition may be brought on, on a petition for rehearing it, without obtaining a previous order for the rehearing. *Ex parte Thompson*, 3 Deac. & Chit. 612. 458

The court will not vary the minutes of a former order, which has been pronounced more than three months, except on a petition for rehearing. *Ex parte Wilson*, 4 Deac. & Chit. 157. 458



Where a party wishes an essential alteration to be made in the judgment of the court, as pronounced on a former hearing, he must not apply to amend the minutes of the order, but must petition for a rehearing. *Ex parte Soper*, 3 Deac. & Chit. 275, 569; 2 Mont. & Ayr. 58. 458

The general rule is, that a petition may be reheard on newly discovered facts. *Ex parte Lavender*, 2 Mont. & Ayr. 117; 4 Deac. & Chit. 497. 358

But a petition for a supersedeas, or to stay the certificate, cannot be reheard on new evidence. *Id.*

**Special Case.**—It is imperative on the judges of the Court of Review to sign a special case. *Ex parte Turner*, 1 Mont. & Ayr. 368. And see *Ex parte Hawley*, 3 Deac. & Chit. 234. 458

Every special case of appeal from the court of Review, tendered for the approval of the judges, shall be left for that purpose at the office of the registrar, signed by counsel for the respective parties, or accompanied with a certificate from the counsel for the appellant, that there is, in their judgment, good cause for such appeal, and an affidavit that a copy of such case has been delivered to the solicitor for the other party eight days prior to such tender thereof. General Order, Court of Review, May 22, 1833, 2 Deac. & Chit. 632; 1 Mont. & Ayr. 749. 458

On an appeal from the court of Review, on a special case, the Chancellor will not at the hearing permit the appellant to present a petition for liberty to proceed "otherwise," for the purpose of rectifying an error in the settlement of the special case. *Ex parte Low*, 1 Mont. & Ayr. 189. 458

The determination of the judge is final as to the settlement of it. *Id.*

The Great Seal will not make an order, that an appeal from the court of Review shall be brought on by petition, instead of a special case, merely on the ground that the matters of law and fact are of a complicated nature, or that the affidavits are voluminous. *Ex parte —*, 1 Deac. 75. 458

Where a party obtains an order of the Lord Chancellor to hear an appeal on petition, instead of on a special case, and the order is improperly obtained, the respondent must move to set it aside, and not wait to make his objection to the form of the proceeding until the petition is called on for hearing. *Ex parte Keys*, 3 Deac. & Chit. 263; 1 Mont. & Ayr. 236. 458

After a special case has once been certified by the chief judge, the court has no jurisdiction to disallow it. *Ex parte Hawley*, 3 Deac. & Chit. 656. 458

**Costs.**—Costs of preparing a special case form part of the costs of appeal to the Lord Chancellor, and should be taxed by the officer in Chancery. The court intimated its opinion to that effect accordingly to such officer. *Ex parte Hawley*, 4 Deac. & Chit. 574; S. P. *Ex parte Richards*, 2 Mont. & Ayr. 59. 458

Costs ordered against bankrupt may be set off against those ordered in his favor. *Id.*

Where the commissioners expunged a proof, on the application of the assignees, and the creditor afterwards succeeded on a petition to have it restored, the court gave him the costs of the petition, as well as of the proceedings before the commissioners; making it an exception to the general rule, that costs are not given against the decision of the commissioners. *Ex parte Brooks*, 4 Deac. & Chit. 209; 2 Mont. & Ayr. 78. 458

On a petition to surrender, where there is no wilful default, costs come out of the estate. *Ex parte Smith*, 2 Mont. & Ayr. 302. 458

Where a party petitions against the decision of the commissioners, and an action is directed to be brought, the result of which is in his favor, he is not entitled to the costs of the petition, but only to the costs of the action. *Ex parte Millington*, 3 Deac. & Chit. 307. 458

An attachment for nonpayment of costs is of course, after disregard of the four-day order, but, unless *ex necessitate*, will not be issued in vacation. *Ex parte Hunt*, 2 Mont. & Ayr. 18. 458

An order of committal for non-payment of costs, under which the party is committed, will not be suspended on the ground of an appeal, unless the costs are paid into court. *Ex parte Fox*, 2 Mont. & Ayr. 18. 458

In cases of scandal, the costs are as between solicitor and client. *Ex parte Porter*, 2 Mont. & Ayr. 220. 458

The rule, of not allowing costs to a party appealing against the judgment of the commissioners, will be relaxed in favor of a petitioner, establishing a clear and indisputable right of proof which the commissioners have rejected. *Ex parte Hooper*, 3 Deac. & Chit. 655. 458

Though an affidavit, alleged to be impertinent, is not read, it will be included in the order for costs by the registrar, unless ordered to be excluded at the hearing. *Ex parte Barrington*, 2 Mont. & Ayr. 72. 458

All affidavits are considered as read on the subject of costs. *Id.*

In cases of fraud, costs may be granted, though not prayed. *Ex parte Taylor*, 2 Mont. & Ayr. 38. 458

When a petition is dismissed with costs, the court will not limit the payment of the costs, merely as to the affidavits that were read on the hearing of the petition; for, in general, all affidavits filed are entered as read. *Ex parte Lucas*, 3 Deac. & Chit. 664. 458

Where the respondent takes a formal objection to a petition, for want of parties, and the petition is for this cause ordered to stand over; the costs of the day are in the discretion of the court. *Ex parte Thompson*, 3 Deac. & Chit. 612. 458

When an order is made on the hearing of a petition that the party shall pay the costs, this includes the costs of an affidavit filed by the other party, although it was not read on the hearing of the petition. *Ex parte Sidebotham*, 4 Deac. & Chit. 141. 458



Where petitioners come voluntarily before the court, to enforce an illegal order made by a commissioner, they will not be protected by such order from having their petition dismissed with costs. *Ex parte Benham*, 1 Deac. 26; 2 Mont. & Ayr. 272. 458

### XXIX. PROCEEDINGS.

The solicitor is bound to deliver up the proceedings to a fresh solicitor appointed by the surviving assignee, without waiting until a fresh assignee is chosen in the room of the one who is dead. *Ex parte Ackroyd*, 3 Deac. & Chit. 21. 460

The court of Review made an order on the solicitor to the commission to deliver up the proceedings, and pay over the monies to the assignees. *Ex parte Hudson*, 2 Deac. & Chit. 507. 460

The solicitor was allowed to take affidavits off the file to attend the trial of an action therewith, undertaking to return them in the same state. *Ex parte Whalley*, 1 Mont. & Ayr. 634. 460

If the two assignees sign a joint order on the solicitor to deliver up the proceedings, the court will enforce it, though one subsequently virtually countermand the order. *Ex parte Grazebrook*, 2 Mont. & Ayr. 53, n. 459

Where the majority of the assignees wish the proceedings to be in the hands of a particular solicitor, the order is of course for their delivery accordingly, unless gross misconduct be charged, and a cross petition for removal, or an injunction. *Ex parte Halford*, 2 Mont. & Ayr. 52; 4 Deac. & Chit. 271. 459

Under the 6 Geo. 4, c. 16, s. 96, the court have a general power upon petition, to direct the proceedings to be entered of record. *Ex parte Thomas*, 3 Deac. & Chit. 292. 458

A notice to produce the proceedings must be served on the assignees, not on the bankrupt. *Ex parte Daly*, 4 Deac. & Chit. 364. 459

### BARRISTER.

The right of practising, pleading, and audience, in the court of Common Pleas, during term time, upon and from the first day of Trinity term, 1834, ceased to be exercised exclusively by the sergeants at law, and from that day King's counsel and all other barristers at law, according to their respective ranks and seniority, have and exercised equal right and privilege of practising, pleading, and audience, in the said court of Common Pleas at Westminster, with the sergeants at law. King's warrant, 25th April, 1834. 460

A mandamus does not lie to compel a party who has been elected principal of an inn of Chancery to attend before the benchers of the inn of court to which such inn of Chancery is attached, for the purpose of enabling such benchers to decide upon the validity of his election, unless it be shown that the benchers of such inn of court have on some former occasion exercised such jurisdiction in invitum. *Rex v. Allen*, 3 Nev. & M. 184; 4 B. & Adol. 964. 460

It was agreed that the trial of an indictment at the sessions should be postponed, the defendant agreeing to pay the costs of the day. The costs were taxed; and at the subsequent sessions, the counsel for the prosecution asked if there was any objection to the amount. The defendant's counsel said there was not, except as to 1*l.* 9*s.* The attorney for the prosecution said he would give up that sum, and the defendant's attorney said he would give a check for the residue. After this, the defendant was applied to for payment, and he said his attorney, who received his rents, would arrange it:—Held, that the indorsement on the brief was an agreement, and, also, that on this evidence the plaintiff could recover the amount of the taxed costs, minus 1*l.* 9*s.* on the count upon the account stated. *Porter v. Cooper*, 1 C. M. & R. 387; 6 C. & P. 354; 4 Tyr. 456. 461

Barristers, under the degree of the coif, are, as well as sergeants, competent to sign pleas in the court of C. P. *Power v. Izod*, 1 Bing. N. R. 304. 461

Whether, in a civil case, if a party conduct his own cause and examine the witnesses, he can be allowed to have assistance of counsel to argue points of law:—*Quere*, but semble that he cannot. *Moscatti v. Lawson*, 7 C. & P. 32—*Alderson*. 461

The court will not interfere in questions arising upon the practice of retainer. *Baylis v. Groat*, 2 Mylne & K. 316. 461

A motion for an injunction to restrain a particular counsel, who had acted for the defendants, from acting, at a subsequent stage of the proceedings, on behalf of the plaintiffs, from whom he had received a retainer, was refused. *Id.*

Seem, no affidavit is necessary to substantiate between counsel what terms were offered or accepted by them on the hearing of a cause. *Ilgulden v. Terson*, 2 Dowl. P. C. 277; 4 Tyr. 309. 461

### BASTARD.

Access is such access as affords an opportunity of sexual intercourse; and where there is evidence of such access between a husband and wife within a period capable of raising the legal presumption as to the legitimacy of an after born child, the court will not direct an issue upon evidence showing the continued adulterous intercourse of the wife with another man, and the improbability of the husband being the father, but will declare the legitimacy of the child. *Bury v. Phillipot*, 2 Mylne & K. 349. 461

At the trial of an issue on a question of legitimacy, a witness was called to prove a fact, showing that there might have been access between a husband and wife at a particular place and time. This witness had not been examined in a suit in the Ecclesiastical Court, to which the mother of the child whose legitimacy was disputed was a party, and in which his evidence would have been material to her; nor was any attempt made by her in that suit to establish the case of access, which his testimony went to make out. The



testimony of this witness was a surprise upon the party against whom it was produced, and its accuracy being impeached by affidavits, the court directed a new trial of the issue. *Gibbs v. Hooper*, 2 Mylne & K. 353. 461

To give jurisdiction to magistrates to make an order of affiliation, under 18 Eliz. c. 3, s. 2, it is necessary that it should be for the relief of a parish in which the illegitimate child was born, and to which it is chargeable. *Rex v. Wilson*, 4 Nev. & M. 243; 2 Adol. & Ellis, 230. 462

Where an order of affiliation, in which the birth of an illegitimate child is alleged to have taken place in A., is confirmed by an order of sessions, subject to a case in which the birth is stated to have occurred in B., to which the putative father had fraudulently removed the mother, who was settled in A.:—Held that the order is bad on the ground (*inter alia*) that it contains a recital of a false fact. *Id.*

By the 4 & 5 Will. 4, c. 76, s. 57, the putative father of a bastard child born before the passing of the act, whose mother is married to another person, is no longer liable to an order of justices for the maintenance of such child, at least while the husband is of ability to maintain it. *Lang v. Spicer*, 1 Mees. & Wels. 129. 462

Semble, that the 4 & 5 Will. 4, c. 76, s. 57, operated as a repeal of the 18 Eliz. c. 3, s. 2, & 49 Geo. 3, c. 68. *Id.*

At the time of making an order of bastardy, the magistrates' clerk delivered an order in a correct form to the parish officers, but delivered to the reputed father an order in which the mother was ordered to pay 1s. 6d. weekly, instead of the father; but, at the same time, the magistrate told the reputed father that he must pay 1s. 6d. per week, and the parish officers afterwards served him with a copy of the order in their possession:—Held, that as the parish officers were the proper parties to have the custody of the order of bastardy, the one delivered to them must be deemed the original, and the defective order to the father only a "notice thereof," under 18 Eliz. c. 3, s. 2, the defect in which might be cured by the statement of the magistrate at the time of making the order, or by a subsequent service of a correct copy of the valid order; and that the father was not justified in refusing to pay the arrears of the maintenance. *Wilkins v. Wright*, 2 C. & M. 191; 3 Tyr. 824. 463

A warrant of commitment for neglecting and refusing to pay a sum awarded by an order of maintenance, under 43 Geo. 3, c. 68, s. 3, must show clearly all that is required by the statute to give the magistrate authority to commit; and therefore such commitment is bad where it omits to state that there was a complaint on oath by one of the overseers of the parish liable to maintain the child, an adjudication by the magistrate, that at the time of the commitment a sum was due and unpaid, that the party charged was called upon for his defence, and that he did not show any reasonable or sufficient cause for not paying. *Id.*

Semble, it should also show that the order of

affiliation was unappealed against, or that it was appealed against and confirmed. *Id.*

A notice of an intended application to the sessions, under 4 & 5 Will. 4, c. 76, s. 73, for an order on the putative father of a bastard child, must be given under the hands of the overseers or guardians; it lies upon them to show that proper notice was given, and the objection is not waived, though the father appears at the sessions, and takes an objection to its being the next sessions, and does not produce the original notice served upon him. *Rex v. Carnarvonshire (Justices)*, 5 Nev. & M. 361; 1 Har. & Wol. 324. 464

When a bastard child becomes chargeable a month before the Epiphany sessions, an application for an order to charge the putative father is not too late at the Easter sessions, *semble*. *Id.*

A bastardy bond conditioned for the payment of the charges incurred "by reason of the birth, education, and maintenance of a bastard child," cannot be enforced after the bastard has attained 21 and ceased to be chargeable, though he may afterwards become chargeable again. *Wandley v. Smith*, 2 C. M. & R. 716. 464

## BILLS OF EXCHANGE AND PROMISSORY NOTES.

*Parties.*—A. and B. sign a formal promissory note, by which they promise, "as churchwardens and overseers," to pay to C. or order a sum of money, with interest; which sum was in fact the amount of a loan made by C. for the use of the parish. A. and B. are personally liable upon such note. *Crew v. Pettit*, 3 Nev. & M. 456; S. C. nom. *Rew v. Pettit*, 1 Adol. & Ellis, 196. 469

The cases enumerated by 3 & 4 Anne, c. 9, s. 1, in which promissory notes signed by an agent cannot be assigned, are instances only. *Dickenson v. Teague*, 4 Tyr. 450. 469

A bill was drawn on the consignees of a cargo of coals shipped to R. by a broker at N., who had effected the purchase there. That bill was returned to the payee, the coal-owner, unaccepted, on account of the date being too short. The broker having directed the payees to prepare another bill at a longer date, they did so, and sent it to his counting-house in N. for his signature. The broker had, in the mean time, left N. in pecuniary embarrassment; and his brother, the defendant, had come to the counting-house to investigate his affairs. The defendant, in the absence of his brother, and at the request and for the convenience of the plaintiffs, signed the bill they had prepared, without qualification of his liability:—Held, that he was personally liable. *Sowerby v. Butcher*, 2 C. & M. 368; 4 Tyr. 320. 469

Where, in an action on a bill of exchange by an indorsee, it is pleaded by the acceptor that the drawer is a married woman, the plaintiff may show in his replication that she drew and indorsed the bill with the authority of her husband, without its being deemed a departure. *Prince v.*



*Brunette*, 3 Dowl. P. C. 382; 1 Scott, 342; 1 Bing. N. R. 485. 470

A promissory note, made payable to a woman who is married at the time of the making, passes by the indorsement of the husband alone during the coverture. *Mason v. Morgan*, 2 Adol. & Ellis, 30; 4 Nev. & M. 46. 470

*Form and Operation.*—A note whereby a party promises "to pay or cause to be paid 130*l.*" is a promissory note, and may be declared on as such, and does not require an agreement stamp. *Lovell v. Hill*, 6 C. & P. 238—*Gurney*. 471

"I promise to pay to M. A. D. or bearer, on demand, 16*l.* at sight, by giving up clothes and papers, &c." was sued on as a promissory note:—Held, that if the jury thought that the clothes &c., had been previously given up by the payee to the maker, it was a good promissory note, as the words in that case would only import the value received. *Dixon v. Nuttall*, 1 C. M. & R. 307; 6 C. & P. 320; 4 Tyr. 1013. 471

Held, also, that no action was maintainable without a presentment at sight. *Id.*

When a note is payable fourteen days after date, and is not deposited as a collateral security, nor is the consideration disputed, no parol testimony is admissible to prove any agreement that it was not to be paid if a verdict was obtained in an action then pending between other parties; for that would be to contradict a written contract by parol evidence. *Foster v. Jolly*, 1 C. M. & R. 703; 5 Tyr. 239; S. C. nom. *Foster v. Sibley*, 1 Gale, 10. 471

An instrument was made, whereby the defendants promised to pay to the plaintiffs, or order, a sum certain by instalments; but it was thereby declared, "that it was thereby considered and fully intended by the receiver, as well as the giver of that note of hand, that all installed payments thereupon whatsoever, from and immediately after the decease of the plaintiff, should cease and become null and void to all intents and purposes, against the executors, &c." A declaration described the instrument as an agreement or instrument in writing:—Held, that a plea that the defendants did not make the said supposed promissory note in the declaration mentioned, was bad on special demurrer. *Worley v. Harrison*, 5 Nev. & M. 173; 1 Har. & Wol. 426. 472

Such an instrument is not a promissory note, being payable only on a contingency. *Id.*

*Form of note.* *Bolton v. Dugdale*, 4 B. & Adol. 619; 1 Nev. & M. 412. 473

The court refused to set aside a demurrer under the late rule, as being frivolous, the cause of demurrer being, that, in debt on a promissory note, it did not appear that the words "value received" were in the note. *Creswell v. Crisp*, 2 Dowl. P. C. 636; 2 C. M. & R. 634; 4 Tyr. 991. 474

A sum of 400*l.* belonging to A. was put by

him into the hands of B., his solicitor, who laid it out on mortgage, and the deeds were deposited with A. Interest being in arrear, and A. pressing for payment, B. gave a promissory note, payable three months after date, to A. for the amount of principal and interest; and it was agreed, at the time of giving the note, that A. should deliver up the deeds to B., and should hold the note till the sale of the mortgaged premises should be completed. When the note became due, A. sued B. upon it, though the deeds had not been delivered up, or the sale of the mortgaged premises been completed. The judge left it to the jury to say whether the note was given on a condition precedent, that the deeds should be delivered up:—Held, that it ought to have been left to them to say what the consideration of the note was, and whether it had wholly failed or not. *Richards v. Thomas*, 1 C. M. & R. 772. 473

On an action coming on to be tried at the assizes, an agreement in writing was entered into, that the trial should be postponed to the next assizes, on the defendant in that action, and the now defendant, undertaking to give the plaintiff a promissory note payable on demand, by way of security, in case the plaintiff should recover a verdict against the then defendant, to be given up if the plaintiff, the payee, should fail in that action. The note was accordingly given, but, after it was signed, a memorandum was indorsed upon it, stating that the note was given upon the condition mentioned in the agreement:—Held, that this indorsement was to be considered as merely a marking of the note for the purpose of identification, and not as an incorporating of the agreement, so as to render the note an agreement or a conditional promise. *Brill v. Cock*, 1 Mees. & Wels. 232. 473

Declaration on a bill of exchange, drawn by N. on the defendant, requiring the defendant to pay "to his order" the sum therein mentioned, accepted by the defendant, and indorsed by N. to the plaintiff:—Held, that the court could see that the word "his" referred to the drawer; and therefore there was no fatal ambiguity. *Spyer v. Thelwell*, 2 C. M. & R. 692; 4 Dowl. P. C. 509. 474

Held, no objection to the validity of a bill of exchange, that the acceptance and indorsement were written before the bill was drawn, notwithstanding the indorsement was made by a stranger to the acceptor:—Held also, that the drawer having subscribed himself as Tho. Wilson, when his name was Thos. Wilson Richardson, was not to be esteemed to have committed a forgery, unless it were proved that the omission of his surname was for purposes of fraud. *Schultz v. Astley*, 2 Bing. N. R. 544; 7 C. & P. 99. 474

*Stamp.*—A joint and several promissory note was made by several parties concerned in a joint undertaking, for the purpose of securing the repayment of a loan of money; and one of the parties signed it some days after the party who borrowed the money:—Held, that the note did not require an additional stamp, if the last signature was put before the money was advanced,



or if the party last signing had promised to sign the note before the advancement of the money, notwithstanding it might not have been signed till afterwards. *Ex parte White*, 2 Deac. & Chit. 334. 475

A promissory note payable to A. B. generally, is not any payable to bearer on demand, and re-issuable, within the first class of notes described in 55 Geo. 3, c. 184, sched. part 1, but a note payable otherwise than to bearer on demand, (not reissuable) within class 2, and therefore such a note for 100*l.* requires a stamp of 3*s.* 6*d.* only. *Cheetam v. Butler*, 5 B. & Adol. 837; 2 Nev. & M. 453. 475

A note for 200*l.* with a lawful interest reserved from a day prior to the date, requires a stamp applicable to a note for 200*l.* only. *Wills v. Noott*, 4 Tyr. 726. 475

In an action on a bill of exchange, a plea that the consideration was cash paid by the plaintiffs as bankers on drafts made more than 15 miles from their place of business, &c. was held bad after pleading over, it containing no allegation that the drafts were payable on demand, or that the amount of any of them was 40*s.* *Greene v. Alliday*, 1 Gale, 218. 475

A promissory note was made for payment of 20*l.* to B. on demand, with lawful interest till payment, for value received:—Held, that this was a note of the second class mentioned in 55 Geo. 3, c. 184, viz. payable otherwise than to bearer within two months after date, and therefore required only a 1*s.* 6*d.* stamp. *Dixon v. Chambers*, 1 C. M. & R. 845; 5 Tyr. 502; 1 Gale, 14. 475

Stamp on bills post dated. *Williams v. Jarrett*, 5 B. & Adol. 32; S. C. nom. *Williamson v. Garratt*, 2 Nev. & M. 49. 475

*Made abroad.*—A bill of exchange drawn in England upon a person abroad, but accepted by him, payable in England, is an inland bill, and requires a stamp as such. *Ammer v. Clark*, 2 C. M. & R. 468; 1 Gale, 191. 477

A set of foreign bills, drawn abroad, was sent to the drawee, (who was also the payee), the defendant, who accepted two parts, and indorsed one to the plaintiff for value, prior to which the other had been indorsed by the defendant to his father conditionally, but who had never insisted on payment, but gave it up on the substitution of other securities:—Held, that the plaintiff was entitled to recover, and that the bill did not require a stamp; held, also, by Lord Tenterden, C. J. and Parke, J., (dubitante Littledale, J.), that it would have been the same if the first part had been indorsed and delivered unconditionally. *Holdsworth v. Hunter*, 5 M. & R. 393. 477

*Alteration.*—In an action by the payee against the acceptor of a bill of exchange, it appeared that the bill had originally been accepted by the defendant, payable at his own house in King's Road, Chelsea; but six weeks after the delivery of the bill to the plaintiff, the defendant, at the request of the plaintiff, altered the description,

by making it payable "at Bland's, Great Surrey Street, Blackfriars:"—Held, that this alteration was immaterial. *Walter v. Cubley*, 2 C. & M. 151; 4 Tyr. 87. 479

In an action by the indorsee against the acceptor of a bill of exchange, the bill appeared, on inspection, to have been altered in amount, and after the acceptance were the words "at Cockburn's," which were not in the defendant's handwriting. Neither the plaintiff nor defendant gave evidence as to when or by whom the alterations were made:—Held, that it was for the jury to say, under the circumstances, whether the bill had been altered after acceptance, and that, if they thought it had, the plaintiff could not recover. *Taylor v. Mosely*, 6 C. & P. 273—*Lyndhurst*. 479

Where the plaintiff declares on an altered bill of exchange, the defendant, on a plea denying the acceptance, may show a material alteration since he accepted it. *Cock v. Coxwell*, 2 C. M. & R. 291; 4 Dowl. P. C. 187; 1 Gale, 177. 479

Where the buyer of goods paid for them by his own acceptance, and after the bill had been accepted, the seller altered the date of it, and thereby vitiated it:—Held, that by so doing he did not preclude himself from suing for the original debt; and consequently that he might recover for the goods sold. *Atkinson v. Hawdon*, 4 Nev. & M. 409; 2 Adol. & Ellis, 626; 1 Har. & Wol. 77. 479

The holder of a bill for 18*l.*, which had been dishonored, agreed to take 8*l.* in cash and another bill for 10*l.* from the drawer. The drawer accordingly drew another bill upon the same acceptor for that amount; while in the hand of the drawer, the acceptor, without the knowledge of the drawer, altered the date and vitiated the bill:—Held, that the latter bill being a nullity, the first was not discharged, and that the drawer was liable upon it. *Sloman v. Cox*, 1 C. M. & R. 471; 5 Tyr. 174. 479

*Transfer.*—A., the drawer of a bill, gave it to B., unindorsed, to present it for payment. B. did so, and got it noted. Afterwards A. indorsed the bill, and gave it to B. to obtain payment:—Held, that this indorsement was sufficient to enable B. to recover in an action against the acceptor, notwithstanding A. said, upon the trial, that B. was indebted to him, and that he did not give him any authority to bring the action. *Adams v. Oakes*, 6 C. & P. 70—*Gurney*. 480

The right of action upon a bill of exchange, accepted for value, may be transferred by indorsement without value, as by way of gift. *Heydon v. Thompson*, 3 Nev. & M. 319; 1 Adol. & Ellis, 210. 480

In an action by B., indorsee, against C., acceptor, C. pleads that the acceptance was obtained from him without consideration by the fraud of A., the drawer, and the bill was indorsed to B. without consideration and with notice of the fraud, and of the want of consideration, as between A. and C. Semble, that B. may reply, merely traversing the fraud. *Id.*



If, however, B. newly assigns a different bill, accepted generally, and the defendant pleads as before, omitting the statement of the original want of consideration, a replication to such plea, merely traversing the fraud, is sufficient. *Id.*

The defendant, the indorsee of a promissory note, which was not negotiable by reason of its not being payable to order, indorsed it to the plaintiff in payment for goods; the plaintiff neglected to present the note when it became due, and it remained unpaid:—Held, that the plaintiff could, notwithstanding, recover the price of the goods sold from the defendant, as the note not being originally negotiable, the plaintiff had not been guilty of laches in not presenting it, and the transfer did not amount to a new making, for want of a stamp. *Plimley v. Westley*, 2 Bing. N. R. 249; 2 Scott, 423; 1 Hodges, 324. 480

The payee of a bill of exchange indorsed it specially to the plaintiffs, and immediately after the special indorsement the defendant indorsed the bill, and then the plaintiffs indorsed it:—Held, that the defendant's indorsement was an equivalent to a new drawing by the defendant, and that he was liable to be sued upon the bill by the plaintiffs:—Held, also, that a fresh stamp was not necessary. *Penny v. Innes*, 1 C. M. & R. 439; 5 Tyr. 107. 480

As by the law of France an indorsement in blank does not transfer any property in a bill, the holder of a bill drawn in that country, and indorsed there in blank, cannot recover against the acceptor in the courts of this country. *Trimbeu v. Vignier*, 1 Bing. N. R. 151; 4 M. & Scott, 695; 6 C. & P. 25. 481

The indorsee of an over-due bill or note, is affected by all equities attaching to the bill or note; but not by a set-off, which would have been available against the indorser. *Borough v. Moss*, 5 M. & R. 236. 481

To assumpsit on a bill of exchange by indorsee against drawers, it was pleaded that the bill was drawn by a partner, but not for partnership purposes, and was indorsed to the plaintiff after it became due. The replication was, that it was not indorsed after it became due, but was indorsed to and taken and received by the plaintiff before it became due:—Held, that it was sufficient for the plaintiff to put in the bill, and not necessary that he should give any evidence to show that the bill was indorsed to him before it became due. *Parkin v. Moon*, 7 C. & P. 408—*Alderson*. 481

Semble, that the old established rule of law, "that the holder of bills of exchange indorsed in blank, or other negotiable securities transferable by delivery, can give a title which he does not himself possess to a person taking them bona fide for value," is not to be qualified by treating it as essential that the person should take them with due care and caution, but that the person taking them bona fide for value, has a good title, though he take them without care or caution, except so far as the want of such care and caution may affect the bona fides and honesty of the transaction. *Foster v. Pearson*, 1 C. M. & R. 849; 5 Tyr. 255. 481

The plaintiff being drawer and payee of a bill of exchange, handed it to H. to get it discounted. H. offered it for that purpose to the defendant, stating that it was not his, but plaintiff's bill. Defendant refused to discount it unless indorsed by H. H. said that he had no interest in it, but to facilitate its being cashed he would indorse it. He did indorse it, upon which defendant took the bill, paid H. only a part of its amount, and got it discounted by one G. The plaintiff was obliged to take it up at its maturity, and sued the defendant on it for the balance unpaid to H. A verdict for defendant was set aside as against the evidence, and a new trial was awarded to try the question, whether the plaintiff was the real owner of the bill at the time it was indorsed, and not whether or not he had at that time been represented to be so by H. *Bastable v. Poole*, 1 C. M. & R. 411; 5 Tyr. 111. 483

A bill of exchange was indorsed by the payee to the Manchester and Liverpool District Banking Company, who indorsed it, and added to their indorsement the following memorandum,—"In need, S. P. & Co." After several other indorsements, the bill was indorsed in blank to the bank of Liverpool, who indorsed it in blank to the plaintiff, who indorsed it specially—"Pay Messrs. Terney & Farley or order," who indorsed it in blank by writing thereon—"Thomas Terney & Farley." After passing through several other hands, the bill when due was duly presented at S. A. & Co., London, bankers, where it was made payable by the acceptance, and was dishonored, the answer being "no advice." On the same day it was presented at S. P. & Co.'s, London, bankers, where it was by the said memorandum to be paid in case of need. S. P. & Co. refused to pay it solely on the ground of the irregularity of Terney & Farley's indorsement. The custom of London bankers was admitted to be to refuse all bills, even their own acceptances, where there is a letter wrong in any indorsement. The bill was returned with due notice to the plaintiff, who gave due notice of dishonor to the Liverpool bank. At the Liverpool bank the irregularity was pointed out to the plaintiff, who, by their recommendation sent the bill to Terney & Farley, who lived in Ireland, to rectify the mistake, and the bill, with the proper indorsement on it, was then sent up to London, and again presented at S. P. & Co.'s, who then refused to pay it as being out of time:—Held, that the bank of Liverpool were liable to the plaintiff on the bill. *Leonard v. Wilson*, 2 C. & M. 569; 4 Tyr. 415. 483

Where a bill of exchange has been negotiated by means of a forgery of the name of the payee as indorser, a court of equity will restrain even a bona fide holder of the bill from suing the acceptor, and will direct the forged instrument to be delivered up to be cancelled. *Edaile v. La Nauze*, 1 Y. & Col. 394. 483

Where the original indorsement of the payee's name on a bill of exchange is a forgery, a real indorsement by the payee after the bill has arrived at maturity, will not give the holder any title. *Id.*



**Acceptance.**—It is the regular and usual course of business in commercial transactions to deliver out a bill of exchange, left for acceptance to any person who mentions the amount, and describes any private mark upon it; and if the clerk of the party leaving it, by his conduct enables a stranger to discover the mark or number, in consequence of which the bill is delivered out to him, the party leaving it cannot maintain trover for the bill against the party who so delivered it out. *Morrison v. Buchanan*, 6 C. & P. 18—Littl. 486

The circumstances of fraud stated in the plea being, that the defendant wrote his name and a qualified acceptance on a blank piece of stamped paper, and delivered it to the drawer for the purpose of his drawing thereon a bill payable at nine months; but that the drawer drew upon such paper a bill payable at six months: the court held, that a replication, merely denying that the defendant wrote his name or a qualified acceptance on a blank piece of stamped paper, in manner and form, &c., sufficiently put in issue the whole fraud. *Heydon v. Thompson*, 3 Nev. & M. 319. 487

In assumpsit by the indorsee against the acceptor of a bill of exchange, if it appear, there are words not in the acceptor's handwriting, making the bill payable at a particular place, it is incumbent on the plaintiff to show that the words were written by the acceptor's authority; and it seems that the addition of such words is a material alteration of a bill since, and notwithstanding the passing of the stat 1 & 2 Geo. 4, c. 78. *Deadbrow v. Weatherley*, 6 C. & P. 758—Tindal. 489

In an action by the indorsee against the acceptor of a bill of exchange, it is competent to the acceptor to show that the acceptance was for the accommodation of the plaintiff, and that he has received no consideration from the drawer, and that it was agreed that the bill, when due, should be taken up by the plaintiff. *Thompson v. Clabley*, 1 Mees. & Wels. 212. 489

On the presentment for acceptance of certain bills of exchange, the drawee said that he would have accepted them if he had funds, (meaning the fund on account of which the bills were drawn); that he had not been able to obtain those funds from France; but that when he did obtain them he would pay the bills:—Held, that this amounted to a conditional acceptance of the bills; and that the defendant, having subsequently become possessed of the fund in question, was bound to pay the bills. *Mendizabal v. Machado*, 3 M. & Scott, 841; 6 C. & P. 218. 490

By accepting a bill payable to the drawer's order, drawn and indorsed in a fictitious name, the drawee undertakes to pay to the signature of the same person as indorser, who signed as drawer. The indorsee of such a bill suing the acceptor, may by comparison of the signatures show that the drawing and the indorsement are in the same handwriting. *Cooper v. Meyer*, 5 M. and R. 387. 490

**Presentment.**—Presentment of checks. *Bodington v. Schlenker*, 4 B. & Adol. 752; 1 Nev. & M. 541. 493

A banker is not bound to pay after banking hours a bill which is accepted payable at his house. The presentment in the evening by the notary's clerk is not a presentment for payment. *Whitaker v. England (Bank)*, 6 C. & P. 700; 1 C. M. & R. 744; 5 Tyr. 268; 1 Gale, 54. 493

Allegation of presentment. *Parkes v. Edge*, 1 C. & M. 429; 1 Dowl. P. C. 643; 3 Tyr. 364. 495

In an action by an indorsee against the drawer of a bill accepted by T. & G. at a London banker's, the declaration did not state the acceptance at all, but stated that it was presented to T. & G. (the drawees) for payment, and that they refused to pay. The proof was, presentment of the bill at maturity at the clearing house to the clerk of the London bankers named in the acceptance:—Held, that as the declaration did not state the acceptance, the place fixed by the acceptors was sufficiently proved, and that the London bankers were agents for that purpose to the acceptors. *Harris v. Packer*, 3 Tyr. 370, n. 495

In assumpsit on a bill of exchange, drawn upon "P. P., No. 6, Budge Row," and accepted by him, an averment that the bill, when due, was presented and shown to P. P. for payment, is supported by proof that the holder went to 6, Budge Row, to present it, but found the house shut up, and no one there. *Hine v. Allely*, 4 B. & Adol. 624. 495

A. draws a bill on B. in the country, making it payable at the house of C. in London, without authority from C., and B. accepts the bill in this form, without giving notice to C., or providing for the payment of the bill at C.'s house. A. negotiates the bill, which, upon becoming due, is presented by the holder to C., who paid it under a supposition that the bill so presented was another bill of a different amount and date, drawn by B. on and accepted by himself, and did not discover his mistake until a fortnight afterwards, when the other bill was presented. B. becomes bankrupt:—Held, that C. could not recover against A. in an action for money had and received. *Davies v. Watson*, 2 Nev. & M. 709. 496

But semble, that if A. himself had received payment as holder of the bill, for his misconduct in making the bill payable at C.'s house, he would have been liable. Id.

**Notice of Dishonor.**—Notice of dishonor by letter. *Solarte v. Palmer*, 1 Bing. N. R. 194; 1 Scott, 1. 499

The holder of a bill of exchange, falling due, and being dishonored after the bankruptcy of the drawer, is bound to use due diligence in giving notice to the bankrupt or his assignees of the dishonor of the bill. Therefore, where the bankrupt's house continued open in his absence after his bankruptcy, the messenger being in possession during part of the time, and the bankrupt's wife, or clerk, during the other period of his absence:—Held, that the holder was at least bound to leave notice at the bankrupt's house. *Ex parte Johnson*, 3 Desc. & Chit. 433; 1 Mont. & Ayr. 622. 496



Quere whether he was bound also to seek out the bankrupt's assignees, for the purpose of giving them notice? *Id.*

No such notice, however, is necessary, where there are no effects of the drawer in the hands of the acceptor, during the currency of the bill. *Id.*

The holder of a bill is entitled to avail himself of notice of dishonor given by any party to the bill. Therefore, an indorsee who has indorsed over, and is not the holder at the time of the maturity and dishonor, may give notice at such time to an earlier party, and upon afterwards taking up the bill and suing, such party may avail himself of such notice. *Chapman v. Keane*, 3 *Adol. & Ellis*, 193; 4 *Nev. & M.* 607; 1 *Har. & Woll.* 165. 498

If a notice of dishonor is sent by post on the day on which the party is to receive it, the onus is on the vendor to prove affirmatively that the letter was put in in time to reach the party that day according to the course of the post. *Fowler v. Hendon*, 4 *Tyr.* 1002. 500

Seemle, that the delivery of a letter to the bellman is a delivery to the post-office. *Pack v. Alexander*, 3 *M. & Scott*, 789. 500

Where the house was shut up, notice of dishonor may be given to the drawers on the day of such dishonor, as in the case of an actual refusal to pay. *Hine v. Allely*, 4 *B. & Adol.* 624. 501

The holder of a bill received due notice of dishonor, and wrote a letter the same day to the indorser, stating the fact, but the letter was not received, till the following day:—Held, a sufficient notice to the indorser. *Poole v. Dicus*, 1 *Scott*, 600; 1 *Hodges*, 162. 501

It is no defence to an action against an indorser, that it was commenced before a reasonable time had elapsed after notice of the dishonor; the only remedy the defendant has is to apply to the court to stay proceedings on payment of costs. *Siggers v. Lewis*, 2 *Dowl. P. C.* 681; 1 *C. M. & R.* 370; 4 *Tyr.* 847. 501

In an action on a bill of exchange by indorsee against drawer, the only evidence of notice of dishonor was a statement made by the defendant in conversation with a witness, in which he said—"I have several good defences to the action; in the first place, the letter (containing notice of dishonor) was not sent to me in time." This statement was left to the jury as evidence of due notice of dishonor:—Held, by *Littledale, J.*, *Patteson, J.*, and *Coleridge, J.*, (Lord Denman, *C. J.*, diss.), that the jury were not warranted in presuming that due notice had been given. *Braithwaite v. Coleman*, 4 *Nev. & M.* 654; 1 *Har. & Woll.* 229. 502

The day after a bill of exchange had been dishonored at L., and before the fact of the dishonor could be known at Y, the drawer's clerk called at Y. upon the indorser prior to the holder. A conversation took place as to the bill being likely to come back, and the clerk said, "I suppose there will be no alternative but my taking up the bill, and if you will bring it to S. on Tuesday, I will pay the money." The indorser did

not receive either the bill or notice until some days after the Tuesday, and notice of dishonor was not given to the drawer in due time:—Held, that the promise did not dispense with giving due notice of the dishonor to the drawer. *Pickin v. Graham*, 1 *C. & M.* 725; 3 *Tyr.* 923. 503

A letter written by the drawer to the holder of a bill, six days after the day on which the drawer should have received notice of dishonor, and containing ambiguous expressions respecting the nonpayment of the bill, was held to be properly left to the jury as evidence from which they might or might not infer that notice had been given on the proper day. *Booth v. Jacobs*, 3 *Nev. & M.* 351. 503

*Actions on Bills and Notes.*—It is no ground for discharging a defendant out of custody, that the plaintiff was not at the time of the arrest in possession of the bill of exchange on which the defendant was arrested, and that it was in the possession of persons to whom the plaintiff was indebted, and to whom he had indorsed it over, if it appears that those persons only hold the bill as trustees for the plaintiff, and are willing to give up the bill for the purposes of the suit. *Stone v. Butt*, 2 *Dowl. P. C.* 335; 2 *C. & M.* 416. 513

In an action on a bill of exchange (by drawer against acceptor), in order to rebut the presumption arising from the plaintiff's possession of the bill, that he was the holder, the defendant offered in evidence a draft of a declaration delivered in the year 1820, in an action on a bill of exchange of the same date and amount, and drawn and accepted by the same parties, in which action the plaintiff and another sued as assignees of a bankrupt:—Held, insufficient to call upon the plaintiff to show how he became possessed of the bill in his individual character. *Dabbs v. Humphrey*, 4 *M. & Scott*, 285; 10 *Bing.* 446. 513

To a declaration on certain bills of exchange by the indorsees against the acceptors, the defendants, pleaded, first, that the bills were accepted for the accommodation of the indorser, and without any consideration for the acceptance; and that they were indorsed to the plaintiffs after they became due: secondly, that the bills were indorsed after they became due; and, that before the indorsement, the indorser was indebted to the defendants in a sum of money exceeding the amount of the bills:—Held, that the pleas were ill, but the court gave the defendants leave to amend. *Stein v. Yglesias*, 1 *C. M. & R.* 565; 3 *Dowl. P. C.* 252; 5 *Tyr.* 173; 1 *Gale*, 98. 513

In an action by an indorsee of a bill or note, if the declaration states the indorsement to have been made by the first indorser directly to the plaintiff, seemle, that the plaintiff cannot avail himself of the title of any immediate indorsee:—Held, issue being joined on the fact that the bill was indorsed after it was due, that this fact was proved by the showing that the plaintiff did not become indorsee until after the bill was due, though the first indorsement was before that period. *Id.*

A court of equity will decree the payment of a



lost bill of exchange on a sufficient indemnity being given, though there may be a remedy at law by action on the bill. *Davies v. Dodd*, 1 Wils. Exch. 110. 513

To a suit by the indorsee against the acceptor of a lost bill of exchange, accepted for the accommodation of the drawer, and without consideration, the drawer need not be a party. *Id.*

In an action on a promissory note payable on demand, the jury cannot give interest, except from the time a demand of payment is made. The issuing of a writ of summons is a sufficient demand. *Pierce v. Fothergill*, 2 Bing. N. R. 167; 2 Scott, 334; 1 Hodges, 251. 513

In assumpsit against the acceptor of a bill of exchange, part payment may be given in evidence, under a plea denying the acceptance, in reduction of the damages. *Shirley v. Jacobs*, 4 Dowl. P. C. 136; 2 Scott, 157; 1 Hodges, 214. 513

Proceedings were commenced on a bill of exchange against the drawer, and also against the defendant, as acceptor; the former paid the bill and costs, and it was delivered up to him, and notice was given to the defendant that proceedings against him were abandoned. His costs, however, were not paid, and as he disputed his liability as acceptor, he ruled the plaintiff to declare, who then applied to a judge to stay proceedings, and obtained an order for that purpose: the court set the order aside. *Lewis v. Dalrymple*, 3 Dowl. P. C. 433. 515

**Declarations on Bills and Notes.]**—In an action by the indorsee against the acceptor of a bill of exchange, the declaration alleged that one P. N. drew the bill, and required the defendant to pay to his order, &c., and that the defendant accepted the bill, and P. N. indorsed it to the plaintiff. On special demurrer, alleging that "his" was ambiguous, &c.:—Held, that "his" could not necessarily be referred to the last antecedent, and that it sufficiently appeared that it had reference to the drawer, and the count was therefore sufficient. *Spyer v. Thelwell*, 4 Dowl. P. C. 509; 2 C. M. & R. 692. 517

A demurrer to a count on a bill of exchange (which was in the exact form given by the rules of T. T. 1 Will. 4), that the words "now elapsed" did not show that the bill was due before the action was commenced:—Held, not to be "frivolous." *Abbott v. Arlett or Aalett*, 4 Dowl. P. C. 759; 1 Mees. & Wels. 209. 517

Seemle, that it is necessary to show on the face of the count that the bill became due before the action was commenced. *Id.*

**Plea in Actions.]**—In an action by an indorsee against the acceptor of a bill of exchange, the court refused to allow a plea denying the drawing as well as a plea denying the acceptance. *Gilmore v. Hague*, 4 Dowl. P. C. 303; 1 Har. & Woll. 523. 517

**Indorsee against drawer of a bill of exchange.** Plea—that the defendant's indorsement was in blank; that the defendant delivered the bill to A. (not a party to the bill), only to get it dis-

counted for him; that A. fraudulently, and in violation of that special purpose, delivered it to B.; of all which the plaintiff had notice:—Held, on general demurrer, that the plea was bad, for not showing distinctly that the defendant never had value for the bill. *Noel v. Rich*, 2 C. M. & R. 360; 4 Dowl. P. C. 228; 1 Gale, 225. And see *Noel v. Boyd*, 4 Dowl. P. C. 415. 517

To an action against the defendant as drawer and indorser of two bills of exchange, the defendant pleaded that the plaintiff was applied to for a loan of money to T. P. B., but agreed to give two-thirds of the amount in money and one-third in wine, upon having the two bills given to him as a security for the wine; the plea then averred, that the contract for the sale and delivering of the wine was a gross fraud, and that the defendant had not had any value, &c. The plaintiff replied, that there was a good consideration for the drawing, and concluded to the country:—Held, that the plea was bad, as being only an answer to a part, and that the allegation of fraud was too general. *Connop v. Holmes*, 4 Dowl. P. C. 451; 2 C. M. & R. 719; 1 Tyr. & G. 85. 517

A defence that A. paid part of the bill sued on, and B. the residue, is the subject of separate pleas. *Easton v. Pratchett*, 1 C. M. & R. 798; 3 Dowl. P. C. 549; 4 Tyr. 472; 1 Gale, 30. 517

**Declaration in debt on a promissory note.** Plea—that, after the making of the note and accruing of the debt in respect thereof, the plaintiff drew a bill of exchange upon the defendant, which he accepted and delivered to the plaintiff, who took it for and on account of the note, and afterwards endorsed it to a person not known to the defendant, and who, at the time of the commencement of the suit, was the holder thereof, and entitled to sue the defendant thereon. Replication, *de injuria*:—Held, on demurrer to the replication, that the plea was bad, inasmuch as it did not aver that the bill was given as well as taken in satisfaction of the note. *Crisp v. Griffiths*, 2 C. M. & R. 159; 3 Dowl. P. C. 752; 1 Gale, 60. 517

The Reg. Gen. Hilary Term, 4 Will. 4, do not enable a defendant in an action on a bill of exchange at the suit of an indorsee, to plead that he received no consideration from the drawer, without showing circumstances of fraud and knowledge of them on the part of the plaintiff. *French v. Archer*, 3 Dowl. P. C. 130. 517

Where an acceptor to an action on a bill of exchange by an indorsee, pleads want of consideration, it is sufficient for the plaintiff, in his replication, simply to aver that there was consideration. *Prescott v. Levi*, 3 Dowl. P. C. 403; 1 Scott, 726. 517

To a declaration on a bill of exchange, (by indorsee against acceptor), the defendant pleaded that no value or consideration had been given for the successive indorsements; the plaintiffs replied, that their immediate indorser did not indorse the bill without value or consideration for so doing, but that they took it for a good and valuable consideration, concluding to the country:—Held good on special demurrer. *Id.*



To a declaration on a promissory note against the maker, he pleaded no consideration; the plaintiff replied that the note was indorsed to her in part payment of a debt, and that she had no notice of the premises in the plea. The defendant rejoined, that she had notice. On demurrer, held, that the plaintiff was entitled to judgment. *Pearce v. Champneys*, 3 Dowl. P. C. 276. 517

To a declaration by indorsee against acceptor, defendant pleaded that the bill was accepted without consideration from the drawer:—Held ill, and that under the rule of H. T. 4 Will. 4, plaintiff might demur. *Low v. Chifney*, 1 Bing. N. R. 267; 1 Scott, 95. 517

In an action by the second indorsee against the payee and indorser of a note, a plea, that the defendant never had any consideration for indorsing the note, and that the first indorser indorsed it to the plaintiff without any consideration, and that the plaintiff always held it without any consideration, is bad on demurrer. *Trinder v. Smedley*, 5 Nev. & M. 138; 1 Har. & Woll 309. 517

In an action by the payee against the maker of a promissory note, a plea that it was made "without any value or consideration for so doing, or for paying the amount thereof," is bad on special demurrer. *Stoughton v. Kilmorey* (Earl), 2 C. M. & R. 68; 3 Dowl. P. C. 705; 5 Tyr. 568; 1 Gale, 91. 517

In an action on a bill of exchange, by an indorsee against his immediate indorser, a plea, that for the indorsement the defendant neither had nor received any value or consideration, is good after verdict, but it would be bad on special demurrer. *Easton v. Pratchett*, 1 C. M. & R. 798; 3 Dowl. P. C. 549; 6 C. & P. 736; 4 Tyr. 472; 1 Gale, 30; S. P. (in error), 2 C. M. & R. 542; 4 Dowl. P. C. 472; 1 Gale, 250. 517

In an action by the drawer and payee of a bill of exchange against the acceptor, a plea, that the defendant received no consideration from the plaintiff for accepting the bill, is insufficient. *Graham v. Pitman*, 1 Har. & Woll. 132; 5 Nev. & M. 37. 517

In an action by an indorsee against the acceptor of a bill of exchange, a plea, that there was not at any time any consideration for his (said defendant's) acceptance or paying the said bill of exchange, was held bad on special demurrer. *Reynolds v. Iremey*, 3 Dowl. P. C. 453. 517

In an action against the acceptor of a bill of exchange, a plea is repugnant which shows a consideration for the acceptance of the bill by the defendant, and concludes "that he has not received any value or consideration for the payment thereof." *Byass v. Wylie or White*, 1 C. M. & R. 686; 3 Dowl. P. C. 524; 5 Tyr. 377; 1 Gale, 50. 517

After a bad plea of "no consideration" to a declaration on a bill of exchange, by which the plaintiff has been delayed during the long vacation, the court will, under special circumstances,

allow the defendant to withdraw his plea and plead *de novo*, and have an inspection of the bill without an affidavit of merits. *Paplef v. Codrington*, 4 Dowl. P. C. 497. 517

To a plea by the acceptor of a bill of exchange, that it was, to the knowledge of the holder, negotiated by fraud, and that no consideration was given for the indorsement to the holder, it is sufficient for the holder to reply generally, that he had no notice of the fraud, and that the bill was indorsed to him for a good consideration. *Bramah v. Roberts or Baker*, 1 Bing. N. R. 469; 1 Scott, 350; 3 Dowl. P. C. 392; 1 Hodges, 66. 517

And where upon demurrer judgment was given for plaintiff on such a replication, the court refused to allow defendant to withdraw the demurrer on payment of costs. *Id.*

In an action on a bill of exchange by indorsee against acceptor, a plea alleging only that the acceptance was obtained by fraud, is bad. *Id.*

In trover for a bill of exchange, defendant pleaded, that before the conversion A. was lawfully possessed of the bill, and that he indorsed it to B., and that B., for a valuable consideration, indorsed it to the defendant. The replication took issue upon the averment of consideration, which was found for the plaintiff:—Held, that by this plea the title of the plaintiff was admitted, and that the defendant was not entitled to arrest the judgment upon the ground that the title appeared to be in A.: held, also, that the defendant was not entitled to a replender. *Fancourt v. Bull*, 1 Bing. N. R. 581; 1 Scott, 645; 1 Hodges, 98. 517

In an action on a bill of exchange, the defendant pleaded a plea of want of consideration, concluding with a verification: the plaintiff, instead of replying by taking issue on the plea, merely added a similiter. After verdict for the plaintiff, the court held, that the record was imperfect, and that there must be a replender; but to save expense, the plaintiff was allowed to amend on payment of costs. *Wordsworth v. Brown*, 3 Dowl. P. C. 698. 517

Where to a plea of no consideration, in an action on a bill of exchange, there is a replication that consideration was given, setting it out under a scilicet, and concluding to the country, no new matter is alleged, so as to make it necessary for the plaintiff to prove the particular consideration set out. *Low v. Burrows*, 4 Nev. & M. 366; 2 Adol. & Ellis, 463; 1 Har. & Woll. 12. 517

But if the replication had concluded with a verification, the consideration alleged would have been part of the issue, and the plaintiff must have proved it. *Id.*

A defendant, who was under terms to plead issuably in an action against him as acceptor of a bill of exchange by an indorsee, pleaded that he had received no consideration from the plaintiff, and the plea was delivered so late in Trinity term that there was not sufficient time to get the demurrer argued that term. The court ordered the plea to be set aside, and that the plaintiff should be at liberty to sign judgment, unless the



defendant consented to amend, upon payment of all costs, and going to trial at the next sittings. *Brown v. Austin*, 4 Dowl. P. C. 161. 517

**Evidence.**—Upon a plea of no consideration to an action on a promissory note, to which the plaintiff replied that there was a consideration, the onus of proving that there was no consideration lies upon the defendant. *Lacey v. Forrester*, 3 Dowl. P. C. 658; 2 C. M. & R. 59; 5 Tyr. 567; 1 Gale, 139. 520

**Proof of consideration.** *Bassett v. Dodgin*, 3 M. & Scott, 417; 10 Bing. 40. 521

A promissory note in the common form, but expressed to be payable on demand, was given to the trustee of a building club, in order to secure the payment, by the maker or his sureties, of certain quarterly contributions, payments of interest on money lent, and fines during a certain period. Arrears having become due, an action was brought on the note, and a cognovit was given for the amount then due and costs, being together less in amount than the sum mentioned in the note. That amount was paid with costs, and a receipt given expressed as being "in discharge of the debt and costs in that action." Another action having been brought on the same note for similar arrears subsequently becoming due.—Held, that it could not be maintained. *Siddall v. Rawcliffe*, 3 Tyr. 441. 521

**Semble**, where a note is regularly indorsed with acknowledgments of receipt of interest up to a given time, it is prima facie evidence of interest being due from that time. *Braley v. Greenslade*, 1 Price's P. C. 144. 521

**Assumpsit** by an indorsee against the acceptor of a bill of exchange. **Plea**—that the defendant accepted the bill for the accommodation of the drawer, and that the drawer did not give, nor did the defendant receive, any consideration, for his accepting or paying the bill; that the drawer indorsed the bill to the plaintiff without any consideration; and that the plaintiff held the bill without consideration. **Replication**—that the drawer indorsed the bill to the plaintiff for a good and valuable consideration.—Held, that it was not incumbent on the plaintiff to begin, and prove, in the first instance, that he gave value for the bill; but that the rule is otherwise, where the title of the holder is impeached on the ground of fraud, duress, or that the bill has been lost or stolen. *Mills v. Barber*, 1 Mees. & Wels. 425. 521

Where the acceptor of a bill of exchange pleads that it was accepted without any consideration, and the plaintiff replies that it was accepted for a good consideration, the onus of proof lies on the defendant to show the want of consideration. **Secus**, where the plaintiff in the replication specifies the particular sort of consideration for which he alleges the bill was accepted. *Batley v. Catterall*, 1 M. & Rob. 379—Alderson. 521

On an issue, whether consideration was given by the plaintiff for a note, the letters of the plaintiff, showing that he was pressed for money, are evidence for the defendant. *Homan v. Thompson*, 6 C. & P. 717—Parke. 521

In an action by an indorsee against the acceptor of a bill of exchange, the mere absence of consideration for the acceptance and prior indorsements, does not throw the onus on the plaintiff of proving the consideration for the indorsement to him, where no circumstances of fraud or illegality appear. *Whittaker v. Edmunds*, 1 M. & Rob. 366—Patteson: 1 Adol. & Ellis, 638.

**Witnesses.**—Where the drawer of an accommodation bill misapplied the bill, and the acceptor brought trover to recover it from a third party, to whom the drawer had improperly paid it away.—Held, that the drawer was a competent witness to support the plaintiff's case. *Fancourt v. Bull*, 1 Bing. N. R. 651; 1 Scott, 645; 1 Hodges, 96. 521

**Defence to Action.**—Defence for want of consideration. *Reid v. Furnival*, 1 C. & M. 538; 5 C. & P. 499. 524

A., having appointed B. his executor, gave him a promissory note, payable on demand, for 100*l.*, in consideration of the trouble he would have in the office of executor after his death. B. died in A.'s lifetime, not having put the note in suit.—Held, in an action upon it by B.'s executors, that the consideration had totally failed, and the action, therefore, was not maintainable. *Solly v. Bird*, 6 C. & P. 316—Bolland: 8 C. nom. *Solly v. Hinde*, 2 C. & M. 516; 4 Tyr. 305. 524

Where a person takes an indorsement of a promissory note from the payee, with notice that the payee was indebted to the maker in a greater amount than in the note, on separate transactions.—Held, that the indorsee could not recover on the note, except to the amount of some advances he had made on the security of the note before he had the notice. *Goodall v. Ray*, 4 Dowl. P. C. 76; 1 Har. & Woll. 333. 523

**Indorsee** against acceptor of a bill of exchange. **Plea**—that the drawer indorsed it to C., in whose hands it remained when due; that C. being unable to obtain payment of it, returned it to B., who continued the holder of it until the defendant, before the indorsement to the plaintiff, delivered to B. another bill drawn by the same party, and accepted by the defendant for a greater amount, which B. accepted in full discharge and satisfaction of the former bill.—Held, on demurrer, that this was a sufficient answer to the action, although it did not appear that the second bill was payable to order. *Lewis v. Lyster*, 2 C. M. & R. 704; 4 Dowl. P. C. 377; 1 Gale, 320. 523

The plea went on to aver, that the latter bill was indorsed by B. to A., and that after it became due, the defendant paid the amount of it to A., in satisfaction and discharge of that bill, and of all damages sustained by the plaintiff by reason of non-payment thereof when due.—Held, that all this might be rejected as surplusage, and did not vitiate the plea. **Id.**

**Declaration** on a bill of exchange, indorsed by J. S. to the defendant, and by the defendant to the said J. S., and by the said J. S. to the plaintiff. **Plea**,—that after the dishonor of the bill, the plaintiff took a cognovit from the said J. S.,



in an action on the bill, by which longer time was given than would have been required for obtaining judgment in that action. Upon general demurrer to the plea, it was held, that it sufficiently appeared that J. S., who indorsed to the plaintiff, was identical with the J. S. who was the first indorser, and that the plaintiff was cognizant of that fact at the time of taking the cognovit, and that therefore the plea set up a good defence, by showing that the plaintiff had given time to a party prior to the defendant. *Hall v. Cole*, 6 Nev. & M. 124. 522

Semble, that if the plaintiff had not known that J. S. was also first indorsee, the giving time to him would not have affected his right of action against the defendant. *Id.*

Held, also, that an objection to the plea for being pleaded in bar of the action generally, and not in bar of its further maintenance, it not being stated that the cognovit was given before action brought, could only be taken advantage of by special demurrer. *Id.*

Action by the indorsees against the indorser of a promissory note for 500*l.* Plea, except as to the sum of 200*l.*, that the note was made and delivered to the defendant in order that he might indorse it for the accommodation of the maker, to enable him to obtain advances of money thereon; that the plaintiffs had only advanced to the amount of 200*l.*, and that there was no consideration for the residue. Replication, that the plaintiffs were the holders of the note for good and valuable consideration, given to the maker in respect of their being the holders of the note to the full amount thereof:—Held, first, on this issue, that it was not incumbent upon the plaintiffs, in the first instance, to prove the consideration given for the note; but that it was necessary for the defendant to begin, and impeach the plaintiff's title:—Held, secondly, it having been proved that more than 500*l.* being due from the maker to the plaintiffs at the time the note was paid in to them, they entered the note as a bill discounted to his credit, but that 198*l.* only were paid to him, that that was equivalent to their having advanced the amount mentioned in the note, and was a giving of a valuable consideration within the meaning of the issue:—Held, thirdly, that if the note were given to them as a security for a previous debt, the plaintiffs might be properly stated to be the holders for a valuable consideration. *Percival v. Frampton*, 2 C. M. & R. 180; 3 Dowl. P. C. 748; 5 Tyr. 579. 523

In *assumpsit*, on a bill of exchange by a second indorsee, to a plea that it was accepted for the accommodation of the drawer, and indorsed by him without consideration to the second indorser, who indorsed to the plaintiff: the plaintiff replied, that his immediate indorser had a good consideration for indorsing, and that he (the plaintiff) was not at any time a holder without value:—Held, that the replication admitted the acceptance and first indorsement to be as stated in the plea, and that the plaintiff was entitled to recover only to the extent of the value that passed between himself and his indorser. *Simpson v. Clark*, 2 C. M. & R. 342; 1 Gale, 237. 523

Dict. per Lord Abinger, C. B., and Bolland, B., that proof that a bill was in its inception without consideration, raises a presumption that a subsequent indorsee did not give value for it, which he must rebut by proving his title; but if so, semble, that proof that it was accepted for the accommodation of a party, that he should raise money upon it, is evidence to go to the jury that that purpose was carried into effect, and that therefore the plaintiff was a holder for value. *Id.*

In an action on a banker's check, if issue is joined on a plea of no consideration for drawing the check, it is an admissible and valid defence that the contract, in consideration of which the check was given, has been rescinded. *Mills v. Oddy*, 1 Gale, 92. 523

Credit given to the holder of a bill, by the party ultimately liable, is tantamount to payment. *Atkins v. Owen*, 4 Nev. & M. 123. 523

Secus, as to credit given by a party not ultimately liable, as where the credit was given by the banker of the holder, such banker not being the party to the bill.—Per Patteson, J. *Id.*

In an action on a bill by a third indorsee against the acceptor, the defendant cannot put the plaintiff to prove consideration, by giving prima facie evidence to show the want of it, merely as between the drawer and his indorsee, and each subsequent indorser and indorsee; but he must also show the want of consideration as between himself and the drawer. And for this purpose, it is not enough to prove that the drawer on the day before the maturity of the bill, procured all the indorsements to be made without consideration, in order that the action might be brought by an indorsee, on the understanding that the money, when recovered, should be divided between one of the indorsees and the drawer. *Whittaker v. Edmunds*, 1 Adol. & Ellis. 638; 1 M. & Rob. 366. 523

After giving a cognovit, it is too late to object, that, at the time of the arrest, part of the note had been paid, and that the note was given for an illegal consideration. *Bligh v. Brewer*, 3 Dowl. P. C. 266; 1 C. M. & R. 651; 5 Tyr. 222. 526

## BOND.

*Construction and Operation.*—The condition of a bond, executed by the principal and two sureties in the penal sum of 1000*l.*, contained a recital that the obligor had taken a farm of the plaintiff (the obligee), subject to the payment of rent reserved in a lease of even date with the bond, and that it also had been agreed by the obligor and the plaintiff, that the obligor should enter into a bond with two sureties in the penalty of 500*l.* for the due payment of the rent. Rent having been found by a jury to be due to the plaintiff to the amount of 740*l.*, the court refused to reduce the verdict to 500*l.*, to which only it was contended the sureties could be liable by virtue of the recital in the condition. *Ingleby v. Mousley*, 3 M. & Scott, 488. 527

The obligor of a bond conditioned for the payment of rent, at the rate of 170*l.* a year, "according to an indenture of lease," is estopped, in an



action on the bond, from saying that the rent reserved by the indenture was 14<sup>0</sup>/<sub>1</sub> a year. *Lainson v. Tremere*, 3 Nev. & M. 603; 1 Adol. & Ell. 792. 527

A person conveyed estates to trustees upon trust to sell and apply the produce of the sale in discharging all his bond debts, together with the interest then due and to grow due for the same to the day of payment. A bond creditor claiming under this deed, is not entitled to principal and interest beyond the amount of the penalty of the bond. *Hughes v. Wynne*, 1 Mylne & K. 20. 529

A bond, conditioned for the payment of a certain sum with interest, may be put in suit without a previous demand of payment. *Gibbs v. Southam*, 3 Nev. & M. 155; 5 B. & Adol. 911. 530

Stamp on bonds. *Lloyd v. Heathcote*, 3 Tyr. 309; 6 C. & M. 336. 532

A bond, conditioned for payment of a sum of money to the obligee on a day named, according to a proviso contained in a conditional surrender of even date, whereby A. (not the obligor in the bond), surrendered to the obligee certain copyhold lands for securing payment of the same sum—was held to require a 1l. stamp, although it bore no stamp denoting the payment of the ad valorem duty on the surrender, and the latter was not produced. *Quin v. King*, 1 Mees. & Wels. 42; 4 Dowl. P. C. 736. 532

On non est factum pleaded to such a bond, where breaches are assigned in the declaration, the jury may assess the damages without a special award of a venire for that purpose. *Id.*

Where the condition of a bond is originally impossible, the bond is absolute. Where the condition is originally illegal, the bond is void. Where the condition subsequently becomes impossible by the act of the obligor, or of a stranger, the bond is forfeited. Where it becomes impossible by the act of the obligee, the bond is saved. *Anon.* (cited in *Beswick v. Swindells*, in error), 5 Nev. & M. 378. 530

*Liability of Obligor.*—Collector's bonds. *Wilks v. Heely*, 1 C. & M. 249; 3 Tyr. 91. 533

The subordinate officers appointed under the *St. Pancras Vestry Act*, 59 Geo. 3, c. 39, s. 19, by the select vestry, are not annual officers, but hold their offices during the pleasure of the vestry. Therefore, the bonds given by them to the directors of the poor, (who are annual officers), under s. 57, continue in force after the directors, to whom they were given, have gone out of office. *McGahey v. Alston*, 1 Mees. & Wels. 336. 532

A bond given to secure the faithful performance of the office of a collector of parochial rates, (who was by act of Parliament to be appointed by trustees for a year, and then to be capable of re-election), was conditioned, that, "from time to time, and at all times thereafter, during such time as he should continue in his said office, whether by virtue of his said appointment, or of any re-appointment thereto, or of any such retainer or employment by or under the authority of the said trustees, or their successors, to be elected in the

manner directed by the said act, he should use his best endeavors to collect the monies received by means of the rates, in the then, or in any subsequent year," &c. &c. :—Held that the obligation of the bond was not confined to the year for which he was originally appointed, but extended also to all subsequent years in which he was continuously reappointed. *Augero v. Keen*, 1 Mees. & Wels. 390. 532

A chief constable appointed for one of the divisions of a riding, gave a bond to the clerk of the peace, with condition, that he should well and faithfully execute his office, should pay, apply, and account for all sums of money coming to his hands as chief constable of his division, and should in all other respects perform and observe all such orders and directions as should be made or given to him in respect of his said office. The justices of the riding having ordered a rate to be levied on the inhabitants according to a certain valuation, the constable collected from his division, and paid over to the treasurer, an undue proportion of rate. The justices in sessions resolved that the bond was forfeited, but that no proceedings should be taken upon it. Application being made to the court of K. B. on behalf of some of the parties aggrieved, for a mandamus to the justices or clerk of the peace to put the bond in suit, the court refused a rule to show cause. Semble, that the taking of a bond with the above condition, is not warranted by stat. 55 Geo. 3, c. 51, s. 19. *In re Lodge*, 2 Adol. & Ellis, 123. 532

Upon the marriage of A. with B., the widow and successor of C., a trader, A., in consideration of the stock in trade, which he receives with B., gives a bond to D., conditioned to pay to the children of B. by C., within twelve months after her death, 300*l.*, if, upon an account taken, the stock in trade and effects of the business, if then carried on by A., shall amount to 400*l.*; but, in case upon such account the stock in trade shall amount to less than 400*l.*, then A. shall pay to such children 120*l.* A., during the lifetime of B., discontinues the trade, and ceases to have any stock :—Held, that this obligation was then discharged. *Beswick v. Swindells*, 3 Nev. & M. 159; 5 B. & Adol. 914; S. C. (affirmed in error), 5 Nev. & M. 378. 534

A. was a clerk to B. from the year 1829. In 1832, C. gave a bond for the faithful conduct of A. as such clerk. After that, B. dismissed A., and, after his dismissal, A. made an admission of various sums that he had not accounted for :—Held, that, in an action on the bond, this admission was not evidence against C., as A. was living at the time of the trial, and might have been called as a witness :—Held also, that, it appearing that one item in the admission was of a sum received by A. before the date of the bond, C. would not be liable to the amount of the admission, although it had been shown to him, and he had said that B. must get what he could of A., and he, C., would pay the rest. *Smith v. Whittingham*, 6 C. & P. 78—Gurney. 535

Presumption of payment. *Gleadow v. Atkin*, 1 C. & M. 410; 3 Tyr. 289. 538



*Proceedings.*—A bond conditioned for the payment of a sum of money at the end of five years, with half-yearly interest in the meantime, with a proviso that, upon default in payment of interest, the principal shall be payable, was held not to be within 8 & 9 Will. 3, c. 11. s. 8, as to assessment of damages. *Jamez v. Thomas*, 2 Nev. & M. 663; 5 B. & Adol. 40. 538

Held, that breaches need not be assigned in an action brought after March 17th, 1829, on a bond executed in 1827, and conditioned for payment of 5000*l.* on the 17th of March, 1829, with interest in the meantime, pursuant to the stipulations of an indenture bearing even date with the bond. *Smith v. Bond*, 3 M. & Scott, 523; 10 Bing. 125. 538

Where, in a debt on bond, a plaintiff has suggested breaches on the roll, pursuant to 8 & 9 Will. 3, c. 11, s. 8, the court, after plea of non est factum pleaded, refused a rule to show cause why some of them should not be struck out, or judgment by default suffered on them, with entry of nominal damages; for, by that statute, the plaintiff may suggest breaches on every part of the condition, and the jury are to inquire of the truth of them; and the defendant had another course, viz. by pleading performance of the condition, and suffering judgment by default on the replication. *Canterbury (Archbishop) v. Robertson*, 3 Tyr. 419; 1 C. and M. 181. 543

Where a bond creditor, by agreement with a debtor, takes interest on his debt by anticipation, a court of equity will restrain an action on the bond, whether brought against the principal or his surety. *Blake v. White*, 1 Y. & Col. 420. 544

In debt on bond, (with non est factum inter alia pleaded), to secure the payment by instalments of the consideration for the purchase of a business, the plaintiff ought to suggest breaches, and if he has not done so, and a verdict be found for him on the plea of non est factum, he is not entitled to a certificate for speedy execution under the statute. *D'Aranda v. Houstoun*, 6 C. & P. 511—Alderson. 538

Also, in such a case, to support a plea that the bond was obtained by fraud, covin, and misrepresentation, it is not enough to show that the business did not produce to the purchaser the sum represented by the seller; but if it be shown that it did not produce the sum to the seller himself, it will be enough, as in such case it may be assumed that the representation was untrue to the knowledge of the party making it. *Id.*

Debt on bond for the penal sum of 12,000*l.* The declaration set forth the condition which was for the payment of 6000*l.*, with interest, and assigned as a breach the non-payment of the 6000*l.* (omitting interest). Plea, that the defendant paid the 6000*l.* with interest, according to the form and effect of the condition:—Held ill on special demurrer. *Bishton v. Evans*, 2 C. M. & R. 12; 3 Dowl. P. C. 735; 1 Gale, 76. 539

A bond was condition to pay 165*l.* by certain instalments, until the whole should be paid. But if default was made in paying any one, the

obligation was to remain in force. An action having been brought upon the bond, in consequence of a default in payment of the second instalment, a judge ordered that, on payment of the 15*l.* and costs, proceedings should be stayed:—Held, that the judge had no power to make such order. *Naylor v. Mopsey*, 4 Dowl. P. C. 669. 544

The sale of a tax-collector's lands and goods is not a condition precedent to putting in suit a bond given by a surety under 43 Geo. 3, c. 99, for the due performance of the collector's duties. At all events, not unless the obligee have notice where to find the collector's property. *Gwynne v. Burnell*, 2 Scott, 16; 2 Bing. N. R. 7. 533

Payment to the accountant of a given year, of sums collected for a different year, is no discharge of the demand against the collector in respect of those sums. *Id.*

It is no objection that the sureties' bond is conditioned for payment by the collector to the receiver-general, and to the commissioners, or that it is conditioned for payment at the times by the act appointed. *Id.*

## BOUNDARIES.

Upon a question of boundary, ancient orders of sessions containing statements respecting the extent of a district within the jurisdiction of the court of quarter sessions, made when no dispute as to boundary appears to have existed, are admissible in evidence. *Newcastle (Duke) v. Broxtowe*, 1 Nev. & M. 598; 4 B. & Adol. 273. 544

In trespass brought by the lord of a manor for the carrying away dollars claimed by him as wreck, two instruments dated in 1639 and 1657, and purporting to be presentments or answers of a jury, partly consisting of the tenants of the manor, to questions by commissioners of survey appointed by the then lord, were put in to prove the boundaries of the manor, and also the lord's title to wreck, which was affirmed in particular passages:—Held, that they were only evidence of the boundaries, and could not be admitted as declarations by the tenants of the manor, of the title of the lord to wreck, that being a matter of private right derived from the crown, respecting which they could not be taken to have any peculiar knowledge, as they had no concern with it. *Talbot v. Lewis*, 5 Tyr. 1. 544

Where two parishes are separated by a river, the medium filum is the presumptive boundary between them. *Rex v. Landulph*, 1 M. & Rob. 393—Patteson. 544

The 5 Geo. 4, c. 79, (the Clifton Watching and Lighting Act), does not extend to those parts of the parish of Clifton which, by the 16 Geo. 3, c. 33, and 43 Geo. 3, c. 140, were made part of the city of Bath. *Bartlett v. Watkins*, 1 Mees. & Wels. 223. 544

## BUILDING ACT.

Where a statute authorizes a company to remove and erect buildings, and provides a specific remedy for parties injured by such removal and erection, the occupier of a house adjoining one



which has been pulled down and rebuilt by the company is not entitled to such remedy in respect of an injury sustained by reason of the removal of a party-wall between the two houses, after a notice given under the Building Act, although the company may not have strictly complied with the requisitions of the Building Act in respect of such party-wall. *Rex v. Hungerford Market Company*, 2 Nev. & M. 340. 545

An executor or administrator may be liable as the owner of the improved rent, for the expenses of pulling down and rebuilding a party-wall under the authority of the Building Act, (14 Geo. 3, c. 78, s. 41), even though he has no other assets than the improved rent. *Thacker v. Wilson*, 4 Nev. & M. 659; 3 Adol. & Ellis, 142; 1 Har. & Woll. 131. 545

The expenses of pulling down and rebuilding a party-wall are a charge upon the land in the hands of the owner of the improved rent. *Id.*

Where an administrator was sued upon the statute, and pleaded that he was only the owner in his character of administrator in right of his intestate, and after setting out an unsatisfied judgment against himself also as administrator, alleged that he had fully administered all the estate but a sum which was not sufficient to satisfy the judgment:—Held, on demurrer, that the plea was no answer to the action. *Id.*

If an act of trespass complained of was done with a bona fide intention to pursue the directions of the Building Act, though it be not justified by it, the defendant is entitled to notice of action. *Wells v. Ody*, 2 C. M. & R. 128, 184; 7 C. & P. 22; 1 Gale, 137. 545

On a plea of not guilty, he may object to the absence of such a notice. *Id.*

In an action of trespass, for laying bricks on the plaintiff's wall, the defendant, under the plea of not guilty, may show that the wall was a party fence wall, and that he was acting under the provisions of the Building Act. *Semble*, that to entitle a party to raise such a wall, it is necessary that he should give notice to the district surveyor, and that such notice applies only to cases where a party intends to take down any building; but even if such a notice be required, the district surveyor may waive it. If a defendant intended to proceed under the Building Act, he would be entitled to notice of action, &c., although he may not have acted exactly according to its provisions. *Id.*

The Building Act, 14 Geo. 3, c. 78, s. 43, which authorizes the building or raising of a party-wall, does not protect a party from liability for any collateral damage resulting from the building so erected; and an action on the case is maintainable by the occupier of an adjoining house, for heightening and building on a party fence wall, whereby his windows were darkened. *Wells v. Ody*, 1 Mees. & Wels. 452; 7 C. & P. 410. 545

By the Building Act, 14 Geo. 3, c. 78, s. 100, it is enacted, that if the plaintiff be nonsuited, the defendant shall have judgment to recover treble costs. *Semble*, that in such a case it is not ne-

cessary for the defendant to enter a suggestion on the roll to entitle himself to treble costs. *Wells v. Ody*, 2 C. M. & R. 184. 545

### CARRIER.

The act 11 Geo. 4 & 1 Will. 4, c. 68, extends to all the articles enumerated in the 1st section, although not within the words of the preamble, "an article of great value in small compass." *Owen v. Burnett*, 2 C. & M. 353; 4 Tyr. 133. 551

To entitle a party to recover for loss or injury to any article of such description, he must give express notice to the carrier of the value and nature of the article. *Id.*

A looking-glass exceeding the value of 10*l.*, was packed up in a case, and sent to the carrier's office, to be conveyed from A. to the house of S., near L. A notice was fixed up in the office, pursuant to the 2nd section of the recent statute. The words, "plate glass," "looking-glass," "keep this edge upwards," were written on the case, but no declaration was made of the nature and value of the article, and no increased rate of carriage paid. The parcel was conveyed from L. to the place of its ultimate destination on a brewer's truck, that being the usual mode in which parcels were conveyed in that part of the country. When the glass was unpacked it was found to be broken:—Held, that the carrier was not liable for the damage occasioned by the breaking of the glass. *Id.*

*Semble*, that the carrier would have been liable if he had been guilty of gross negligence. *Id.*

Bodies, which are made partly of the soft substance which is taken from the skins of rabbits, and partly from the wool of sheep, do not come under the description of furs in the Carriers' Act, 11 Geo. 4 & 1 Will. 4, c. 68. *Mayhew v. Nelson*, 6 C. & P. 58—*Tindal*. 551

By 11 Geo. 4 & 1 Will. 4, c. 68, s. 8, carriers are responsible for losses arising from the felonious acts of their servants. The defendant, a carrier, was sued to recover the value of a parcel lost, and slight evidence was given to raise a suspicion that his servant, who was still in his employ, had stolen the parcel: on a verdict found for the plaintiff, a new trial was refused, on the ground that the defendant ought to have called the servant as a witness. *Boyce v. Chapman*, 3 Bing. N. R. 222; 2 Scott, 365; 1 Hodges, 338. 549

### CASE.

*Malicious Arrest.*—In an action for a malicious arrest, the jury may imply malice from the absence of reasonable or probable cause. But this is an inference not of law but of fact, which the jury are not bound to draw. *Mitchell v. Jenkins*, 2 Nev. & M. 301; 5 B. & Adol. 588. 560

Presenting to the jury the absence of such cause as conclusive evidence of legal malice is a misdirection. *Id.*

*Quære*, whether an action for a malicious arrest will lie where the arrest is for 20*l.* due on a pro-



missory note, and that promissory note has been paid, but more than 20l. is due upon a general account between the parties? *Norriah v. Richards*, 5 Nev. & M. 269; 1 Har. & Woll. 437. And see *Beare v. Pinkus*, 4 Nev. & M. 846, and *Nicholas v. Hayter*, 4 Nev. & M. 882. 560

*Quære*, whether in an action for a malicious arrest, the mode in which the original action is determined must be such as in itself shows a want of reasonable cause? *Id.*

Proof that a plaintiff had not declared in an action removed by habeas corpus within two terms, is not sufficient evidence of a determination of the suit to support an action for malicious arrest. *Id.*

*Quære*, whether an action for a malicious arrest can be maintained, when the cause is removed from an inferior court by habeas corpus? *Id.*

Where in case for a malicious arrest, the declaration alleges certain facts "whereupon and whereby the suit was ended and determined," the plaintiff cannot show any other determination of the suit than the mode stated. The acceptance of the debt and costs in satisfaction of the action under a judge's order or a rule of reference is a sufficient determination of the suit. *Combe v. Capron*, 1 M. & Rob. 398—*Patteson*. 560

In an action on the case against a party for causing the arrest of a person privileged from arrest, (e. g. a witness attending on his subpoena, or a practising attorney), thereby putting him to the expense of finding bail and procuring his discharge by order of a judge, the plaintiff must show that his imprisonment at the particular time in question took place by some act of the defendant, and that he knew or recognized the circumstances accompanying it, and also knew that the party arrested was privileged at that time. *Stokes v. White*, 4 Tyr. 786; 1 C. M. & R. 223. 560

*Quære*, whether such an action is maintainable? *Id.*

Negligence in navigating ships. *Vennall v. Garner*, 1 C. & M. 21; 3 Tyr. 85. 568

*Malicious Criminal Proceedings.*—[In an action for a malicious arrest on a charge of felony, it is not necessary for the plaintiff to give in evidence the whole of the proceedings before the magistrates. *Biggs v. Clay*, 3 Nev. & M. 464. 562

A person convicted of a trespass under the Game Act, 1 & 2 Will. 4, c. 32, underwent the sentence of imprisonment under that conviction, and did not appeal against it:—Held, that that conviction was an answer to an action against the informer for a malicious prosecution. *Mellor v. Baddeley*, 2 C. & M. 675; 4 Tyr. 962; 6 C. & P. 374. 563

To maintain an action against a person for having made a false charge of felony before a magistrate, it is not necessary to show that the charge was taken down in writing and acted upon by the magistrate; but it is necessary that the jury should be satisfied that it was made to the magistrate with a view to induce him to entertain

it as a charge of felony. *Clarke v. Postan*, 6 C. & P. 423—*Bosanquet*. 563

In an action against defendant for taking plaintiff to a police office, and causing him to be imprisoned, without reasonable or probable cause, on a charge that he uttered menaces against the defendant's life; it was held, that it was not for the judge alone to determine whether the menaces justified the charge, but that it should have been left to the jury to determine whether the defendant believed the menaces, before the judge decided whether or not there was reasonable and probable cause for the charge. *Venafr v. Johnson*, 3 M. & Scott, 847; 10 Bing. 301; 6 C. & P. 563

In an action on the case for laying a complaint before the magistrate of threatening language, in consequence of which the plaintiff was taken into custody and imprisoned till he found bail; if it appear that the threat was used in consequence of a private dispute, and was not uttered to the defendant, but related to him by a servant, who gave evidence of it before a magistrate, the question for the jury will be, whether the defendant acted bona fide upon the threat mentioned to him, or merely used it as a pretext for accomplishing his own private purposes. *Id.*

In an action for charging plaintiff with a felony maliciously, and without reasonable or probable cause:—Held, that the judge was warranted in leaving to the jury, instead of deciding himself, the existence of probable cause, upon the following state of facts:—Plaintiff, a servant, being discharged from service on a Friday, took away with her from her master's house, a trunk and bag the property of her master. The master wrote to her the next day, demanding his property, and threatening to proceed criminally on the Monday following, if it were not restored: the plaintiff being absent from home when the letter was delivered, no answer was returned; whereupon the master, the same day, Saturday, had her taken into custody, but when she was brought before the magistrates on Monday, declined to make any charge. *M'Donald v. M'Donnell v. Rooke or Brooke*, 2 Bing. N. R. 217; 2 Scott, 359; *Hodges*, 314. 563

*Other malicious Procedure.*—[In an action on the case for maliciously, and without reasonable or probable cause, procuring the plaintiff to be outlawed, the declaration stated that the plaintiff was not in any wise subject or liable to be outlawed at the suit of the defendant; that the defendant made an affidavit of debt, whereby he deposed that the plaintiff was indebted to him in 3550l., and that the plaintiff, upon the prosecution of the defendant, under color and pretence of owing the said sum of 3550l., was declared an outlaw; assigning for special damage, that the plaintiff was put to costs in and about reversing the outlawry. The existence of the alleged debt (the non-existence of which was the only gravamen charged in the declaration) being admitted:—Held, that there was reasonable and probable cause for proceeding to outlawry, notwithstanding the defendant was aware at the time of issuing the exigent that the plaintiff was



abroad, and had an agent in London:—Held, also, that under not guilty, the reversal of the outlawry was not put in issue; and semble, that if it had been, the rule of court, and entry thereof in the officer's book, was not evidence of that fact. *Drummond v. Pigou*, 7 C. & P. 228; 2 Bing. N. R. 114; 1 Hodges, 190. 566

A declaration stated, that the plaintiff had bought of C. & Son certain goods for a sum mentioned, which the defendant had lent the plaintiff on his personal credit, without agreement for any lien on them in respect thereof, which sum the plaintiff paid to C. & Son, who accepted it in payment for the goods; yet that defendant falsely and wrongfully pretending that he was entitled to such lien, and had a right of preventing their delivery to the plaintiff till the said loan should be repaid, wrongfully and maliciously, and without reasonable or probable cause in that behalf, but under the color of the said pretended lien, ordered C. & Son, not to deliver the said goods to the plaintiff, but to keep them till they received further orders; in consequence whereof C. & Son refused to deliver them to him. Plea, that plaintiff never paid C. & Son:—Held, on demurrer, that the action was maintainable; for after putting the averment of payment which had been traversed out of consideration, it appeared sufficiently that the defendant knew that there was no agreement for a lien on the goods, and that there was no obligation on C. & Son to deliver the goods to the plaintiff without payment, and that their refusal so to deliver up the goods to the plaintiff arose from the defendant's statement, and the damage directly resulted from that act of his. *Green v. Butten*, 2 C. M. & R. 707; 1 Tyr. & G. 118. 566

The declaration stated that the defendant had been employed by the plaintiff to edit the Court Journal for reward, and that he did not perform the duties of editing the same in a proper manner; but, without the knowledge, leave, authority, or consent of the plaintiff, "falsely, maliciously and negligently inserted and published in the same a false and malicious libel," &c.; that afterwards, an information was exhibited against the plaintiff "for the falsely and maliciously printing and publishing of the said libel, and such proceedings were thereupon had that the plaintiff was convicted of that offence and fined 100l. After verdict for the plaintiff, the judgment was arrested, on the ground that the injury sustained was not connected with the breach of duty averred, it not appearing that the printing and publishing of which the plaintiff was convicted was the same act as that with which the defendant was charged, viz. the inserting and publishing. *Colburn v. Patmore*, 1 C. M. & R. 72; 4 Tyr. 677. 566

Semble, the proprietor of a newspaper, in which, without his knowledge or consent, a libel is inserted by his editor, cannot recover against him the damages sustained by his own conviction as proprietor. Id.

a nuisance upon them, and subsequently receives rent, is liable for the continuance of the nuisance. *Rex v. Peadley*, 3 Nev. & M. 627; 1 Adol. & Ellis, 822. 576

But a landlord is not liable in respect of a new nuisance created by his tenant during the term. Id.

Where a landlord lets premises, the natural consequence of the regular use of which is, that they will become a nuisance unless properly attended to, he is liable if they afterwards become a nuisance by such regular use. Id.

The landlord ought, in such case, either to stipulate with his tenants that they will do that which is necessary to prevent the premises from becoming a nuisance, or to reserve to himself the power of entering for the purpose. Id.

An action lies against a party, who by carelessness or negligence in excavating his own ground, either causes or accelerates the fall of an adjoining house. *Dodd v. Holme*, 3 Nev. & M. 739; 1 Adol. & Ellis, 493. 576

Two persons having adjacent lands, the one built a house at the extremity of his land, the other afterwards excavated his own soil near to, but without touching the ground so built upon:—*Quære*, whether the party making such excavation is bound to see that his neighbor's foundations be not thereby weakened, and whether, if they be so, he is guilty of an actionable negligence in having so used his own soil without protecting that of his neighbor, although no negligence be shown in the mode of carrying on the work? Id.

Supposing him not liable in the case of a newly built house:—*Quære*, whether he would be so if the house had stood so twenty years before the excavation was made? Id.

But where it is alleged and proved, that the defendant so negligently, unskilfully, and improperly dug his own soil, that the plaintiff's house was thereby injured, an action lies: and, although it be shown that the house was infirm, and could at all events have stood only a few months, still the plaintiff may recover, in proportion to the loss actually suffered, if the jury find that the injury to the house was the consequence of the defendant's negligence; and in determining the question of negligence, the jury ought to consider the state of the plaintiff's house. Id.

Where a public company has the right by law of taking up the pavement of the street, for the purpose of laying down pipes, the workmen they employ are bound to use such care and caution in doing the work as will protect the king's subjects, themselves using reasonable care, from injury; and if they so lay the stones as to give such an appearance of security as would induce a careful person, using reasonable caution, to tread upon them as safe, when, in fact, they are not so, the company will be answerable in damages for any injury such person may sustain in consequence! *Drew v. New River Comp.* 6 C. & P. 754—*Tindal*.

*Pleadings.*—In case for injuries done by dogs accustomed to bite, &c.; the plea of not

*Nuisance.*—A person who lets premises with



guilty puts the scienter in issue. *Thomas v. Morgan*, 2 C. M. & R. 496; 4 Dowl. P. C. 223; 1 Gale, 172. 576

Proof that the dogs are of a furious disposition, and have bitten cattle, is no evidence of the defendant's scienter; but a promise by the owner of the dogs, on being informed of the injury they have done, to make compensation, is some evidence of it, to go to the jury, but of the slightest degree. *Id.*

In an action on the case, the defendant cannot now, under the plea of "not guilty," raise any objection as to defective proof of the inducement in the declaration. *Dukes v. Gostling*, 3 Dowl. P. C. 619. 576

In an action for a malicious prosecution, the court will not permit the defendant to plead that he had probable cause to indict together with a plea of not guilty. *Cotton v. Brown*, 4 Nev. & M. 831; 3 Adol. & Ellis, 312. 576

The plea of not guilty to an action for a malicious prosecution, puts in issue (under the new rules of H. T. 1834) the fact of prosecution, and the want of probable cause. *Id.*

In an action for a nuisance, where the defendant pleads not guilty, the plaintiff must not only prove the existence of the nuisance, but that the defendant was the person who caused it. *Dawson v. Moor*, 7 C. & P. 25—Abinger. 576

In case for a nuisance, the declaration stated that the plaintiff was possessed of a term of years in a messuage, and that he was disturbed in its enjoyment by the alleged nuisance. The defendants pleaded that they were possessed of their workshops and manufactory (the nuisance complained of) for ten years before the plaintiff became possessed of his term. The plaintiff replied that the term he held the residue of, was created four years before the defendants were possessed of their said workshops and manufactory.—*Held*, on demurrer, that the plea was bad, the defendant should have alleged an user for twenty years. *Elliotson v. Feetham*, 2 Scott. 174; 2 Bing. N. R. 134; 1 Hodges, 259. 576

### CERTIORARI.

*Civil Cases.*—A judgment in an action of ejectment, in an inferior jurisdiction, is not within the meaning of the 19 Geo. 3, c. 70, s. 11; and, therefore, if the defendant leaves the jurisdiction, the judgment cannot be removed into a superior court. *Doe d. Stansfield v. Shipley*, 2 Dowl. P. C. 408. 577

A plaint being levied in an inferior court, not of record (the Hull court of Requests) having cognizance of debts not exceeding 5*l.*, the defendant sued out a writ, in the form of a certiorari, commanding C. H. F. to return into the court of K. B. the plaint, and all things concerning the same. C. H. F. was not a commissioner, but only clerk of the court of Requests. No affidavit was filed, or order of K. B. or of a judge obtained for issuing the writ. The court on motion set

it aside. *Ex parte Phillips*, 2 Adol. & Ellis, 586. 577

Per Littledale, J., a certiorari does not go, as of course, to a court not of record. *Id.*

If a plaintiff, without improper motives, has removed a judgment into a superior court by an irregular writ of certiorari, issued without leave of the court, such amendments will be allowed, and terms imposed, as will enable him to avail himself of the judgment, without prejudice to the defendant. *Rowell v. Breddon*, 3 Dowl. P. C. 324. 577

A return to a writ of certiorari to remove a cause, directed to the judge of an inferior court, certifying the cause and claiming consuance by charter, is sufficient if good upon the face of it. *Perrin v. West*, 5 Nev. & M. 298; 3 Adol. & Ellis, 405; 1 Har. & Woll. 401. 577

Having no day in court, he cannot be required to produce the charter. *Id.*

Nor can any traverse be taken upon the return. *Id.*

A party coming to a court, in a civil suit, is not protected from arrest at the king's suit. *Id.*

*Criminal Cases.*—By 5 & 6 Will. 4, c. 33, s. 1, no certiorari is to issue to remove any indictment or presentment from any court of session, assize, oyer and terminer, or gaol delivery, or any other court to the court of K. B. at the instance of the prosecutor or any other person (except the attorney general) without motion first made in K. B. or before some judge of that court and leave obtained.

By s. 2, defendants are to enter into recognizances before obtaining a certiorari. 578

The prosecutor has a right to remove his indictment at any time before trial, and the court has no jurisdiction over the costs consequent on exercising that right. *Rex v. Pasman*, 2 Dowl. P. C. 529. 578

The court will remove an indictment by certiorari, at the instance of the defendant, from the Central Criminal Court, on the suggestion that it involves points of law arising out of proceedings in Chancery, relating to matters of account. *Rex v. Wartnaby*, 2 Adol. & Ellis, 436. 578

The mere fact of a defendant on an indictment for an assault being a member of the bench of magistrates who are to try it, is not a sufficient ground within the 5 & 6 Will. 4, c. 33, s. 1, for removing the indictment by certiorari. *Rex v. Fellowes*, 4 Dowl. P. C. 607. 578

*Convictions.*—A conviction under the 1 & 2 Will. 4, c. 32, s. 30, is still irremovable under s. 45, notwithstanding the 5 & 6 Will. 4, c. 20, s. 21. *Rex v. Hester*, 4 Dowl. P. C. 589. 579

Where it is enacted, generally, that no summary conviction in pursuance of an act shall be removed by certiorari into a superior court, a certiorari may, nevertheless, be issued at the instance of a private prosecutor, although the application be not made by the attorney-general, and the crown is not directly interested. *Rex v. Boulbee*, 6 Nev. & M. 26. 579



**Orders of Sessions.**—Where an appeal against an order of removal has been tried with the acquiescence of the appellants and the respondents, and the order quashed, a certiorari to remove the proceedings for the purpose of quashing the order of sessions will not be granted, although the respondents received no notice of trial, as required by a rule of court of the sessions, and were consequently wholly unprepared for the trial. *Rex v. Yorkshire, E. R. (Justices), 3 Nev. & M. 93.* 580

A certiorari removing an order of sessions, which order, upon being sent back to the sessions for restatement, is reversed by them, does not operate to remove the new order of sessions. *Rex v. Bloxam, 3 Nev. & M. 385; 1 Adol. & Ellis, 386.* 580

The party complaining of the second order is the party who must remove it. *Id.*

A certiorari does not lie to remove an order of sessions made more than six months previously, although the delay was occasioned by causes over which the prosecutor had no control. *Id.*

Notice to a magistrate (under 13 Geo. 2, c. 18, s. 5,) of intention to move for a certiorari "on the first day of next term, or so soon after as I can be heard:"—Held irregular, if served on the first day of that term, though the party does not, in fact, move till after the expiration of six days.—*Denman, C. J., dubitante. In re Flounders, 4 B. & Adol. 865; 1 Nev. & M. 502.* 583

The notice required by 13 Geo. 2, c. 18, s. 5, of intention to move for a certiorari to remove an order of justices, must be made six days, computed one day exclusive and one day inclusive, before the rule nisi is applied for: therefore, where notice was given on the 20th for a motion on the 25th, and the motion was made on that day, it was held insufficient, and the rule was discharged, but without costs. *Rex v. Cumberland (Justices), 4 Nev. & M. 378; 1 Har. & Woll. 16: S. P. Rex v. Goodenough, 2 Adol. & Ellis, 463.* 580

Where an act of parliament, enabling a company to make certain canals, &c., directs that questions of compensation, &c. shall be tried by a jury, before the justices at quarter sessions, and expressly takes away the certiorari, and a subsequent act, enabling the company to make certain other canals, directs that the former act, and all powers, provisions, exceptions, rules, remedies, regulations, penalties, forfeitures, articles, matters, and things therein contained, shall be in full force, and shall extend to and be used, executed, applied, enforced and put in execution, to all intents and purposes, as to that act and the several matters and things therein contained, for making and maintaining the canals, &c. to be made by virtue of that act, and for carrying the several purposes of that act into execution in as simple and beneficial a manner, to all intents and purposes, as if the same had been respectively re-enacted in the body to that act:—Held, that the clause taking away the certiorari must be considered as embodied in the

latter act. *Rex v. Yorkshire, W. R. (Justices), 3 Nev. & M. 802.* 580

And in such case the court will not grant a mandamus to the justices or clerk of the peace to enter up judgment upon the verdict of a jury, otherwise than in the terms in which it is given by the jury, even though it appear by affidavit, that in considering the amount of damages to be assessed by them, they took into consideration matters not properly within their jurisdiction. *Id.*

So, though it should appear upon the face of the proceedings that the jury have assessed separate damages, in respect of matters foreign to their jurisdiction. *Id.*

But such a finding would be a nullity, and could not be enforced. *Id.*

**Proceedings.**—A rule for a certiorari to remove a record from an inferior jurisdiction is absolute in the first instance. *Pawsey v. Gooday, 3 Dowl. P. C. 605.* 582

A judge's order or fiat for a certiorari to issue in vacation can only be granted nisi. *Rex v. Chipping Sodbury, 3 Nev. & M. 104.* 583

The rule for a certiorari, under the 19 Geo. 3, c. 70, s. 4, is absolute in the first instance, and applies to all cases where the defendant removes himself and his effects out of the inferior jurisdiction. *Knowles v. Lynch, 2 Dowl. P. C. 623.* 583

When a certiorari was directed to the justices of the peace, and also to the clerk of the peace, and the return was signed by the clerk of the peace, but was not sealed, the court sent back the return to be amended. *Rex v. Macnamara, 1 Alcock & Napier, 61. (Irish.)* 583

An indictment for a nuisance in keeping a common gaming house was preferred by a private prosecutor, who, after removing it by certiorari, proceeded no further. Another party then caused a venire to be issued, and other steps taken for bringing the case to trial, though desired by the original prosecutor to forbear. On motion by the latter for a stay of proceedings, (he alleging that the offence had been discontinued,) the court refused to interfere, the prosecution being for a public nuisance. *Rex v. Wood, 3 B. & Adol. 657.* 583

The court will not quash a writ of certiorari, unless there is an admission, or something tantamount to it, by the party suing it out, that he has done it for the purpose of delay. *Landens v. Sheil, 3 Dowl. P. C. 90.* 582

## CHARITY.

In the administration of charity property, given, not for purposes of individual benefit, but for performance of duties, if the revenues increase so as to exceed a reasonable compensation for the duties, the surplus must be applied to other charitable purposes. *Att. Gen. v. Brentwood Schoolmaster, 1 Mylne & K. 376.* 584



## CHOSE IN ACTION.

A chose in action, not coupled with any partial interest in possession, and which cannot be reduced into possession without a suit, is not assignable in equity. *Prosser v. Edmonds*, 1 Y. & Col. 481. 586

An assignment of a bare right to file a bill in equity for a fraud committed on the assignor, is contrary to sound policy, and void; therefore, where A., who was entitled to certain property under his father's will, for a valuable consideration, assigned the whole of that property (except a reversionary interest in the funds) to B., his father's executor, and afterwards assigned the whole of his interest under his father's will (including, therefore, the reversionary interest) to C.:—Held, that C. could not maintain a bill to set aside the first assignment, on the ground of fraud committed by B. against A., the latter refusing to join as plaintiff in the suit. *Id.*

If a cestui que trust assign his interest, and the assignee does not give notice to the trustee, but assign over, the new assignee need not give notice. *Ex parte Newton*, 2 Mont. & Ayr. 51. 526

The court will not grant a special injunction against the assignees of a bond, to restrain an action brought by them in the name of the assignor. *Portarlington (Lord) v. Graham*, 5 Simon, 417. 526

## COMMON.

Declaration for trespasses in W.: plea, that W. is part of a waste called D., over which the defendant had common appurtenant by prescription: replication, that W. had been inclosed and severed from the waste, and held adversely to the commoners for twenty years. This replication is maintained by evidence that part of W. had been inclosed twenty years, and part not; and that the alleged trespasses were committed in both parts. *Tapley v. Wainwright*, 2 Nev. & M. 697; 5 B. & Adol. 395. 592

If a tenant makes an encroachment adjoining to the farm he rents, this encroachment will be for the benefit of his landlord, unless it appear clearly from some act done at the time, that the tenant intended to make the encroachment for his own benefit, and not to hold it as he held the farm. *Doe d. Lewis v. Rees*, 6 C. & P. 610—Parke. 591

An inclosure of waste lands had been made on a manor belonging to the crown, which was held for 23 years without payment of rent, or other acknowledgment. The manor was sold in fee by certain commissioners, by virtue of 57 Geo. 3, c. 97, to the lessor of the plaintiff, who brought an ejectment to recover the inclosure:—Held, that although the crown might have ousted the party in possession of the inclosure, the lessor of the plaintiff was not entitled to bring an ejectment. *Doe d. Wall or Watt v. Morris*, 2 Scott, 277; 1 Hodges, 215. 591

The commissioners have no power under 57 Geo. 3, c. 97, to sell to a subject the right to re-

cover property to which the crown had only a right of possession. *Id.*

*Prima facie*, the lord of the manor is entitled to all waste lands within the manor; and it is not essential that the lord should show acts of ownership of such lands; and evidence that the public have been used to throw rubbish on waste land is rather evidence that it belongs to the lord than to any private individual. If a person, within twenty years, inclose a portion of the lord's waste by the licence of the lord, such person cannot be turned out of the possession of it by the lord without some act being done, from which a legal revocation of the licence can be inferred. *Prima facie*, every inclosure made by a tenant adjoining the demised premises is presumed to be made by him for the benefit of the landlord; but this presumption may be rebutted by evidence. If a lessee inclose land which is near the demised premises, as being part of the premises comprised in his lease, this is not an adverse possession against his landlord; and a twenty years' possession by him will not enable him to retain possession of the inclosed land against his landlord. *Doe d. Dunraven v. Williams*, 7 C. & P. 332—Coleridge. 591

The General Inclosure Act, so far as it enacts that the commissioners' oath, and the appointment of any new commissioner, shall be annexed to and inrolled with the award, is merely directory. *Cassamajor v. Strobe*, 5 Sim. 87; 2 Mylne & K. 706. 593

An inclosure act directed allotments to be made to A., as a full compensation for his right to the soil of the waste as lord of the manor, for his right to the tithes as rector, and for his right of common. Part of the waste had been used by the lord as a rabbit-warren, but no mention of it as such was made in the inclosure act, nor did it appear that the lord had any right of warren in the waste. The commissioners made an allotment to A. as a full compensation for his right and interest in the warren, and also three other allotments as a full compensation for his rights above-mentioned:—Held, that A.'s title to the allotment in respect to the warren could not be objected to, as that allotment was a portion of the lord's compensation for his right of soil. *Id.*

Allotment for roads. *Thackrah v. Seymour*, 1 C. & M. 18; 3 Tyr. 97. 595

A modus of 10s. a year was payable to an impropriate rector, in lieu of all the tithes of a farm, to which farm were appurtenant rights of common in two several townships, B. and C. Under an inclosure act, to which the impropriator was a party, the common lands in the township of B. were inclosed, and allotments made to the impropriator in lieu of tithes, moduses, prescriptions, and customary payments. The act directed, that, when the allotment should be made to the impropriator, all tithes, moduses, prescriptions, and customary payments should cease, and be for ever extinguished. By a contemporaneous act, to which the impropriator was not a party, the common lands in the township of C. were also inclosed:—Held, that the impropriator



being only entitled to a modus in respect of the farms and commons appurtenant, and the modus having been extinguished under the provisions of the first-mentioned act, he was not entitled to tithes of the allotments made in respect of the farm under the other act. *Jackson v. Douglas*, 1 Young, 391. 598

By an act for inclosing lands in a parish and extinguishing its tithes, the commissioner was directed to value the tithes, as being equal to a fixed proportion of the net annual value of the lands, and then to find an equivalent corn-rent; and by his award, or some previous writing under his hand, to be annexed thereto, to set forth the same, and to apportion the corn-rent upon the lands of the respective proprietors, and to fix when the first payment of the corn-rent should be made, and when the tithes should be extinguished; and a right was given to any person aggrieved by any thing done in pursuance of that act, to appeal to any general or quarter sessions in the county, held within four months next after the cause of complaint should have arisen. The commissioners having determined the amount of the corn-rent, and fixed the day for the first quarterly payment of it, and also the day from which the tithes should cease and be extinguished, by a previous writing, which afterwards was annexed to the award:—Held, that an appeal by the rector on the ground of the corn-rent being inadequate, must be within four months of such previous writing, and that an appeal within four months of the date of award was not in time. *Rex v. Nockolds*, 3 Nev. & M. 334; 1 Adol. & Ellis, 245. 598

*Semble*, that no notice of the corn-rents having been fixed, and the tithes extinguished by the previous writing, was requisite, though the act required that all notices necessary to be given by the commissioners should be given in a particular way, eight days before the period for doing the business to which such notice should relate. *Id.*

But held, that, supposing that the four months could not be allowed to run until the party intended had notice that his rights had been affected, notice given by the commissioner in the manner required by the act in other cases was sufficient, although the notice, which stated in general terms what had been done, referred for particulars to a schedule deposited at a distant place; and held, also, that private notice was sufficient. *Id.*

In trespass for breaking and entering the close of the corporation of G., the defendant's pleas set out an act for inclosing common lands in B., which recited that the corporation as lords of the manor, were owners of the soil, and other persons were proprietors of lands over which rights of common were exercised; the commissioners were directed to make certain allotments to such lords and proprietors, and it was enacted that they should set out as a common pasture, out of certain commons in G., called the E., and W. commons, such plots of land as should be a full compensation for the rights of common of all the owners and proprietors of commonable

messuages for such messuages only; and that such plots of land should be used, stocked, and enjoyed by such owners and proprietors, and their respective tenants and occupiers of the said messuages only, as a common pasture, in such manner as the commissioners should direct. Parties dissatisfied to bring actions within three months against persons in whose favor award made, or appeal within six months to the sessions against the award; but in default of such action or appeal the award to be final. The commissioners allotted a plot of ground in the W. common, as common of pasture, to be used, stocked, and enjoyed by the owners and proprietors of commonable messuages, and their respective tenants and occupiers of the said messuages only having right of common upon the said common of G., and they stinted the common as empowered by the act. The commissioners also (inter alia) allotted lands to the corporation in respect of their interest as lords of the soil in G. The right of common had always been, up to the passing of the act, in the occupiers of commonable messuages, being freeman of G. After the act, a party, being the proprietor and occupier of one of the commonable messuages, but not being a freeman of the borough, put his beasts upon the common; whereupon the corporation brought trespass against him more than six months after the passing of the act. Upon demurrer, the court held that the act did not change the nature of the rights of common, by giving them to the owners of commonable messuages, who were not burgesses; and that therefore the commissioners had no power to create such new rights. And they held that the language of the award had no other effect than to ascertain the spot on which the right was to be exercised, without altering the nature of the right; and that the action was therefore well brought, though more than six months had elapsed since the making of the award. *Godmanchester (Bailiffs, &c.) v. Phillips*, 2 Nev. & M. 713; 5 B. & Adol. 198. 599

By a local act all rights of common whatever in B. were extinguished: the wastes were divided; the owners of allotments were directed to inclose; and authorized to distrain the cattle of strangers trespassing. No fence having been made:—Held, that the owner of an allotment in B. could not distrain cattle which had strayed into his allotment from a common in W., in pursuance of an alleged right of common pur cause de vicinage in the inhabitants of W. *Wells v. Pearcy*, 1 Scott, 426; 1 Bing. N. R. 556. 599

*Semble*, that the cattle would be liable to distress, or the owner to an action of trespass, notwithstanding the want or defect of fences, if the cattle were suffered to remain in the locus in quo after notice to the owner that they were trespassing there. *Id.*

*Quære*, whether a notice in fact to the commissioners of W., (without inclosure), that all the rights of common in B. were extinguished, would put an end to the legal excuse of trespasses pur cause de vicinage? *Id.*



## CONTRACT.

*Making.*—The first count of a declaration in assumpsit stated, that the plaintiffs were possessed of lands for the remainder of three terms of years, which respectively commenced on the 15th of February, 1785; that they put them up to auction, subject to a condition that the purchaser should take the stock in trade thereon at a valuation to be made by two persons; and that the amount of such stock was valued by them at 892l. 6s. 4d., and assigned for breach non-payment of the same. The second count was for lands bargained and sold for the remainder of the terms then unexpired, as well as for goods bargained and sold. On the production of the leases under which the plaintiffs derived title, they were dated on the 15th of February, habendum, from the day of that date; and the valuation given in evidence, after setting forth the prices of each article, contained a condition that certain pans then in use were valued as sound, but should any of them prove broken the first time of using, the valuers agreed to estimate an allowance to be made thereon:—Held, that it was immaterial to set out in the declaration the precise day on which the leases bore date, and, that the valuation might be considered as absolute, as it was not proved that any of the pans were broken at the time specified, and consequently that there was no variance. *Welsh v. Fisher*, 2 Moore, 378. 604

A. agreed to sell to B. his interest in a public-house, and his furniture, &c., at an appraisement, to be made by two appraisers, the same to be paid for on B.'s taking possession, which was to be on or before the 25th March then next; and 30l. was paid by B. as a deposit; and he agreed that if he should not complete his part of the agreement the sum so paid should be forfeited. The buyer and seller appointed appraisers respectively. On the 25th of March the two appraisers met, and the seller's appraiser was then informed that the appraiser of the buyer could not conveniently on that day complete the valuation, but would finish the business the next day; no objection was made to the proposed delay. The appraiser of the buyer went to the seller's premises the following day to make the valuation, but the seller refused to allow him so to do, and said he would not complete the contract:—Held, that, under the circumstances, it was incumbent on the seller if he intended to insist that the contract should be completed on the day mentioned in the agreement, to have notified such intention to the buyer, and not having so done, that the latter was entitled to recover back the deposit. *Carpenter v. Blandford*, 8 B. & C. 575; 3 M. & R. 93. 604

*Statutes of Frauds.*—A., on the 20th of July, made proposals in writing (unsigned) to B., to enter his service as bailiff for a year, B. took the proposals and went away, and entered into A.'s service on the 24th of July:—Held, that this was a contract on the 20th, not to be performed within the space of one year from the making, and within the fourth section of the statute of

frauds. *Spelling v. Huntingfield (Lord)*, 1 C. M. & R. 20; 4 Tyr. 606. 604

A beneficed clergyman entered into an agreement to permit the profits of his living to be received by a third person, for the purpose of the surplus (after paying a competent stipend to a curate to serve the church) being applied in liquidation of his debts:—Held, that such an agreement, signed by the creditors only, and not by the debtor, or by any person thereunto by him lawfully authorized, does not amount to such a substitution of a new agreement in the place of an old contract as to operate as a bar to an action at the suit of a creditor who has signed it; it being a contract "for an interest in or concerning lands, tenements, or hereditaments," within the statute of frauds. *Alchin v. Hopkins*, 4 M. & Scott. 615; 1 Bing. N. R. 99. 604

*Validity generally.*—A party cannot enforce a contract where the consideration is illegal, either wholly or in part. *Waite v. Jones*, 1 Scott, 730; 1 Bing. N. R. 656; 1 Hodges, 166. 605

The declaration stated that the defendant signed a memorandum in writing, whereby he agreed with the plaintiff (amongst other things) to pay him certain specified sums towards the liquidation of certain debts, in consideration of the plaintiff's executing a certain deed of separation, and agreeing to pay the said debts in full; that the plaintiff, confiding in the defendant's agreement, executed the said deed of separation; that is to say, a certain deed of separation between the plaintiff and his wife, and agreed to pay the debts in full, &c. The defendant pleaded, that, at the time of making the agreement, the plaintiff was solely liable to make the several payments, the supposed agreement by the plaintiff to pay which was by the memorandum stated to be the consideration for the defendant agreeing, as was alleged to be in the said memorandum agreed by him:—Held, that the plea was no answer to the declaration, inasmuch as it disclosed no facts tending to show that any part of the consideration for the defendant's promise was illegal. *Id.*

Illegality of consideration must be pleaded specially as a defence, not only where the express contract on which a plaintiff sues is illegal, but also where illegal services having been performed, no contract to pay for them can be implied. *Potts v. Sparrow*, 1 Bing. N. R. 594; 1 Scott, 578; 3 Dowl. P. C. 630; 1 Hodges, 135. 605

In assumpsit by an attorney to recover his bill of costs for preparing a deed, and also costs of an action instituted in pursuance of that deed, in which action his client had failed in consequence of the deed having been held void on the ground of maintenance:—Held, that the defendant could not set up the illegality of the contract in answer to the action under a plea of non-assumpsit. *Id.*

A contract made between two or more persons to enter into a partnership in contravention of the law is void, and confers no rights upon either party. *Armstrong v. Lewis* (in error), 4 M. & Scott, 1. 608

Quære, whether a legal partnership could exist



in the profits of sworn clerk or side clerk of the court of Exchequer, as those offices were formerly constituted? or, whether such a partnership can at present exist in the profits of the office of clerk of the rules of that court? *Clark v. Richards*, 1 Y. & Col. 351. 616

**Legal Proceedings.**—Where an action has been commenced for an unliquidated demand, payment by the defendant of an agreed sum in discharge of such demand is a good consideration for a promise by the plaintiff to stay proceedings, and pay his own costs. And, per Littleale, even in the case of a liquidated demand, the same promise made in consideration of the payment of such demand may be enforced in an action of assumpsit, where the agreement has been such that the court would stay proceedings if the plaintiff attempted to go on. *Wilkinson v. Byers*, 1 Adol. & Ellis, 106; 3 Nev. & M. 553. 606

Money paid by A. to B., in order to compromise a qui tam action of usury brought by B. against A., on the ground of an usurious transaction between the latter and one E. may be recovered back in an action by A. for money had and received; for the prohibition and penalties of the stat. 18 Eliz. c. 5, attach only on the "informer or plaintiff, or other person suing out process in the penal action, making composition," &c., contrary to the statute; and not upon the party paying the composition; and therefore the latter does not stand, in this respect, in pari delicto, nor is he particeps criminis with such compounding informer or plaintiff. *Williams v. Hedley*, 8 East, 378. 606

And such recovery may be had although E.'s assignees had before recovered from B. the money so received [by him as money received to their use, (the money paid by way of composition being at the time stated to be E.'s money :) there being no evidence at the trial of the cause to show that A., the plaintiff, was privy to that suit. Id.

In consideration that plaintiff had published a libel at defendant's request, and had at the like request consented to defend an action brought against plaintiff for such publication, defendant promised to indemnify plaintiff from the costs of the action:—Held, that the promise was void. *Shackell v. Rosier*, 2 Bing. N. R. 634. 606

**Trading.**—In construing a covenant not to carry on any offensive trade or business on premises demised, much will depend on the situation of the premises; and in construing such a covenant, it is particularly worthy of consideration, whether such trade as that complained of was carried on there at the time of the demise; and, semble, that a trade carried on there at the time of the demise, would not be within the covenant. *Gutteridge v. Munyard*, 7 C. & P. 129; 1 M. & Rob. 334—Tindal. 609

Lease for twenty-one years to A. B., his executors, administrators, and assigns. Proviso, that if A. B., his executors, administrators, and

assigns should become bankrupt or insolvent, or suffer any judgment to be entered against him, &c. by confession or otherwise, or suffer any extent, process, or proceedings to be had or taken against him, whereby any reasonable probability might arise of the estate being extended, &c., the estate should determine, and the lessor have power to re-enter. A. B. died during the term, and by his will devised the premises to his executors on certain trusts. The surviving executor having become bankrupt:—Held, that the lessor's right of re-entering thereupon accrued. *Doe d. Bridgman v. David*, 1 C. M. & R. 405; 5 Tyr. 125; S. C. nom. *Doe d. Williams v. Davis*, 6 C. & P. 614. 609

The converting of a demised house into a lunatic asylum, is not a breach of a covenant not to "use or exercise any trade or business of butcher, baker, slaughterman, melter of tallow, tallow chandler, tobacco-pipe maker, soap boiler, or any other offensive trade." *Doe d. Wetherell v. Bird*, 4 Nev. & M. 285; 2 Adol. & Ellis, 161. 609

In such a covenant, the words "trades" and "business," must be taken to be used in different senses, and the former must be confined to businesses conducted by buying and selling. Id.

The plaintiffs, lessees of premises under a demise, with a covenant not to suffer certain trades to be carried on therein, amongst others, those of a "common brewer" or "retailer of beer," without the licence of the assignor, underleased to the defendant who covenanted in like manner not to carry on the trades prohibited without the licence of the plaintiffs. The defendant (under a licence from the plaintiffs) carried on the business of a "retail brewer" on the demised premises; whereupon the superior landlord brought an ejectment for the supposed forfeiture, which not being defended, he obtained possession:—Semble, that this recovery in the ejectment by the superior landlord, was no answer on the part of the defendant to a demand for rent by his lessors, a "retail brewer" not being within the proviso in the original lease. *Simons v. Farren*, 4 M. & Scott, 672; 1 Bing. N. R. 126. 609

In covenant for non-payment of rent reserved by a lease containing a clause prohibiting the carrying on of certain trades upon the demised premises without the licence of the lessor, the defendant pleaded that his immediate lessor, who held under one A. C., subject to a similar covenant, gave him a licence to carry on one of those trades, and that by reason, and on the ground that the defendant so carried on such trade, R. C. "having good right and title to the demised premises as heir at law of A. C." evicted the defendant:—Held, that, the plea not negating that the trade was carried on with the licence of the original lessor, did not disclose such right in R. C. to evict, as to afford an answer to the plaintiff's claim for rent. *Simons v. Battley*, 1 Scott, 105. 609

The usual covenants between landlord and tenant will not extend to covenants in restraint of trade. And a stipulation that the premises should not be converted into a school does



not imply, and cannot be extended to, a restriction against the carrying on of other trades. *Van v. Corpe*, 3 Mylne & Keen, 269. 609

**Maintenance.**—Agreement to lease the rectorial tithes of a parish, including the tithes of ninety acres supposed to be within the parish, but which had not paid tithes to the lessor during his incumbency, with a stipulation that the intended lessee would, within a given time, take such legal proceedings for the recovery of the tithes of the ninety acres as his counsel should advise:—Held, not to be within the statute of maintenance. *White v. Gardner*, 1 Y. & Col. 385. 613

Courts of equity will give no encouragement to contracts which savor of maintenance, or champerty, though such contracts may not be within the strict legal limits assigned to those offences. *Prosser v. Edmonds*, 1 Y. & Col. 481. 613

It is not maintenance to purchase an interest which is the subject of a suit; but if the purchaser give an indemnity against all the costs that have been or may be incurred by the seller in the prosecution of the suit, the transaction amounts to maintenance. *Harrington v. Long*, 2 Mylne & K. 590. 613

Where, after a decree in a creditor's suit, the plaintiff sold a debt which he had proved in the cause, and took from the purchaser a deed of indemnity against all expenses which he had incurred and might incur in the suit, and his name continued to be used as plaintiff in the suit, together with that of the purchaser, it was held, that the transaction amounted to maintenance, and the bill was, upon that ground, dismissed. *Id.*

The defendants stated, that in consideration that the plaintiff, at the request of the defendant, had given the defendant a certain letter, by means of which he was enabled to end disputes and differences which had arisen between himself and third parties, and to recover certain property, the defendant promised to give the plaintiff 1000*l.*:—Held, that this declaration disclosed a sufficient consideration for the defendant's promise. *Wilkinson v. Oliveria*, 1 Scott, 461; 1 Bing. N. R. 490. 613

The court will not order an attorney to repay a sum of money paid to him voluntarily, under an agreement to give him one-third of what was recovered in an action, the application not having been made until thirteen years after the money was paid. *Ex parte Yeatman*, 4 Dowl. P. C. 304; 1 Har. & Woll. 510. 613

Where an attorney agreed to save a party harmless from all costs of some suits, on his being allowed to retain half of whatever sums were recovered, the court nevertheless ordered him, on application of the party with whom the agreement was made, to deliver his bill of costs for the purpose of having it taxed. *In re Masters*, 1 Har. & Woll. 348. 613

Such an agreement amounts to maintenance, and is illegal. *Id.*

Quære whether a conveyance by assignees of

a bankrupt, where neither bankrupt nor assignees have been in possession within a year, amounts to embracery? *Doe d. Oliver v. Powell*, 3 Nev. & M. 616. 613

**Bankrupts and Insolvents.**—A fiat in bankruptcy issued against the defendant on the petition of the plaintiff. After the fiat, and before the choice of assignees, the plaintiff obtained from the bankrupt his acceptance for part of his debt. The plaintiff was afterwards chosen one of the assignees, and the defendant obtained his certificate:—Held, that it was not competent to the plaintiff to sue upon the bill; the security being void, both as being contrary to the policy of the bankrupt law generally, and contrary to the spirit of the 8th sect. of the 6 Geo. 4, c. 16. *Rose v. Main*, 1 Scott, 127; 1 Bing. N. R. 357. 618

An agreement between a petitioning creditor, who has sued out a fiat in bankruptcy, and the bankrupt, that the former shall abandon the prosecution of the fiat, and that the bankrupt shall accept a bill of exchange for a certain amount, is illegal, even as between the bankrupt and the petitioning creditor; and the bill of exchange accepted by the bankrupt, in pursuance of such an agreement, is void, and no action can be maintained upon it. *Davis v. Holding*, 1 Mees. & Wels 159. 613

Where creditors call on a stranger to a bankrupt's estate to be the assignee, and he, having declared he will not be liable to costs, assents to their appointment, an agreement by the petitioning creditor, who was also solicitor to the commission, to indemnify him against costs, is not illegal. *Gilmour v. King*, 3 Tyr. 581; 1 C. & M. 612. 618

Plaintiff, an attorney, conducting a commission of bankruptcy, having received a debt due to the bankrupt, in order to effect an arrangement for a supersedeas, undertook to pay the defendant, solicitor of the bankrupt, the surplus of the sum so received, should any remain, after defraying certain charges incurred by the plaintiff, if defendant would pay plaintiff his costs of conducting the commission:—Held, not a sufficient consideration to support an action against the defendant on his promise to pay the plaintiff's costs, without an averment and proof that the commission had been superseded, as the contract without a supersedeas was illegal. *Haslam v. Sherwood*, 4 M. & Scott, 434; 10 Bing. 541. 618

By 5 & 6 Will. 4, c. 41, so much of the 6 Geo. 4, c. 16, as enacts that any note, bill, or mortgage shall be void by reason of being given on an agreement to sign a bankrupt's certificate is repealed, and it is enacted instead, that such securities shall be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration only. 618

An agreement was made to withdraw the opposition to a person's discharge under the Insolvent Debtor's Act on consideration of his giving a bill for the debt, and his son guaranteeing the payment of it, and the opposition was with-



drawn, and after the discharge the bill was given:—Held, that such bill was contrary to the policy of the Insolvent Debtors Act; and the party having been arrested on it, the bail-bond was ordered to be delivered up to be cancelled. *Gould v. Williams*, 4 Dowl. P. C. 91; 1 Har. & Woll. 344. 618

*Other Matters.*—A bond is good with a condition to be forfeited if defendant shall hire one C., so as to give him a settlement in S., &c. *Whiting v. Punchard*, 3 Wils. 50. 618

Where a statute contains regulations for the protection of buyers against the fraud of sellers, a seller cannot recover for the price of goods sold in contravention of the regulations, although the statute does not in terms prohibit such a sale, but imposes a penalty upon the seller. Where, therefore, butter was sold in firkins not branded according to the provision of acts (36 Geo. 3, c. 86, and 38 Geo. 3, c. 73) "to prevent abuses and frauds in the packing, weight, and sale of butter," which require that makers of vessels for the packing of butter shall brand them with their names, under a pecuniary penalty, and that sellers of butter shall, under a further penalty, use vessels so branded, and brand their own names:—It was held, that an action for the price could not be maintained. *Foster v. Taylor*, 3 Nev. & M. 244; 5 B. & Adol. 887. 619

*Secus*, in the case of a breach of mere revenue regulation, which is enforced by a penalty. *Id.*

A factor selling a parcel of prize manufactured tobacco, consigned to him from his correspondent at Guernsey, of which a regular entry was made on importation, but without having entered himself with the excise officer as a dealer in tobacco, nor having any licence as such, may yet maintain an action against the vendee for the value of the goods sold and delivered: and this, though the tobacco were sent to the defendant without a permit, at his desire: there being no fraud upon the revenue, but at most a breach of revenue regulations protected by penalties; even if such factor could, upon this single and accidental instance, be considered as a dealer in tobacco within the meaning of the stat. 29 Geo. 3, c. 68, s. 70, which requires every person who shall deal in tobacco first to take out a licence, under a penalty. *Johnson v. Hudson*, 11 East, 180. 619

The court of Chancery refused to carry into effect a deed between relations, dividing the property of a testator, under whose will they took interests, (one of the parties being also heir-at-law, and entitled to after-purchased lands), considerable benefits being given up by the heir without consideration; it appearing on the deed that the parties did not understand the extent of their rights; and there being evidence of the mental imbecility, habitual intoxication, and extreme ignorance of the heir-at-law; of his not understanding the nature of legal instruments, and of his having no professional adviser at the time he executed the deed; although no direct fraud or undue influence was proved, and the party acquiesced for five years. *Dunnage v. White*, 1 Wils. C. C. 67. 614

Relief against a disposition of property by the intended wife, pending a treaty of marriage, can only be given where the husband has been kept in ignorance of the transaction; and s<sup>e</sup>mble, that, in applying the principle upon which conveyances made by the intended wife, pending a treaty of marriage, are avoided, on the ground of fraud upon the marital right, the court will take into consideration the meritorious object of such conveyances, and the situation of the intended husband in point of pecuniary means. *George v. Wake*, 1 Mylne & K. 610. 611

*Construction.*—If an agreement is in the alternative, and one branch of the alternative cannot by law be performed, the party is bound by law to perform the other. *Stevens v. Webb*, 7 C. & P. 60—Parke. 621

A. was in custody on a ca. sa., and, in consideration of the plaintiff consenting to his discharge, B. agreed to pay 35*l.* or to surrender A. to the sheriff; A. on a subsequent day offered to surrender himself to the sheriff, who would not retake him, as the plaintiff had consented to his discharge:—Held, that the agreement was absolute for the payment of the 35*l.*, and that the other alternative was not satisfied by the offer of the surrender. *Id.*

A previous agreement will be determined by a later one, which is necessarily inconsistent with it in effect, though not containing any express stipulation in terms for so superseding it. On the 28th of May, 1831, plaintiff agreed with the defendant for twelve months for the performance of various literary works to be hereafter indicted by the defendant, the plaintiff to receive from the defendant for the same six guineas a week, and not to be at liberty during the above twelve months to engage in any publication similar to "The Court Journal" mentioned in the agreement. By agreement between the same parties, dated 14th of October, 1831, the plaintiff agreed to take on himself the various duties of editing the publication called "The Court Journal," recited to be then the entire property of the defendant, and to devote all his time and attention to the same, except the hours he had already engaged on Saturdays and Mondays, to superintend a paper named. The defendant was to pay the plaintiff 10*l.* a week:—Held, that the first agreement was superseded by the second, so that the plaintiff could not recover on the first after the second came into operation. *Patmore v. Colburn*, 4 Tyr. 840. 621

An agreement on dissolution of partnership, to assign the partnership property in consideration of 50*l.* paid, and five bills for 100*l.* each delivered, is not executory, but executed. *Ex parte Gibson*, 2 Mont. & Ayr. 4. 621

A contract to sell mess pork of Scott & Co., held to mean mess pork manufactured by Scott & Co.; also, that evidence was admissible to show the meaning that language bore in the market. *Powell v. Horton*, 2 Bing. N. R. 668. 621

Where A., for a valuable consideration, contracted to sell and plant 70,000 trees, on certain



lands of the defendant, and also well and sufficiently to keep in order the trees aforesaid, for two years next after the planting thereof, and that such of them as should die during such period, except from injury by sheep, game, or cattle, should be replanted in the autumns of the two years by him :—Held, that evidence of non-performance by A. of any part of his contract, by which the trees had become of less value to the defendant, was admissible to reduce the damages in an action on the agreement for their price, and for planting them. *Allen v. Cameron*, 3 Tyr. 907. 621

Semble, that this agreement meant to keep in order, not by pruning only, but by weeding and clearing the ground about the trees. *Id.*

Semble, that if the terms of an agreement are equivocal, and do not distinctly explain what is to be done by either party, the price may be taken into consideration in ascertaining the right construction. *Id.*

A stipulation that judgment shall not be entered up on a warrant of attorney, unless the consor or insolvent, does not oust the consor from the right to enter up judgment before the day specified, if the consor be in insolvent circumstances, although he may not have become bankrupt or taken the benefit of an insolvent debtors act. *Biddlecomb v. Bond*, 5 Nev. & M. 621. 621

In a contract for the supply of goods, there was a condition that in the event of the bankruptcy or insolvency of the vendor, the contract should be terminated, or if he should be afflicted in mind or body so as to be unable to carry on his trade :—Held, that there was nothing in the contract to show that the word "insolvency" was used in a technical sense, and therefore it must be understood in its ordinary import of being unable to pay his just debts. *Parker v. Gossage*, 2 C. M. & R. 617; 1 Tyr. & G. 105; 1 Gale, 228. 621

Indebitatus assumpsit for goods sold and delivered; it is no plea that the sale and delivery were in pursuance of a contract, which it was agreed should be wholly rescinded. *Edwards v. Chapman*, 4 Dowl. P. C. 752; 1 Mees. & Wels. 231. 621

*Proceedings in Equity*.—A party who, under a misapprehension of his legal rights, parts with his property for a bona fide and valuable, but not an adequate consideration, cannot have the transaction set aside on the mere ground of mistake. *Marshall v. Collett*, 1 Y. & Col. 232. 623

#### COPYHOLD.

The heir may, without admittance, devise copyhold estates decended upon him. *King v. Turner*, 1 Mylne & K. 456. 625

Where lands are held by copy of court roll, according to the custom of the manor, they are copyhold within the 55 Geo. 3, c. 192, although they are not held at the will of the lord. *Doe d.*

*Edmunds v. Llewellyn*, 2 C. M. & R. 503; 1 Gale, 193. 624

By a special verdict it was found, that previous to the passing of the 55 Geo. 3, c. 192, there did not appear upon the court rolls of the manor, any entry of a surrender of lands parcel of the manor, and held by copy of court roll thereof, to such uses as should be declared by the last will of the person making such surrender, had ever been made :—Held, notwithstanding, that they were within the above statute. *Id.*

Quære, whether a negative custom that copyhold lands surrendered to the use of a will, should not pass thereby, is good? *Id.*

A surrenders a copyhold to such uses as B. shall appoint, and in default of and until appointment, to B. in fee; B. appoints to C. The lord is bound to admit C. without requiring the previous admission of B. *Rex v. Oundle* (lord of manor), 3 Nev. & M. 484; 1 Nev. & M. 586; 1 Adol. & Ellis, 285. 628

In order to constitute the grantee of a copyhold a perfect customary tenant, where the grant is made out of court, such grant must be notified at the next customary court, or at such other subsequent court as the custom points out, and must be entered on the rolls of the court. *Doe v. Whitaker*, 3 Nev. & M. 225. 628

But it is sufficient if, having been entered on the court rolls at a void court as at a good court it appears on the court rolls at a subsequent good court, and be not then objected to by the tenants. *Id.*

It is no objection to a copyhold grant that it is made upon the surrender of a former grantee in remainder, whose admittance had upon such former grant been expressly respited, and of whose admittance at any subsequent time there was no entry in the court rolls. *Id.*

Nor is it an objection to the grant of several customary tenements by one copy of court roll, that several rents are reserved, without specifying which is reserved out of each tenement, it appearing that former entire grants of the same several tenements have contained similar entire reservations. *Id.*

Nor is it an objection that two heriots are expressed to be reserved, where in former grants only one heriot has been reserved. *Id.*

A customary court cannot be held out of the manor, unless there be a custom to warrant it; and if a court be so held, all that is done at it is void. *Id.*

But the nullity of such court only affects such things as are required to be done at a court. *Id.*

A lord may grant to and admit a copyhold tenant, not only out of court but also out of the manor. *Id.*

A grant by the lord in person is good, although it purport to be made at a court within the manor, which in fact was held out of the manor. *Id.*

The steward of a manor may take a surrender out of court. *Id.*

But a steward cannot admit out of court. *Id.*



But a voluntary grant of a copyhold, made by the steward at a court held off the manor, is sufficient where such steward is also clothed with a power of attorney, which expressly authorizes him to make voluntary grants. *Id.*

So, although the grant purport to be made by such steward, as steward, and without any reference being made in the grant the special authority. *Id.*

A copy of court roll admitting a surrenderee, in trust for the grantee of an annuity, there stated to be secured by the bond of the purchaser, and, subject thereto, to the use of the purchaser; his executors, administrators, and assigns, requires an ad valorem stamp in respect of the purchase money expressed to be so paid by the purchaser to the surrenderor, but without reference to the annuity—whether the statement is taken to refer to an annuity already granted, or to an annuity to be created in futuro. *Doe d. Chapeau v. Reynolds*, 2 Nev. & M. 383. 628

A custom in a manor required that the consent of the husband to a surrender by his wife should be expressed in the surrender and admission; a surrender was made by the wife at a general court, and the husband was present at that court, but in the surrender the consent was not expressed:—Held, that the surrender was inoperative. *Doe d. Shelton v. Shelton*, 4 Nev. & M. 857; 3 Adol. & Ellis, 265; 1 Har. & Woll. 287.

Held, also, that the court could not infer from circumstances that the husband's consent had been given. *Id.*

Seem, that such a surrender would not be good, even if the husband were divested of all property at the time. *Id.* 628

A copyhold was surrendered to the use of A. for life; remainder to such person or persons, and for such estate or estates, as A. should appoint by will, executed in the presence of and attested by three witnesses; remainder, in default of such appointment, to the use of A. in fee: after 55 Geo. 3, c. 192, A. devised to B. by a will executed in the presence of two witnesses only:—Held, a good devise of the remainder in fee, and that the want of a surrender to the use of this will was aided by the statute. *Doe d. Hickman v. Hickman*, 1 Nev. & M. 780. 630

A., being the owner of a copyhold, made a conditional surrender of it, in the year 1826, to W., to secure money lent. In 1832, A. sold the copyhold to G., and made a surrender of it to him absolutely. In 1833, G. was admitted tenant; and, in 1834, W. was also admitted tenant:—Held, that, on ejectment brought by W., he was entitled to recover. *Doe d. Wheeler v. Gibbons*, 7 C. & P. 161—Park. 630

A. & B., joint tenants of a copyhold, make partition by parol without the assent of the lord, and after wards occupy in severalty. A. surrenders to C. by general words.—C. is not entitled to be admitted to the parcels occupied by A. in severalty. *Rex v. Southwood*, 5 M. & R. 414. 630

Copyholds which have been surrendered to the use of the will, do not pass by a general devise of the real estate, where the will was made before the 55 Geo. 3, c. 192. *Doe d. Smith v. Bird*, 5 B. & Adol. 695; 2 Nev. & M. 679. 630

If in ejectment by the lord against a copyholder, for a forfeiture by waste, the jury find there has been no damage, there is no waste and no forfeiture. *Doe d. Grubb v. Burlington (Earl)*, 2 Nev. & M. 534; 5 B. & Adol. 507. 633

If a copyholder pull down a barn without any intention of rebuilding, the lord cannot recover the place from him on the ground of a forfeiture, if the jury find that the premises are not damaged. *Id.*

A copyholder in fee surrendered to the use of another person, and afterwards, and before the admittance of the surrenderee, committed and was convicted of simple felony: there being a custom in the manor that any tenant of customary tenements, who should commit and be convicted of felony, should forfeit his said tenements to the lord:—Held, that the surrenderor, before admittance, was still tenant for the purpose of forfeiture, and that his estate was forfeited to the lord, and that the surrenderee not entitled to be admitted. *Rex v. Mildmay*, 5 B. & Adol. 254. 633

Where a copyhold was surrendered to a mortgagee and his administrators, and no condition was expressed in the surrender, and the mortgagee died intestate and without an heir, it was held that the lord of the manor was entitled to enter upon the copyhold as an escheat. *Att.-Gen. v. Leeds (Duke)*, 2 Mylne & K. 343. 633

## COPYRIGHT.

The court of Chancery cannot specifically perform an agreement, whereby A. agrees to compose and write reports of cases determined in a court of justice, to be printed and published by a particular individual, for a stipulated remuneration, nor interfere by injunction to restrain the party from permitting the reports written by him to be published by another person; the remedy, if any, is at law. *Clarke v. Price*, 2 Wils. C. C. 167. 637

Assumpsit for the copyright of a play. Plea, non assumpsit:—Held, that it could not be objected that the assignment was not in writing, but that it ought to have been specially pleaded. *Barnett v. Glossop*, 1 Scott, 621; 1 Bing. N. R. 633; 1 Hodges, 94. 638

The assignee of the copyright of a dramatic work, printed and published within ten years of the passing of 3 & 4 Will. 4, c. 15, and not the author, who has assigned such copyright, is entitled to the sole right of representing the piece or causing it to be represented. *Cumberland v. Planche*, 3 Nev. & M. 537; 1 Adol. & Ellis, 580. 638

So, where the work is printed and published subsequently to the act, and no reservation of the



right to the exclusive representation is expressly made by the author. *Id.*

No action can be maintained for pirating a print, where the date of the first publication has not been engraved on the plate, according to the provisions of 8 Geo. 2 c. 13, s. 1; the performance of the directions of the statute in that respect being a condition precedent to the right of property vesting in the proprietor. *Brookes v. Cock*, 4 Nev. & M. 652; 3 Adol. & Ellis, 138; 1 Har. & Woll. 129. 639

A. made a copy of a print invented by B. in colors and of large dimensions, and exhibited it as a diorama. The court refused to restrain the exhibition until the right had been established by law. *Martin v. Wright*, 6 Sim 297. 639

Prints engraved and struck off abroad, but published here, are not protected from piracy. *Page v. Townsend*, 5 Sim. 305. 639

To publish in the form of quadrilles and waltzes, the airs of an opera of which there exists an exclusive copyright, is an act of piracy. *D'Almaine v. Boosey*, 1 Y. & Col. 289. 639

The English assignee of the copyright of a foreign musical composer is within the protection of the statutes relating to copyright. *Id.*

Semble, that a foreigner, who resides and publishes in England, is within the like protection. *Id.*

By the 5 & 6 Will. 4, c. 65, *the author of any lecture, or person to whom he hath sold or otherwise conveyed the copy thereof, in order to deliver the same in any school, seminary, institution, or other place, or for any other purpose, is to have the sole right and liberty of printing and publishing such lecture; and if any person shall, by taking down the same in short-hand, or otherwise in writings, or in any other way, obtain or make a copy of such lecture, and shall print, lithograph, or otherwise copy and publish the same, without leave of the author or other person, &c., and every person who, knowing the same to have been printed or copied and published without such consent, shall sell, publish, or expose to sale any such lecture, shall forfeit such printed or otherwise copied lecture or parts thereof, together with one penny per sheet, to be recovered by action of debt.*

By s. 2, *the penalty is imposed for publication in newspapers.*

By s. 3, *persons having leave to attend lectures are not to be deemed to have leave to publish them.*

By s. 4, *nothing is to prevent persons from printing and publishing lectures which have been printed and published with leave of the authors or their assigns, and of which the period of copyright has expired.*

By s. 5, *the act is not to extend to lectures delivered in unlicensed places, universities, or public schools or colleges, or on any public foundation, or by any individual in virtue of or according to any gift, endowment, or foundation.*

## CORPORATION.

*Acts of Corporation.*—A member of an incorporate company, entering into a contract with the company, must be deemed, in respect of that contract, a stranger. *Hill v. Waterworks Co. (Manchester)*, 2 Nev. & M. 583; 5 B. & Adol. 866. 642

In debt on bond against a corporate company, where it is shown that the bond has been sealed with the seal of the company by the proper officer, it is competent to the defendants, under the plea of non est factum, to prove that several of the requisitions of the act necessary to the validity of the execution have not been complied with. *Id.*

Quære whether a corporation can borrow money, except under seal? *Wilmot v. Coventry (Corp.)*, 1 Y. & Col. 516. 642

By 5 Will. 4, c. 39, s. 13, *every writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary of such corporation.*

See the 5 & 6 Will. 4, c. 76, *the Municipal Corporation Reform Act.*

A custom in the city of London, that a freeman of the city shall not set on work in the manual occupation of a butcher, one who is a foreigner to the liberties of the city, is good. *Shaw v. Poynter*, 4 Nev. & M. 290; 2 Adol. & Ellis, 319. 658

When, in a bye-law of a corporation, making certain regulations, for breach of which parties are to be liable to be sued for a penalty, there is a separate proviso, making certain exceptions, a party suing for breach of the bye-law need not aver in the declaration, that the case was not within the exception in the proviso; but such fact, if it exist, must be shown by the defendant by way of excuse. *Id.*

A corporation aggregate may maintain assumpsit for the use and occupation of tolls, although they did not grant the tolls to the occupier by any instrument under their common seal. *Carmarthen (Mayor, &c.) v. Lewis*, 6 C. & P. 608 —Parke. 642

A corporation is liable in tort for the tortious act of its agent, though not appointed by seal, if such act be an ordinary service, such as a distress, professedly made under a statute, for a debt due to the corporation; and a jury may infer the agency from an adoption of the act by the corporation, as from their having received the proceeds of the seizure. *Smith v. Birmingham Gas Comp.*, 1 Adol. & Ellis, 526; 3 Nev. & M. 771. 643

By charter Edw. 1, granted to the burgesses of C., that the constable of his castle of C. for the time being should be mayor of that borough, "sworn as well to the king as to the burgesses who, on oath for preserving the king's right being first taken, should swear to the burgesses, that he would preserve the liberties of the bur-



geses, granted by the said king, and faithfully do those things which to the office of mayoralty belong, in the said borough." By letters patent, his present Majesty granted the office of the castle of C.:—Held, that, until oath taken, according to the charter, the title of the grantee is incomplete. *Rex v. Roberts*, 5 Nev. & M. 130; 1 Har. & Woll. 444. 655

The grantee of an office, for which an oath is a necessary qualification, but which may be executed by deputy, cannot appoint a deputy until he has been sworn. *Id.*

A party is appointed during pleasure, by letters patent of King Geo. 3, to an office which cannot be executed until oath taken. He takes the oath, and, by operation of 57 Geo. 3, c. 45, and 6 Anne, c. 7, s. 8, is continued in office until six months after the death of Geo. 4, and, by the operation of 1 Will. 4, c. 6, until six months after the passing of that act. Before the expiration of the last-mentioned period, he is by letters patent again appointed to the office:—He cannot, after this second appointment, execute the office until the oath be again taken. *Id.*

Quære, whether an officer in the situation of the constable of the castle of Carnarvon can appoint a deputy to be mayor of the borough, and, if so, whether the appointment must be by deed? *Id.*

**Qualification and Election of Members.]—**Acceptance of incompatible office. *Rex v. Patteson*, 1 Nev. & M. 612; 4 B. & Adol. 9. 649

Where a statute directs an election by poll, semble, that the poll may be taken from the holding up of electors' hands; but if the tellers appointed to take the number differ, and a poll is demanded and refused, the court will grant a mandamus to enter an adjournment of the election meeting, and to proceed to complete the election. *Rex v. St. Luke's*, 2 Nev. & M. 464. 115

To impeach the election of a party returned as elected, it is not sufficient to allege that many votes were bad and fictitious, without showing that some other candidate had a majority of legal votes. *Rex v. Jefferson*, 2 Nev. & M. 487. 651

On a motion for a quo warranto information, an affidavit stating the relator's information and belief that the officer was elected at a court held on a certain day, and there was not at the court where he was elected as aforesaid a proper number of electors present, is answered if it be sworn that there was a proper number of electors at the court held on the specified day, and that the officer was not elected at that court. *Rex v. Rolfe*, 4 B. & Adol. 840; 1 Nev. & M. 773. 651

The officer is not bound to answer for the proceedings of any other day than that specified by the relator. *Id.*

Where it is granted by charter that a corporation shall have so many aldermen and so many capital burgesses, and that when one of the latter shall die, depart, or be removed, another shall be elected in his place by "the mayor and aldermen

and other capital burgesses then surviving or remaining, or the greater part of them;" the election must be made by a majority of the full members, of aldermen and of capital burgesses; a mere majority of the members of both bodies who happen to survive is not sufficient. *Rex v. May*, 4 B. & Adol. 843. 651

By charter of Car. 2, there were to be in the borough of S. a mayor, aldermen, and twenty-four capital burgesses; on the death or removal of an alderman, the mayor and aldermen, or the greater part of them, were to elect a capital Burgess to supply his place; when a capital Burgess died, &c., the mayor, aldermen and capital burgesses, or the greater part of them, were to elect a successor from among the inhabitants and burgesses; and the mayor was to be annually elected on a certain day, "by the burgesses of the said borough, or the greater number of them," with the consent of twenty-four freeholders and inhabitants, to be chosen as directed by the charter: in practice, the mayor had always been elected by the capital burgesses only. At the election of mayor on the charter-day in 1832, there was not a majority of the number of twenty-four capital burgesses present, and no other burgesses attended:—Held, that this did not avoid the election, for that the word "burgesses" in the charter (where it treated of the election of mayor) could not be construed to mean only capital burgesses; that the right of election did not devolve upon the body of capital burgesses by the mere forbearance of the other burgesses to interfere; and that the capital burgesses, in electing the mayor, acted in the capacity of burgesses merely. *Rex v. Goldsmith*, 4 B. & Adol. 835. 651

A declaration for a penalty under the 5 & 6 Will. 4, c. 76, s. 54, for bribing a voter in the election of councillors, "by corruptly promising to give him employment in hauling stones at certain hire, as and for a reward to give his vote for" particular candidates, was held good on demurrer; for an employment is a reward within the latter as well as the former branch of that section; and whether the employment in the particular case was given by way of corrupt bargain, was a question for the jury; but the court must assume that such was the case, a corrupt agreement being sufficiently alleged in the declaration:—Held also, that an allegation that an election of councillors took place under the act, and that the defendant, not regarding the statute, corrupted the party to vote in such election, was a sufficient statement that the offence was committed after the passing of the act. *Harding v. Stokes*, 1 Mces. & Wels. 354. 655

On motion for a mandamus to the master and wardens of an incorporated mercantile company of the city of London, to call a meeting of the company at the next annual day of election, for the purpose of electing a master and warden according to the charters, it being suggested as the ground of motion, that the said officers were at present improperly elected by a part only of the company, instead of the whole body—the court refused the writ. *Rex v. Attwood*, 4 B. & Adol. 481; 1 Nev. & M. 236. 651



On motion for a quo warranto against the master elected in the manner complained of, it appeared that the practice, as far as it could be traced, from the year 1488, had been for the master, wardens, and a body called the court of assistants (which had varied in number from twenty-four to forty), to elect the master, and that he had usually been elected out of the court of assistants, and not out of the general body; the assistants, besides belonging to the court, had the same qualifications for being elected as the other members of the company. In some instances, but it was not stated how many or when, persons had been elected who were not of the court. The company had existed from time immemorial. By a charter of Ric. 2, they were empowered to elect a master de seipsis when and as they should please; and by a charter of 18 Hen. 7 (1502) all their liberties, franchises, and customs were confirmed:—Held, that if one entire by-law were to be presumed, for the master, wardens, &c. to elect, and to elect out of a restricted body, the latter part of such by-law would be bad and vitiate the whole, but that no ground was laid for presuming such by-law, inasmuch as the election from the particular body might have been in every instance by choice, and not under any particular rule: and further, it appeared that there were exceptions, although these were not specifically stated; and that even the practice of electing by a limited body was not necessarily to be presumed part of a by-law, as it might have been a custom incorporated by reference in the charter of Hen. 7. *Id.*

A custom in a borough for the leet jury of the borough, being also the leet jury of a manor, to elect the members of the corporation in whom the government of the borough is vested, is a reasonable and legal custom, although the manor and borough are not shown to be co-extensive. *Rex v. Beaufort (Duke)*, 2 Nev. & M. 815; 5 B. & Adol. 442. 655

An affidavit, stating that the court of mayor and aldermen had again determined that A. B. was not a fit and proper person to be admitted, is no ground for refusing a mandamus, because the prosecutor has a right to have the facts stated in the return, in order that he may have an opportunity of controverting the truth of them; at all events, the affidavits in answer to the rule ought to show that the court of mayor and aldermen had, on the second occasion, come to the conclusion that A. B. was not a fit and proper person to be admitted to the office, on a fresh investigation. A mandamus having issued, the return stated that A. B. was elected by a majority of votes, and returned as so elected to the court of mayor and aldermen; that a petition was presented to that court against his admission to the office, whereupon they examined the merits of the petition according to custom, and determined that he was not a fit and proper person to be admitted to the office, nor duly elected; and further, that he was not in fact duly elected:—Held, that this return was not inconsistent. *Rex v. London (Mayor)*, 5 B. & Adol. 233. 656

Seemle, that a town clerk is not bound to allow inspection of the voting papers delivered at the

election of councillors, under 5 & 6 Will. 4, c. 76, to more than one burgess at a time. *Rex v. Arnold*, 6 Nev. & M. 152. 655

Nor to allow any burgess to have more than one of such voting papers in his hand at the same time. *Id.*

But that he is bound to allow any burgess, who brings with him a list of the burgesses, to make marks upon such lists, denoting how each voter appears by the voting paper to have given his vote. *Id.*

### COSTS.

*Generally.*—It is not competent to an attorney who has not been inrolled to sue for any fees or disbursements; where, therefore, the defendant's attorney (duly qualified in other respects to act as an attorney) had omitted to cause himself to be inrolled, and the defendant had made no advance on account of the suit—the court allowed the plaintiff to discontinue without costs. *Humphreys v. Harvey*, 2 Dowl. P. C. 827; 4 M. & Scott, 500; 1 Bing. N. R. 62. 661

A pauper plaintiff in an action of trespass, who gets only a farthing damages, is entitled to full costs, and not merely to costs out of pocket. *Gougenheim v. Lane*, 4 Dowl. P. C. 482; 1 Mees. & Wels. 136. 661

Quære, whether the officers are entitled to any fee against a pauper? *Id.*

The costs of a motion by a female defendant to be discharged out of custody on the ground of coverture, or that she has been arrested by a wrong name, are not costs in the cause, and therefore not taxable on a discontinuance of the action. *Mummery v. Campbell*, 4 M. & Scott, 379; 2 Dowl. P. C. 798; 10 Bing. 511. 663

By the 10 Geo. 4, c. 44, s. 41, where an action is brought against any member of the metropolitan police, for any thing done in pursuance of that act, and the defendant recovers a verdict, or the plaintiff is nonsuited or discontinues, the defendant is entitled to costs as between attorney and client:—Held, that this provision is not affected by the 3 & 4 Will. 4, c. 42, s. 32; and therefore, that, where such persons are made defendants with others, the judge has no power to certify that there was reasonable cause for making them defendants, in order to deprive them of costs. *Humphrey v. Woodhouse*, 1 Scott, 395; 1 Bing. N. R. 506; 3 Dowl. P. C. 416; 1 Hodges, 64. 663

The form provided by Reg. Gen. 1 W. 4, and entitled "Common Counts," constitutes separate counts as well for the purposes of pleading as of taxation of costs. (See Reg. Gen. of Pleading, Hil. 4 W. 4, No. 5). *Jourdan v. Johnson*, 5 Tyr. 524; 4 Dowl. P. C. 534; 1 Gale, 312. 663

*Motions and Rules.*—Where a motion was made to compel a defendant to produce an instrument to have it stamped, the court, on making the rule absolute, refused to allow more costs than the plaintiff would have been entitled to if the application had been made to a judge at



chambers. *Vaughan v. Trewent*, 2 Dowl. P. C. 299. 662

Where a party shows cause successfully in the first instance, he is not entitled to costs. *Fitch v. Green*, 2 Dowl. P. C. 439. 162

The Court of Exchequer discharged a rule which had been obtained without costs, although moved with costs. *Bleasdale v. Darby*, 9 Price, 606. 662

If a cause standing in the paper is postponed on payment of costs, the defendant is not entitled to more costs than he would have been if the record had been withdrawn. *Walker v. Lane*, 3 Dowl. P. C. 504; 1 Gale, 52. 662

If a rule is drawn up in the alternative, the party who fails on the substantial question is not entitled to the costs of the rule, although he succeeds upon the alternative. *M'Andrew v. Adam*, 1 Scott, 99; 1 Bing. N. R. 270; 3 Dowl. P. C. 120. 662

If the plaintiff recover a verdict in an action on the case, and endeavor, on a rule nisi being obtained for a nonsuit or to reduce the damages, to support his verdict to the extent, although he be held entitled to nominal damages, he is not entitled to the costs of the rule, he having in substance failed in his opposition to it. *Id.*

Unless he gives notice to the opposite party of his intention to abandon the other. *Id.*

Where a rule is discharged on a preliminary objection to the title of the affidavit, supporting the rule obtained for setting aside proceedings on the ground of irregularity, the court has discretion as to the costs of the application. *Harris v. Mathews*, 4 Dowl. P. C. 608. 662

Where a rule is discharged on a technical objection taken to an affidavit, without going into the merits, no costs are allowed. *Preedy v. Lovell*, 4 Dowl. P. C. 671. 662

The rule of 1796 concerning costs on rules discharged without any restriction as to costs, is strictly confined to applications on the ground of irregularity, either mentioned in the rule or in the affidavits. In all other cases where rules are moved, with costs, and charged generally without saying any thing about costs, the successful party will not be entitled to them. A special direction must be given by the court to enable him to obtain them. *Drinker v. Pascoe*, 4 Dowl. P. C. 566. 662

The costs of enlarging a peremptory undertaking on account of the absence of a material witness, must be paid by the defendant, and are not costs in the cause. *Percival v. Bird*, 4 Dowl. P. C. 748. 662

*Summons and Orders.*—A judge at chambers has power to give costs upon a summons; but this power will only be in extreme cases. *Bridge v. Wright*, 4 Nev. & M. 5; S. C. nom. In re *Bridge*, 2 Adol. & Ellis, 48. 662

The court will not, unless a strong case be made out, review the decision of a judge at chambers, as to costs. *Sheriff v. Gresley*, 5 Nev. & M. 491; 1 Har. & Wol. 588. 662

Where a judge at chambers declines to give

costs on a summons, the court will not afterwards entertain an application on the subject of such costs. *Davy v. Brown*, 1 Scott, 384; 1 Bing. N. R. 460; 1 Hodges, 22. 662

Quære, whether a judge at chambers has power, during term, to order the attorney to pay the costs of irregular proceedings? *Wilson v. Northorp*, 4 Dowl. P. C. 441. 662

An order of a judge at chambers was obtained in term, for setting aside an irregular judgment, with costs; the costs were taxed upon the order, which was then made a rule of court, and then a personal application was made of the amount:—Held, that this was the regular mode of proceeding. *Id.*

*Costs of the Day.*—A proposal to refer, made after the commission day, held not to warrant the plaintiff in not proceeding to trial, and that he was liable to pay the costs of the day. *Eaton v. Shuckburgh*, 2 Dowl. P. C. 624. 667

If a pauper withdraws his record because he is not prepared with a certain necessary document at the assizes, the court will compel him to pay the costs of the day. *Doe d. Lindsey v. Edwards*, 2 Dowl. P. C. 471. 667

A rule requiring a pauper to 'pay the costs of the day, for not proceeding to trial, is nisi in the first instance. *Id.*

Costs of the day for not proceeding to trial may be moved for, though the plaintiff has subsequently tried his cause, got a verdict, signed final judgment, and taxed his costs. *Redit v. Luccock*, 2 C. & M. 337; 4 Tyr. 281. 667

The motion for costs for not proceeding to trial is for a rule to be absolute in four days, unless cause is shown in the mean time. *Robinson v. Robinson*, 3 Dowl. P. C. 177. 667

In order to ground an application for costs of the day, upon a rule for judgment as in case of a nonsuit being discharged on a peremptory undertaking, it is necessary that it should appear by affidavit that costs have been incurred. *Ray v. Sharp*, 4 Dowl. P. C. 354. 667

In discharging a rule for judgment as in case of a nonsuit on a peremptory undertaking the court will order payment of costs of the day, "if any," although the defendant's affidavit do not show that any costs have been incurred. *Doe d. Humphreys v. Owen*, 1 Mees. & Wels. 321. 667

But not where his affidavit shows that none could have been incurred; as where it states that notice of trial was duly countermanded. *Id.*

*Courts of Requests Acts.*—Under the London Court of Requests Act, it is no objection to the defendant's claim for costs, that the plaintiff was unaware that the defendant resided within the jurisdiction. *Crowder v. Bell*, 2 Dowl. P. C. 508. 667

Where a verdict was given for 2l. 8s. 6d. for goods sold, after deducting 4l. 19s. 6d. for tuition and money payments:—Held, that the claim was a balance of an account on demand originally exceeding 5l. within 47 Geo. 3, sess. 1, c. 4,



(Blackheath Act); and therefore that no suggestion to deprive the plaintiff of costs could be entertained. *Moreau v. Hicks*, 2 Adol. & Ellis, 782; 4 Nev. & M. 563; 1 Har. & Woll. 87. 667

Where a Court of Requests Act applies to defendants residing within the jurisdiction, the affidavit of a defendant applying to enter a suggestion to deprive the plaintiff of costs, ought to show that the defendant was residing there at the time of action brought, as well as merely describing him as resident there at the time of affidavit sworn. *Id.*

If a defendant, liable to be sued in the Westminster court of Requests, omits to plead the statute (23 Geo. 2, c. 27) in bar of a suit in a superior court, or to apply for a nonsuit at the trial, on the ground that the claim is less than 40s., the court will not after verdict enter a suggestion to deprive the plaintiff of his costs. *Clark v. Hamlet*, 1 Har. & Woll. 177. 667

The 4 Geo. 3, c. 123, repeals the previous Southwark Court of Requests Acts, as to depriving a plaintiff of costs where he recovers less than 40s. *Claridge v. Smith*, 4 Dowl. P. C. 583. 667

Where it appears upon the record that the debt sought to be recovered is under 40s., and that the defendant resides within the operation of a Court of Requests Act, which gives costs to a defendant if the plaintiff proceeds in a superior court and recovers less than 40s., a suggestion is unnecessary. *Defries v. Snell*, 4 Dowl. P. C. 680. 667

The defendant pleaded payment of 1l. 18s. into court in satisfaction of the cause of action, and the plaintiff took the money out of court:—Held, that the defendant was not entitled to enter a suggestion on the roll to deprive the plaintiff of costs on the ground that the action was brought to recover a less sum than 40s., and therefore recoverable in the county court. *Tarrant v. Morgan*, 2 C. M. & R. 253; S. C. nom. *Ferrant v. Morgan*, 1 Gale, 156. 668

A defendant is not entitled to enter a suggestion for double costs under the Middlesex County court Act, 23 Geo. 2, c. 33, where the debt is reduced below the sum of 40s. by a set off. *Jenkinson v. Morton*, 1 Mees. & Wels. 300. 668

Previous to making an application with respect to costs under the London Court of Requests Act, it is not necessary to have the record in court. *Kidd v. Mason*, 3 Dowl. P. C. 85. 669

Since the Uniformity of Process Act, 2 Will. 4, c. 39, an attorney can no longer sue by attachment of privilege; and therefore, though he sues in his own court as a common person, the court will not enter a suggestion on the roll to deprive him of costs for not suing in the Middlesex court of Requests. *Wright v. Skinner*, 1 Mees. & Wels. 144; 4 Dowl. P. C. 745. 669

The defendant is now at liberty to move to have a suggestion entered under the Court of Requests Act, to deprive the plaintiff of costs, notwithstanding final judgment may have been signed, if the motion is made as early as can be, and particularly if it appears that the costs have

not been taxed. *Godson v. Lloyd*, 4 Dowl. P. C. 157. 669

A defendant, by consenting to a cause being tried before the under-sheriff, under the Writ of Trial Act, knowing at the time that he was liable to be sued in a local court only, does not thereby waive his right to claim costs from the plaintiff upon his recovering less than 5l. *Shaw v. Oates*, 4 Dowl. P. C. 720. 669

A local act gives treble costs to a defendant who is sued for less than 5l. in any other than the local court, so as it shall appear to the judge or judges of the court where the action is tried that the debt is under 5l., and the defendant shall give evidence, to be allowed of by the judge of the court where such action is brought, that the defendant is resident within the local jurisdiction. The cause is tried by the under-sheriff, under the Writ of Trial Act, and the defendant gives evidence of his residing in the local jurisdiction, and the plaintiff recovers less than 5l. Quære, whether the court above can give costs to the defendant under the act? *Id.*

On the trial of an action upon a special contract with the money counts, evidence is given of a special contract, but the jury find a general verdict for 31s., being the precise amount which the plaintiff would have been entitled to recover under the count for money had and received; the defendant is not entitled to the entry of the suggestion on the roll, that the action was brought for a debt not amounting to 40s., in order to deprive the plaintiff of costs under the provisions of a Court of Requests Act. The court are bound by the record as returned by the under-sheriff. *Mansfield v. Brearey*, 3 Nev. & M. 471; 1 Adol. & Ellis, 347. 669

In an affidavit supporting an application for double costs under the 23 Geo. 2, c. 33, s. 19, (the Middlesex County Court Act), it must be stated that the defendant is liable to be summoned to the county court. *Foster v. Godfrey*, 2 Dowl. P. C. 587; S. P. Unwin v. King, 2 Dowl. P. C. 492. 669

In order to deprive a plaintiff of his costs, under the Middlesex County Court Act, the application must be made before final judgment. *Unwin v. King*, 2 Dowl. P. C. 593. 670

On an application to enter a suggestion under the London Court of Requests Act, it was sworn that the defendant had a house and warehouse in the city, in which his partner and servants resided, and that he carried on business on his own account, in partnership with his brother as a silk broker, and sought his livelihood:—Held, that that was a sufficient seeking a livelihood within the statute. *Bond v. Bailey*, 2 C. M. & R. 246; 3 Dowl. P. C. 808; 1 Gale, 162. 670

It is not necessary to state when the action was commenced, if it appears that the defendant was then within the jurisdiction. *Id.*

It makes no difference that the cause was tried before the sheriff. *Id.*

Where the verdict was obtained in vacation, application may be made to enter a suggestion



after final judgment signed and execution issued. *Id.*

43 *Eliz. c. 6.*—In an action of trespass against several defendants, two suffered judgment by default; and the jury who tried the cause assessed the damages against them at a farthing:—Held, that the judge might certify to deprive the plaintiff of costs, as against these parties, under 43 *Eliz. c. 6, s. 2.* *Harris v. Duncan*, 2 *Adol. & Ellis*, 158; 4 *Nev. & M.* 63. 670

A sheriff or judge of an inferior court, to whom a cause is sent by writ of trial, under 3 & 4 *Will. 4, c. 42, s. 17*, has no power of certifying to deprive of costs pursuant to 43 *Eliz. c. 6, s. 2.* *Wardroper v. Richardson*, 1 *Adol. & Ellis*, 75; 3 *Nev. & M.* 839. 670

Where a judge certified at the trial of an action of trespass to deprive the plaintiff of costs, the court held the judge's opinion final. *Twigg v. Potts*, 4 *Dowl. P. C.* 266. 670

The court will not interfere where the judge has granted a certificate under the stat. 43 *Eliz. c. 6*, to deprive the plaintiff of costs, except upon the question, whether he had power to grant the certificate? *Cann v. Facey*, 5 *Nev. & M.* 405; 1 *Har. & Woll.* 482. 670

If the judge give his reasons for granting the certificate, and those reasons are erroneous, it is no ground of interference. In an action *qu. cl. fr.*, the plaintiff obtaining less than 40s. damages, the plea of not guilty, since the new rules of pleadings, being a special plea, takes the case out of the 22 & 23 *Car. 2, c. 93, s. 136*; but the judge may, notwithstanding, grant his certificate under the 43 *Eliz. c. 6, s. 2*, to deprive the plaintiff of costs, the whole record and evidence at the trial being properly taken into consideration. *Smith v. Edwards*, 4 *Dowl. P. C.* 621; 1 *Har. & Woll.* 497. 670

The 43 *Eliz. c. 6, s. 2*, only empowers the judge who tries the cause to give the certificate under that act to deprive the plaintiff of costs; and in case of executing a writ of inquiry, whether before a judge or a sheriff, the certificate cannot be granted. *Claridge v. Smith*, 4 *Dowl. P. C.* 583. 670

In trespass for assault, and false imprisonment, and tearing the plaintiff's clothes, there was issue upon a new assignment to a plea of son assault demesne. The jury found a verdict for the plaintiff, with one shilling damages:—Held, that the judge had no power to certify under the 43 *Eliz. c. 6*, to deprive plaintiff of costs. *Bone v. Dawe*, 5 *Nev. & M.* 230; 1 *Har. & Woll.* 311. 670

Where, in such a case, the judge had certified, the court granted a rule on the masters to tax the plaintiff his costs, notwithstanding the certificate. *Id.*

21 *Jac. 1, c. 16.*—Where, in an action for slander, spoken of a person in the way of his trade, the plaintiff recovered less than 40s. damages:—Held, that the plaintiff was entitled to no more costs than damages, and that the judge had no power to certify to enable the plaintiff to full

costs. *Goodall v. Ensell*, 2 *C. M. & R.* 249; 3 *Dowl. P. C.* 743; 1 *Gale*, 147. 671

22 & 23 *Car. 2.*—In trespass for turning the plaintiff out of a room per quod he was prevented from exercising his business as an attorney therein, if the plaintiff obtain a verdict for less than 40s. he is not entitled to full costs without a judge's certificate, under 22 & 23 *Car. 2, c. 9, s. 136.* *Daubney v. Cooper*, 5 *M. & R.* 325. 672

Where a plaintiff recovered 13s. damages in an action of trespass *qu. cl. fr.*, to which only the general issue was pleaded, it was held that he was entitled to his full costs as under that plea, as restricted by the rules of pleading of *H. T.*, 4 *Will. 4*, and freehold could not come in question; so that the judge might certify under the 22 & 23 *Car. 2, c. 9, s. 136*, in order to ensure the plaintiff his costs. *Hughes v. Hughes*, 4 *Dowl. P. C.* 532; 2 *C. M. & R.* 663; 1 *Tyr. & G.* 4; 1 *Gale*, 302. 672

Where there are pleas in trespass *quare clausum fregit* of not guilty, and that the close is not the plaintiff's, and the jury find a verdict for plaintiff with nominal damages, the plaintiff will be entitled to no more costs than damages. *Howell v. Thomas*, 7 *C. & P.* 342—*Coleridge.* 672

Operation of 43 *Geo. 3, c. 46.*—Goods were sent by the plaintiff to the defendants, on sale or return. The defendants returned part to the plaintiff's shopman. The plaintiff demanded payment for the whole, and was not informed by the defendants that part had been returned. He afterwards arrested them for the higher sum, but failed to recover the item charged for the article returned:—Held, that there was reasonable and probable cause for the arrest; and the court refused to grant the defendant his costs. *Roper v. Sheasby*, 3 *Tyr.* 486. 674

A defendant, who is arrested for a larger sum than is recovered against him, is entitled to costs if there be no reasonable or probable cause for the arrest, though the arrest is not shown to have been malicious. *Erle v. Wynne*, 1 *C. & M.* 532; 3 *Tyr.* 586. 675

The statute does not apply to cases where the defendant pays money into court, and the plaintiff takes it out, although it be a much smaller sum than that for which the defendant was arrested. *Rowe v. Rhodes*, 2 *C. & M.* 379; 2 *Dowl. P. C.* 384; 4 *Tyr.* 216. 675

Plaintiff having arrested the defendant for 27*l.*, and his demand having been reduced to 10*l.* by a claim on the part of the defendant, the court allowed the defendant his costs, although the defendant's claim was not altogether undisputed. *Sims v. Jaquest*, 4 *M. & Scott*, 380; 2 *Dowl. P. C.* 800; 10 *Bing.* 510. 675

B., a builder, is employed by A. in altering A.'s house. During the progress of the work A. countermands the employment, whereupon B. requests A. to appoint a valuer, and upon receiving no answer to his application, B. continues the work, completes it, and arrests A. for the whole amount, but recovers only for the work done previously to the countermand. The de-



defendant is entitled to costs. *Russell v. Atkinson*, 2 Nev. & M. 667. 675

To entitle a defendant to costs, it is essential that there should be an arrest as well as a holding to bail. *Bates v. Pilling*, 2 C. & M. 374; 2 Dowl. P. C. 367; 4 Tyr. 231. 675

Where a defendant was held to bail in a much larger sum than the plaintiff recovered:—*Quere*, whether, if it had been a case within the act 43 Geo. 3, c. 46, by reason of the absence of a reasonable or probable cause for holding to bail to such an amount, the mere fact of the defendant's not having been actually arrested would have been sufficient to deprive him of the benefit of that act? *Wilson v. Broughton*, 2 Dowl. P. C. 631. 675

A party is not warranted in arresting another for a debt of which he has not, at the time of making the arrest, some evidence besides his own personal knowledge of its existence; and therefore a plaintiff arresting a defendant for a large sum of money, and having at the time of the arrest evidence only as to a small portion of the amount, was held to be liable to costs, although, at the time of the trial, some evidence of a subsequent acknowledgment by the defendant was given. *Griffiths v. Pointon*, 2 Nev. & M. 675; *S. P. Nicholas v. Hayter*, 4 Nev. & M. 882; 2 Adol. & Ellis, 348. 675

The plaintiff arrested the defendant for 400*l.*, having previously obtained acceptances for 320*l.* for part of the debt from the defendant's agents, to meet which remittances were made to the latter by the defendant:—Held, that the arrest for 400*l.* was made without reasonable or probable cause, and therefore that the defendant was entitled to costs. *Reynolds v. Flower*, 3 M. & Scott, 801. 676

Where the defendant was arrested for 33*l.* 8*s.* 9*d.*, and, on the cause being referred, the arbitrator directed a verdict to be entered for the plaintiff for the sum of 3*l.* 9*s.* only:—Held, that it was sufficient prima facie evidence that the arrest was without reasonable or probable cause, and that it threw the onus upon the plaintiff to satisfy the court that he had reasonable and probable cause; and the plaintiff having failed to do so, that the defendant was entitled to costs under the 43 Geo. 3. *Summers v. Grosvenor*, 2 C. & M. 341; 2 Dowl. P. C. 224; 4 Tyr. 222. 676

To entitle the defendant to costs under 43 Geo. 3, c. 46, s. 3; where the difference between the sum for which he was arrested and that recovered is small, the defendant must show clearly to the court that the arrest was without reasonable or probable cause. *Paley v. Barker*, 1 Har. & W. 208. 674

The statute 43 Geo. 3, c. 46, s. 3, does not apply to the case where a defendant, having been arrested for debt, pays into court less than the amount sworn to, and the plaintiff accepts it. *Brooks v. Rigby*, 2 Adol. & Ellis, 21; 4 Nev. & M. 3. 675

Where a defendant was arrested for 20*l.* and upwards, and the jury gave only 17*l.* 19*s.*:—Held, that the defendant was entitled to costs under the 43 Geo. 3, c. 46, s. 3; it appearing

that the plaintiff had first sent in a bill for the above sum, and had afterwards added 2*l.* 2*s.* for goods supplied, which had been returned as unsuitable, there being reason to believe that the plaintiff had added that sum to make up an arrestable amount. *Sutton v. Burgess*, 4 Dowl. P. C. 376. 676

The power of the court, under the 43 Geo. 3, c. 46, s. 3, to allow the defendant his costs where he had been arrested without reasonable or probable cause, was given to an arbitrator, on a cause being referred, but the arbitrator made no order on the subject:—Held, that the court could not afterwards make the order. *Greenwood v. Johnson*, 1 Har. & Woll. 184. 675

The court has no power under 43 Geo. 3, c. 46, s. 3, to award costs to the defendant, except in cases where the plaintiff has recovered, by judgment only, a less amount than the sum for which he had arrested the defendant. *Holder v. Raith*, 4 Nev. & M. 466; 2 Adol. & Ellis, 445; 1 Har. & Woll. 8. 675

Therefore they have no jurisdiction under this statute in cases in which the recovery has been by an award upon a reference before issue joined. *Id.*

So, although in the order of reference it is expressly agreed that the costs of the action, of the reference, and of the award, shall abide the event of the suit in like manner as upon a verdict. *Id.*

*Dubitatur*, whether, if in such a case the parties consented that judgment should be entered up for the sum awarded, with a view to reserve the jurisdiction of the court under the statute, the court would accept the power? *Id.*

The plaintiff arrested the defendant for 42*l.* 5*s.* money lent, and proved on the trial admissions of the loan of 18*l.*, for which she had a verdict. On a motion to allow the defendant his costs, under the stat. 43 Geo. 3, c. 46, s. 3, it appeared from the plaintiff's affidavit, that she had lent the defendant sums of money at different times, amounting to the sum for which he was arrested; but it did not appear that she had any witness to, or evidence of such loans, beyond the defendant's admissions, as proved on the trial. The defendant swore that she had lent him only 1*l.* The court, although believing from the affidavits that the whole sum was due, and that the defendant's affidavit was false, held, that as the plaintiff could have had no reasonable ground to expect that she could recover the whole debt for which she made the arrest, the defendant was entitled to his costs under the statute. *Lewis v. Ashton*, 1 Mees. & Wels. 493. 674

Where, owing to the omission of a count in the declaration, applicable to part of the plaintiff's demand, the plaintiff was prevented from recovering an amount equal to the sum for which the defendant was arrested, and which the jury found to be due; but on the omission in the declaration being discovered, the verdict was ultimately given for a less sum:—Held, that the defendant was not entitled to costs under 43 Geo. 3, c. 46, s. 3. *Preedy v. M'Farlane*, 1 C. M. & R. 819; 3 Dowl. P. C. 458; 5 Tyr. 355; 1 Gale, 20. 674

Held, also, that he was not so entitled, although



the indorsement for bail on the *capias* by mistake stated a larger sum than that stated in the affidavit of debt, the defendant not having been arrested for the amount so indorsed, but for the amount really due. *Id.*

Where a defendant is arrested and goes to prison, it is "an arrest and holding to bail" within the meaning of the statute. *Id.*

Where the defendant was arrested for 20*l.* 2*s.*, and the plaintiff failed to establish at the trial a reasonable ground for proceeding for more than 19*l.* 17*s.*, the court refused to tax the defendant his costs under 43 Geo. 3, c. 46, the plaintiff being taken by surprise on the objection to the 5*s.* deducted from his claim. *Mantel v. Southall*, 2 Scott, 132; 2 Bing. N. R. 74. 675

The verdict of the jury is not conclusive as to the amount for which the plaintiff had reasonable cause (within the meaning of the 43 Geo. 3, c. 46, s. 3) for holding the defendant to bail, *quære*? *Id.*

Defendant having been arrested for 65*l.*, when there was not probable cause for arresting him for more than 44*l.*, the court allowed him his costs under 43 Geo. 3, c. 46. *Bradley v. Milnes*, 1 Scott, 697; 1 Bing. N. R. 738; 1 Hodges, 118. 675

Where a defendant obtains costs under the 43 Geo. 3, c. 46, s. 3, on the ground that the arrest was without reasonable or probable cause, neither party is entitled to the costs of a prior unsuccessful motion to enter a nonsuit. *Id.*

An application for costs, under 43 Geo. 3, c. 46, on the ground that the plaintiff arrested for 35*l.*, and recovered only 19*l.* 19*s.*, is not answered by affidavits stating that the plaintiff's demand was reduced at the trial by the false evidence of a witness, who was, in fact, a partner of the defendant, but stated herself to be his servant only. *Tipton v. Gardiner*, 5 Nev. & M. 424. 675

Where a plaintiff recovers a sum less than the amount for which he arrested, and held the defendant to bail, and it appears that his only probable cause of action was not bailable, (being for unliquidated damages), the defendant is entitled to costs under 43 Geo. 3, c. 46, s. 3. *Beare v. Pinkus*, 4 Nev. & M. 846. 675

The court refused to allow the defendant his costs under the 43 Geo. 3, where, upon conflicting testimony as to the value of the goods supplied, the jury gave a verdict for 8*l.*, the arrest having been for 20*l.*: 8*l.* was the mean of the estimates by the witnesses of the two parties. *Shotwell v. Barlow*, 3 Dowl. P. C. 709; 1 Gale, 107. 675

Defendants having been arrested for a sum of 45*l.*, the plaintiff at the trial recovered only 21*l.* Part of the demand was for a sum of 19*l.* 10*s.*, which it was stated by a witness he had seen paid on a particular day; and a receipt was put in, from which it appeared that the money was paid on a former day. The jury under the circumstances disallowed that part of the plaintiff's demand, and also made a small deduction from the other part. It was not denied, however, by the defendants, that the money was due, and it was positively sworn by the plaintiff that it was due from the defendants:—Held, that the defend-

dant was not entitled to his costs under the 43 Geo. 3, c. 46. *Smith v. Smith*, 3 Dowl. P. C. 733. 675

If the plaintiff arrests a defendant for one side of a mutual account, without giving credit for what he knows to be due from himself; although the defendant has refused to deliver his account, the latter is entitled to his costs under the 43 Geo. 3, c. 46, s. 3. *Ashton v. Naull*, 2 Dowl. P. C. 727. 675

Where the reduction of the plaintiff's claim was occasioned by a dispute as to the right of the defendant to claim a set-off:—Held, that though the arbitrator awarded in favor of the defendant in respect of the set-off, and thereby reduced the plaintiff's claim a third, that the defendant was not entitled to his costs under the 43 Geo. 3, c. 46, s. 3. *Cawthorne v. Cawthorne*, 4 Dowl. P. C. 182. 675

Upon a motion to allow the defendant his costs under the 43 Geo. 3, c. 46, the court will refer to the judge's notes taken at the trial, in order to supply the omission in the defendant's affidavit of the amount recovered by the verdict. *Van Neuvel v. Hunter*, 5 Nev. & M. 376; 3 Adol. & Ellis, 243; 1 Har. & Woll. 273. 677

The verdict of the jury, in a question of a disputed account, must be taken to be almost conclusive. *Id.*

The rule for allowing the defendant his costs need not drawn up on reading the record of nisi. *Id.*

On an application for defendant's costs under the 43 Geo. 3, c. 46, s. 3, the onus of proving that the arrest was without reasonable or probable cause lies on the defendant, and the court will not inquire whether the finding of the jury was correct. *Twiss v. Osborne*, 4 Dowl. P. C. 107; 1 Har. & Woll. 274. 677

In order to obtain costs under the 43 Geo. 3, c. 46, s. 3, it is not necessary to show that the arrest was malicious. *Id.*

A defendant applying for costs under 43 Geo. 3, c. 46, must show a *prima facie* case of absence of reasonable or probable cause for arresting for the amount sworn to. *Nicholas v. Hayter*, 4 Nev. & M. 882; 2 Adol. & Ellis, 348. 677

A great disproportion between the sum recovered and the amount sworn to is a sufficient *prima facie* case. *Id.*

And it is no answer for the plaintiff to allege, that but for the death of one material witness, and the absence abroad of another, he could have proved a debt to the full amount. *Id.*

*Several Issues*.]—Under Reg. Gen. H. T. 2 Will. 4, the defendant is entitled to the costs of all issues found for him, although they exceed the costs of those found for the plaintiff. *Milner v. Graham*, 2 Dowl. P. C. 422. 678

If a defendant pleads the general issue and several special pleas, and the jury find for him on the general issue, and for the plaintiff on the special pleas, the latter is entitled to the costs of the pleadings and witnesses on those pleas. *Hart v. Cutbush*, 2 Dowl. P. C. 456. 678



In replevin, the defendant pleaded that the goods belonged to himself and others, as assignees under a commission of bankruptcy: he also avowed taking the goods as a distress for rent-arrear. Verdict for the plaintiff on the issue joined in the plea; for the defendant on the avowry. The court refused to allow defendant costs on the issue found for the plaintiff. *Midleton v. Mucklow*, 10 Bing. 401. 678

Before the issue was made up, the cause was referred, the costs of the cause were to abide the event of the award. The arbitrator found that the plaintiff had sustained damage to a certain amount upon one of the breaches of covenant specified in his particular; and as to the rest, that he had no cause of action against the defendant.—Held, that the defendant was entitled under rule 74 H. T. 2 Will. 4, to the costs of those issues that were found for him, notwithstanding the cause was not in strictness at issue. *Daubuz v. Rickman*, 1 Scott, 564; 4 Dowl. P. C. 129; 1 Hodges, 75. 678

Where, in an action on the case, a defendant succeeds on one of several issues, which goes to the foundation of the plaintiff's cause of action, he will be entitled to the general costs of the cause, although there is a verdict for the plaintiff upon the plea of "not guilty," without damages. *Frankum v. Falmouth* (Lord), 4 Dowl. P. C. 65; 1 Har. & Woll. 337. 678

The rule of H. T. 2 Will. 4, s. 74, does not apply to paupers; and the costs of such of the opposite parties, who have got verdicts, cannot be deducted from the plaintiff's costs of the cause. *Gougenheim v. Lane*, 4 Dowl. P. C. 482; 1 Mees. & Wels. 136. 678

Where, in case for libel, on the general issue, the jury found for the plaintiff, and also found as a fact, that a great part of the declaration did not apply specifically to the plaintiff, though there were innuendoes, by which it was endeavored to connect him with the matter complained of:—Held, that the defendant was entitled to the costs of that part. *Prudhomme v. Fraser*, 4 Nev. & M. 512; 2 Adol. & Ellis, 645; 1 Har. & Woll. 5. 678

The 74th rule, H. T. 2 Will. 4, extends to give the defendant the costs of an issue found for him on a demise in ejectment, which the lessor of the plaintiff abandoned at the trial, though the evidence was equally applicable to the demise, upon which he succeeded. It is not necessary, under the terms of the rule, that the costs should be confined exclusively to the issue found for the defendant: but the question of amount is entirely a question for the Master, with which the court will not interfere. *Doe d. Smith v. Payne or Webber*, 4 Nev. & M. 381; 2 Adol. & Ellis, 448; 1 Har. & Woll. 10. 678

In ejectment, where there was but one count, and the lessor of the plaintiff recovered judgment for part only of the lands claimed, the defendant succeeding as to the chief question in dispute:—Held, that the defendant was entitled to have his costs, as to the part found for him, set off against the costs of the lessor of the plaintiff, under the rule H. T. 2 Will. 4, c. 1, s. 74. *Doe*

*d. Errington v. Errington*, 4 Dowl. P. C. 602; 1 Har. & Woll. 502. 678

Where there are several issues, some of which are abandoned at the trial, the plaintiff is entitled only to the costs of those parts of such briefs and such of the witnesses as were necessary for the issues on which he succeeded. *Gougenheim v. Lane*, 4 Dowl. P. C. 482; 1 Mees. & Wels. 136. 678

Where a plea of not guilty to the whole action is found for the defendant, and a plea of justification is found for the plaintiff, the defendant is entitled, under 4 Ann. c. 16, ss. 4 & 5, to the general costs of the cause, and the plaintiff is entitled to the costs on the special plea, including not only the costs of the pleadings but also of the evidence, in disproof of the justification. *Spencer v. Hamerton*, 6 Nev. & M. 22. 678

Semble, that Reg. 7 H. T. 4 Will. 4, giving the costs of particular issues to the successful party, does not apply to demurrers. *Farley v. Briant*, 5 Nev. & M. 58. 678

Part found only. *Vallance v. Evans*, 1 C. & M. 856; 3 Tyr. 865; S. C. nom. *Valance v. Adams*, 2 Dowl. P. C. 118. 679

Where some issues are found for the plaintiff and some for the defendant, the latter is entitled to the costs of the issues found for him, but not to the general costs of the cause, or to the expenses of his own witnesses, unless their evidence related exclusively to the issues found for him. *Larnder v. Dick*, 2 Dowl. P. C. 332; S. C. nom. *Larnder v. Dick*, 2 C. & M. 389; 4 Tyr. 239. 679

Where several defendants defend separately, and apparently by different attorneys, but all the business is virtually done by one, they are not entitled to charge by separate bills of costs, but must make a joint charge. *Nanny v. Kenrick*, 2 Dowl. P. C. 334. 679

In an action on the case against many defendants, where one suffers judgment by default, and a verdict is entered for the others, those for whom the verdict is entered are entitled to their costs. *Price v. Harris*, 2 Dowl. P. C. 804; 10 Bing. 557; 4 M. & Scott, 474. 679

A declaration in slander contained ten counts; the jury found for the plaintiff, with 50*l.* damages on the seventh count, and 100*l.* on the other nine counts. On error brought, the court held that the sixth count was bad, and, consequently, that a venire de novo must be awarded; but, on the plaintiff consenting to remit the 100*l.* damages, directed that the verdict should be retained on the seventh count:—Held, that the plaintiff was not entitled to the costs of the other nine counts. *Dadd v. Crease* (in error), 2 C. & M. 223; 4 Tyr. 74; S. C. nom. *Dann v. Crease*, 2 Dowl. P. C. 269. 681

Where there were issues of fact, and also issues of law on demurrer, but the pleadings demurrer to were afterwards amended by leave, upon payment of costs, and all the issues made issues of fact:—Held, that the Master was right in not allowing so much of the briefs and paper books for arguing the demurrer as related to the issues of fact. *Jones v. Roberts*, 2 Dowl. P. C. 374. 682



Where there are several defendants, and a verdict passes against some and for others, the latter are entitled to their aliquot proportion of the whole costs incurred, and not merely to 40s. each. *Griffiths v. Jones*, 4 Dowl. P. C. 159; 2 C. M. & R. 333; 1 Gale, 254. 679

Where several defendants are sued in trespass, and a verdict is found for the plaintiff on some of the issues against some of the defendants, and against him on all the other issues, the plaintiff is entitled to the balance only of the costs, after deduction of all the costs of all the defendants. *Starling or Starving v. Cozens or Cousins*, 3 Dowl. P. C. 783; 2 C. M. & R. 445; 1 Gale, 159. 679

Where there are several defendants, and one alone employs an attorney for all, the others are not entitled to claim any costs. *Id.*

In an action on the case containing several counts in the declaration, some issues were found for the plaintiff and some for the defendant:—Held, that the Master, in taxing the costs, was correct in deducting the costs of the defendant's issues from the plaintiff's costs, and that the lien of the plaintiff's attorney was only upon the balance coming to the plaintiff. *Eades v. Everatt*, 3 Dowl. P. C. 687. 679

Held, also, that the expense of a witness called by the defendant, whose evidence was substantially directed towards the issues found for the defendant, was properly allowed to the defendant, although he gave some evidence upon the other issues. *Id.*

In trespass, four defendants pleaded separate pleas by the same attorney; one the general issue and a justification, upon both of which he was found guilty; another, similar pleas, but was only found guilty on the general issue; and the two others, the general issue only, upon which they were acquitted:—Held, that the costs payable to the three last might be set off against the costs which the plaintiff was entitled to recover from the first. *Lees v. Kendall*, 5 Nev. & M. 340; 1 Har. & Woll. 316. 679

*Executors and Administrators.*—The 31st section of the 3 & 4 Will. 4, c. 42, renders executors or administrators suing in right of the testator or intestate liable to costs, where they are nonsuited or the defendants obtain verdicts, unless the court or a judge shall otherwise order:—*Seemle*, that the court will otherwise order where there appears to be reasonable or probable cause for suing in the representative character. *Lysons v. Barrow*, 4 M. & Scott, 463; 10 Bing. 563; 2 Dowl. P. C. 807. 683

The defendant effected a policy of insurance on the life and for the benefit of one G., and, on his death, received the sum insured. The plaintiffs, as executors of G., sought to recover this sum in an action for money had and received by the defendant to their use as executors, and were nonsuited on a ground collateral to the merits of the cause:—The court ordered the judgment of nonsuit to be entered up with costs, under the statute. *Lysons v. Barrow*, 4 M. & Scott, 463. 683

Where an executor or administrator sues in his representative character, and the defendant

obtains judgment as in case of a nonsuit, the executor is not liable to the cost of the cause, but only to such costs as have been occasioned by his own wilful negligence in not proceeding to trial. *Pickup v. Wharton*, 2 C. & M. 401; 2 Dowl. P. C. 368; 4 Tyr. 224. 683

An order to exempt an executor plaintiff from costs after a verdict for the defendant, is a matter within the discretion either of a single judge or of the whole court; and if a single judge has made an order, such order cannot be reviewed,—the decision, either of the whole court or of a single judge, being final. *Maddocks v. Phillips*, 5 Nev. & M. 370; 1 Har. & Woll. 251. 683

An executor plaintiff who loses his cause is not, under the 3 & 4 Will. 4, c. 42, s. 31, exempted from the payment of costs, unless mala fides appears on the part of the defendant—*Vaughan, J., dissentiente*. *Brown v. Croley*, 3 Dowl. P. C. 386. 683

Upon a declaration containing an account stated with the plaintiffs as executors, though it also contains counts on promises to the testator, the defendant is, in case of a nonsuit, entitled to costs as of course. *Spence v. Albert*, 4 Nev. & M. 368; 2 Adol. & Ellis, 785; 1 Har. & Woll. 7. 683

The discretion as to costs in actions by executors, given to the court or a judge of any of the superior courts, by 3 & 4 Will. 4, c. 42, s. 31, extends only to cases in which executors were before that enactment exempted from the payment of costs. *Id.*

The 32nd section of 3 & 4 Will. 4, c. 42, as to payment of costs by executors and administrators, in actions brought by them, was held, (*Littledale, J., dissentiente*), to apply to actions tried after the passing of the act, whether commenced before or not; although the cause had been made a remanet before the passing of the act. *Freeman v. Moyes*, 3 Nev. & M. 863; 1 Adol. & Ellis, 338. 683

The court has no jurisdiction under the 3 & 4 Will. 4, c. 42, s. 31, to relieve an executor plaintiff from costs to which he was liable before the act. *Ashton v. Poynter*, 5 Tyr. 322; 1 C. M. & R. 738; 3 Dowl. P. C. 465; 1 Gale, 57. 683

Where an executor plaintiff seeks to be relieved from costs under the discretionary power of the court, the application should be made before taxation, otherwise, if it be granted, it will be on payment of the costs of the application. *Id.*

Executors declared in one count on a contract by the defendant with their testator, and in another on a contract by the defendant with them to pay money due to the plaintiffs as executors on an account stated between them, with a promise to pay them as executors, and a verdict was found for the defendant:—Held, that he was entitled to his costs of the last count under 23 H. 8, c. 15, and that the court has no power to interfere under 3 & 4 Will. 4, c. 42, s. 31, in favor of the plaintiffs as executors. *Id.*

The court will not relieve an executor or administrator plaintiff from costs, unless there has been some misconduct on the part of the defendant, which led the plaintiff to proceed with the



action, or unless some other very peculiar ground is laid for the interference of the court. It is not enough that the action was brought bona fide; that the plaintiff had apparent reasonable grounds for suing, and that he was taken by surprise by the defence. *Godson v. Freeman*, 2 C. M. & R. 585; 1 Tyr. & G. 35; 4 Dowl. P. C. 543. 683

The discretion as to costs in actions by executors, given by the court or a judge, by the 3 & 4 Will. 4, c. 42, s. 31, is not to be governed by the fact of the action having been properly brought, but it must be shown that the plaintiff was induced to bring it by something like fraud or misrepresentation on the part of the defendant. (Per Curiam—Mr. Justice Vaughan dissenting.) The mere fact that the defendant when applied to refuses to state the ground of his resistance of the claim, will not suffice. *Southgate v. Crowley*, 1 Scott, 374; 1 Bing. N. R. 519; 1 Hodges, 1. 683

Where an executor has commenced an action, without using due diligence to ascertain that he can proceed with a reasonable prospect of success, or is guilty of any laches, so as to cause unnecessary expense or vexation to the defendant, the court will not interpose to excuse him from costs, in exercise of the discretion given to them by the 31st sect. of the 3 & 4 Will. 4, c. 42. *Wilkinson v. Edwards*, 1 Scott, 173; 1 Bing. N. R. 301; 3 Dowl. P. C. 137. 683

An administrator arrested the defendant on a bond given to the intestate more than 20 years before his death, and no interest had been paid upon it. The defendant pleaded his discharge under the Insolvent Act, and the verdict was found in his favor. It appeared that the plaintiff had knowledge that the defendant had applied for his discharge before the action was brought:—Held, that the administrator was not entitled to be relieved from the payment of costs to the defendant under 3 & 4 Will. 4, c. 42, s. 31. *Engler v. Twyden*, 2 Bing. N. R. 263; 2 Scott, 427; 4 Dowl. P. C. 330; 1 Hodges, 303. 683

When an action was commenced by an executrix before, though not tried till after the passing of the 3 & 4 Will. 4, c. 32:—Held, that a successful defendant was entitled to costs. *Grant v. Kemp*, 2 C. & M. 636. 683

An executor had commenced an action before the stat. 3 & 4 Will. 4, c. 42, and the court allowed him to discontinue on payment of all costs incurred since the passing of that act. *Lakin v. Massie*, 4 Dowl. P. C. 239; 1 Gale, 270. 684

Quere, whether the power of a judge to relieve an executor from costs is final or subject to review by the court? Id.

An administrator who pleads the general issue and plene administravit, and succeeds on the latter plea, is entitled to the general costs of the cause. *Iggulden v. Terson*, 2 Dowl. P. C. 277; 4 Tyr. 309. 684

*Arbitration.*—Where by an order of reference the costs of the causes referred were to abide the event of them, and in one, which was not at issue,

the arbitrator found that the plaintiff had no cause of action against the defendants:—Held, that the costs of the pleadings followed the event of the cause, as in case of a nonsuit. *Dibben v. Anglesea (Marquis)*, 2 C. & M. 722; 4 Tyr. 927; S. C. 10 Bing. 568. 685

Where a plaintiff, who did not give distinct notice of attending an arbitrator by counsel, attended by counsel, and refused to consent to an adjournment, except on the defendant's paying the costs of the meeting: the court held the plaintiff not entitled to such costs, stayed the certificate made by the arbitrator in his favor, and referred the case back to the arbitrator. *Whatley v. Morland*, 2 C. & M. 347; 4 Tyr. 255; 2 Dowl. P. C. 249. 685

Trespass, qu. cl. fr. Plea—first, general issue; secondly, lib. ten.; thirdly, a private way; fourthly, a highway. The cause was referred, and it was agreed that the fourth plea should be withdrawn, and that the arbitrator should have power to direct what should be done by either party, and what road the defendants should have; that he should decide on the costs of the cause as if the fourth plea remained, and that the costs of the cause, and of the reference, to be taxed by the proper officer, should be in his discretion. The arbitrator found for the plaintiff on the first and second issues, and for the defendant on the third, and directed that the plaintiff should pay the defendants the costs of the cause, of the reference, and of the award, to be taxed, &c., and set out a road to be used by the defendants. The plaintiff is entitled to costs on the first and second issues, and the defendants to the costs of the cause upon the third issue. Neither party is entitled to costs on the fourth issue. *Allenby v. Proudlock*, 5 Nev. & M. 636. 685

*In Ejectment.*—An attachment will be issued for not paying costs in ejectment on the Master's allocatur after judgment as in case of nonsuit, though no subpoena solvas has issued against the nominal plaintiff. *Doe d. Floyd v. Roe*, 4 Tyr. 85; S. C. nom. *Doe d. — v. Baker*, 2 Dowl. P. C. 217; S. P. *Doe d. Fry v. Fry*, 2 C. & M. 234; 2 Dowl. P. C. 265. 686

A rule for an attachment for nonperformance of the terms of the consent rule, is properly intitled as in an action against the casual ejector, although obtained upon affidavits intituled as in an action against the tenant. *Rex v. Bryant*, 2 Nev. & M. 667. 686

In ejectment, twelve defendants entered into a joint consent rule shortly before the trial; by a judge's order two were permitted to withdraw their plea, and suffer judgment by default. At the trial the two did not appear when called on:—Held, that the plaintiff was entitled to a general judgment against all the defendants, they receiving the costs of that defence which, as to a part of the premises, was successful. *Doe d. Bish-ton v. Hughes*, 1 Gale, 263. 986

*Other Proceedings.*—The 1 Will. 4, c. 21, does not enable the court, where a party has declared in prohibition and succeeded, to grant him his



costs incurred in the ecclesiastical court. *Tessimond v. Yardley*, 5 B. & Adol. 458. 689

No costs allowed for appearing to support a demurrer which has been entered in the paper before joinder, and without delivering the demurrer books to the judges. *Howarth v. Hubbersty*, 5 Tyr. 391. 686

Issues were joined in fact and in law, and notice of trial of the former given, but the plaintiff having gone to trial, paid the costs of the day on motion in the subsequent term. In that term the demurrer was argued, and the defendant had leave to amend on payment of costs. The Master disallowed all the plaintiff's costs of the paper books and benefit which related to the issues in fact, and was held right. *Jones v. Roberts*, 4 Tyr. 310; 2 Dowl. P. C. 374. 686

Under stat. 1 Will. 4, c. 21, s. 6, the costs of a mandamus, and of applying for it, may be obtained of the court by a distinct motion after the issuing of the writ. And upon such motion for costs, the court will refer for its guidance to the affidavits filed in support of the application for a mandamus, if it be clear that both applications are made by the same parties. *Rex v. Kirke*, 5 B. and Adol. 1089. 688

The tenant in a writ of intrusion is not entitled to costs upon a nolle prosequi. The statute 8 Eliz. c. 2, is confined to personal actions. *Williams, dem. Harris, ten.*, 4 M. & Scott, 491; 2 Dowl. P. C. 819. 690

Where a verdict is found for the plaintiff on some counts and for the defendant on other counts, and the questions raised on the counts found for the defendant are submitted for the opinion of the court, in the form of a special case, on which the defendant obtains judgment, the Master, in taxing costs, should allow the costs of the special case to the defendant. *Gosbell v. Archer*, 5 Nev. & M. 523; 2 Adol. & Ellis, 500; 1 Har. & Woll. 559. 691

Where a special case, on which judgment had been given for the plaintiff in this court, was at the instance of the defendant turned into a special verdict, that he might have an opportunity of obtaining the judgment of a court of error thereon, this court, after the lapse of two years, and after the costs of the trial and special case had been taxed and paid, refused to allow the plaintiff the costs thereby occasioned. *Collins v. Gwynne*, 2 Scott, 332; 4 Dowl. P. C. 122. 691

*New Trial.*—Where a new trial is granted upon payment of costs, remanet fees, although incurred before the unsatisfactory trial, are to be paid by the party impugning the verdict. *Robinson v. Day*, 2 Nev. & M. 670; 5 B. & Adol. 814. 691

Where a new trial is granted, and nothing said in the rule as to the costs of the former one, and after various subsequent proceedings one party succeeds, he is not entitled to the costs of the first trial. *Newbury v. Colvin*, 2 Dowl. P. C. 415. 692

If an attorney shows cause on his own behalf,

against a rule for a new trial, or a stet processus, his client not appearing, the costs of the attorney are not costs in the cause, but must be made the subject of a special application to the court; and if that application is not made when the rule is disposed of, the court will not afterwards amend the rule as to them. *Southey v. Teary*, 2 Dowl. P. C. 522. 693

The rule as to the payment of costs on a motion for a new trial, is the same in principle in criminal and civil cases. *Rex v. Aldridge*, 1 Nev. & M. 776. 693

The 64th rule H. T. 2 Will. 4, applies only to cases where a new trial is granted upon the whole record. *Bower v. Hill*, 2 Scott, 540; 1 Hodges, 334. 691

On the trial of a right of way, in one count claimed as a public, and in another as a private way, a general verdict was found for the defendants. The court afterwards directed a new trial, expressly by the rule, confining it to the right claimed in the second count. In the rule no mention was made of costs, nor any reservation of the defendant's verdict on the first count:—Held, that the defendants were, nevertheless, entitled to the costs of the issues found for them on the first trial, and not in contest on the second, they having succeeded on such second trial. *Id.*

Where a jury, not being able to agree upon a verdict, were dismissed by the judge, but without the consent of the parties, the court refused to grant the plaintiff, who obtained the verdict at a second trial, the costs of the first attempt at trial. *Seally v. Powis or Powers*, 3 Dowl. P. C. 372; 1 Har. & Woll. 118. 691

Where a jury is discharged by the judge, of his own authority, from finding a verdict, they being unable to agree, the ultimately successful party is not entitled to the costs of the first attempt at trial. *Waite v. Spurgin*, 4 Dowl. P. C. 575. 691

Where a plaintiff is prepared to try at one sittings, but, from the press of business, the cause does not come on, and those sittings last till the second sittings commence, but the plaintiff is obliged to withdraw his record on account of its not having been revealed, he is still not liable to the costs of the first sittings. *Waters v. Weatherby*, 3 Dowl. P. C. 328. 691

Where a cause was referred at nisi prius to an arbitrator to reduce the damages, or enter a verdict for the defendant, on which the court gave judgment that the verdict ought to be reduced:—Held, that the costs of this rule were properly taxed as costs in the cause. *Goodall v. Ray*, 4 Dowl. P. C. 76; 1 Har. & Woll. 333. 691

The party who succeeds at a second trial, will not be allowed in taxation the costs he has incurred for copies of a short-hand writer's notes of the evidence given at the former trial. *Crease v. Barrett*, 2 C. M. & R. 738; 1 Tyr. & G. 112. 693

The execution of a writ of inquiry was set aside for misdirection; the defendant paid the amount of the verdict without proceeding to a second inquiry:—Held, that he was not liable to the costs



of the first inquiry. *Porter v. Cooper*, 1 Gale. 149. 693

*Double and treble Costs.*—The double costs given to magistrates by 21 Jac. 1, c. 12, s. 5, are those costs only which are recoverable in the ordinary course of law doubled. *Thomas v. Saunders*, 3 Nev. & M. 572; 1 Adol. and Ellis, 552. 694

Therefore, where the plaintiff in an action for false imprisonment against magistrates, within 21 Jac. 1, obtained an order for changing the venue for the purpose of securing an impartial trial, in which order he undertook to pay to the defendants all the extra costs necessarily occasioned by such cause being tried in the county where the trial was ordered to be had, the defendants were not entitled to have such extra costs doubled. *Id.*

A justice of the peace is not entitled to have a suggestion entered on the roll, that the action was brought against him for an act done by him as a justice of the peace, in order to obtain double costs. *Fosbrooke v. Hall*, 1 Mees. & Wels. 205; 4 Dowl. P. C. 701. 694

Seemingly, that a justice of the peace is entitled to double costs on discontinuance before trial, under the 7 Jac. 1 c. 5. *Id.*

The defendant will not be allowed to enter a suggestion on record to entitle him to double costs, if the plaintiff is willing to give him double costs without. *Id.*

By 5 & 6 Will. 4, c. 83, s. 3, *treble costs are given to patentees in whose favor a verdict or decree passes, or a certificate of the judges that the validity of the patent came in question.* 694

Seemingly, that in order to entitle a party to treble costs under the 100th section of the Building Act, no suggestion on the record is necessary. *Wells v. Ody*, 3 Dowl. P. C. 799; 1 Gale, 161. 694

In an action for penalties given by a statute against a party acting, though disqualified, the defendant is not entitled on a nonsuit to treble costs under a clause of the act, giving them in any action "for any act or thing done in execution of, or under the authority of the act." *Charlesworth v. Rudgard*, 3 Dowl. P. C. 517; 1 C. M. & R. 896; 5 Tyr. 476; 1 Gale, 42. 694

By a river navigation act commissioners are authorised to appoint a clerk, and to allow and appoint to him a reasonable sum for his attendance, &c.; and it is enacted that such sum *shall be paid* by the proprietors of the tolls of the navigation. By a distant section, if such proprietors shall neglect or refuse to pay such sum of money, &c. which shall be so allowed and become due or payable to the clerk, *upon demand thereof made*, of the proprietors or the collector, such sum may be recovered by action of debt, &c. with double costs of suit, such action to be brought in the name of the clerk. No action can be brought upon the prior enactment alone; and an action on the statute must be taken to be founded on the two sections conjointly, although the decla-

ration omit to state an actual demand. Where, therefore, in debt upon the statute, the plaintiff obtains a verdict upon nil debit pleaded, he is entitled to double costs notwithstanding such omission. *Tibbets v. Yorke*, 5 Nev. & M. 609. 694

Quære, whether the omission would have been good of special demurrer? *Id.*

*Security for Costs.*—A plaintiff cannot be required to give security for costs, unless it appears that he is gone abroad for more than a temporary residence. *Taylor v. Fraser*, 2 Dowl. P. C. 622. 696

Security for costs cannot be required from a peer, though residing abroad. *Ferrars (Earl) v. Robins*, 2 Dowl. P. C. 636. 696

A plaintiff who is a peer, and out of the jurisdiction, must give the usual security for costs in equity. *Aldborough (Lord) v. Burton*, 2 Mylne & K. 401. 696

A commissioner of the Ionian Islands filling his office out of this country cannot be compelled to find security for costs, when plaintiff. *Nugent (Lord) v. Harcourt*, 2 Dowl. P. C. 578. 696

Where a plaintiff, suing in forma pauperis, will be absent from England eighteen months, the court will compel him to give security for costs, or stay his proceedings until his return. *Foss v. Wagner*, 2 Dowl. P. C. 499. 696

Where the plaintiff resides abroad, the court, by the 98th rule of H. T. 2 Will. 4, has a discretionary power to require security for costs, notwithstanding that the defendant has proceeded in the cause after he knew that the plaintiff resided abroad. *Fletcher v. Lew*, 5 Nev. & M. 351; 1 Har. & Woll. 430. 696

So, it may be required after issue joined, seemingly. *Id.*

If a plaintiff be permanently resident abroad, and is only occasionally in this country, he will be liable to give security for costs. *Gurney v. Key*, 3 Dowl. P. C. 559; 1 Har. & Woll. 203. 696

The court will not compel a plaintiff to give security for costs because he had gone to serve in a foreign army in a civil war. *Frodsham v. Myers*, 4 Dowl. P. C. 280; 1 Har. & Woll. 526. 696

Where a cause was tried, and the jury not being able to agree in their verdict, were discharged by consent of both parties, and the plaintiff gave a new notice of trial:—Held, that an application for security for costs, on the ground that the plaintiff had gone to reside abroad, was too late, it appearing that the defendants had been fully aware of that fact before the first trial. *Wainwright v. Bland*, 2 C. M. & R. 740; 4 Dowl. P. C. 547; 1 Tyr. & G. 137. 696

In an action brought upon a bond, in the name of an obligee resident abroad, for the benefit of an assignee in this country, the defendant may claim security for costs from the nominal plaintiff: the assignee's written undertaking is



not sufficient. *Youde v. Youde*, 3 Adol. & Ellis, 311. 696

Where in an action by a foreigner, security has been given for costs, in an amount afterwards much exceeded by the defendant's costs actually incurred on the trial, it is too late for him to move for further security for costs after a nonsuit and pending a rule for a new trial. *Alivon v. Furnival*, 2 C. & M. 555; 4 Tyr. 370. 696

Where one of two lessors of the plaintiff is abroad, the defendant is not entitled to security for his costs. *Doe d. Bawden v. Roe*, 1 Hodges, 315. 696

If one of three plaintiffs is resident in this country, and the other two are residing abroad, the defendant is not entitled to security for his costs. *Orr v. Bowles*, Hodges, 23. 696

Where a plaintiff is a mariner, and is abroad on a voyage, his family being left in this country in lodgings:—Held, that he will not be required to give security for costs. *Ford v. Boucher*, 1 Hodges, 58. 696

Assignees of bankrupts. *Mason v. Polhill*, 1 C. & M. 620; 3 Tyr. 595; 2 Dowl. P. C. 61. 698

The court will not compel a plaintiff in a *qui tam* action to give security for costs, though it is sworn that he is a pauper, and has a very great number of actions by the same attorney. *Gregory q. t. v. Elwidge*, 2 Dowl. P. C. 259; 2 C. & M. 336; 4 Tyr. 233. 698

If an insolvent debtor proceeds with an action after executing his assignment, although no assignees are appointed, the court will compel him to find security for costs. *Doyle v. Anderson*, 2 Dowl. P. C. 596. 698

Where a plaintiff becomes bankrupt before the trial of a cause, the defendant cannot apply for security for costs till he has ascertained that the assignees have resolved to proceed with the action. *Wilkinshaw v. Marshall*, 4 Tyr. 993. 698

A plaintiff declared in time to go to trial at the sittings in Mich. T., had not two orders for time to plead been obtained. As the "usual terms" were imposed, viz., *inter alia* the accepting short notice of trial, the plaintiff might still have gone to trial at the sittings after that term, but did not. On the 10th of January he appeared in the *Gazette* as a bankrupt, and on the 29th the issue was delivered:—Held, that an application for security for costs from the assignees made on the 31st January was in time. *Id.* 698

Plaintiff, who, under circumstances, had been ordered to give security for costs by reason of his insolvency, but who had not complied with the order was ordered to give that security within ten days or his bill to be dismissed. *Tredwell v. Byrch*, 1 Y. & Col. 480. 698

The court refused to grant a rule, calling upon the defendant in replevin to find security for costs, although it was sworn that neither the defendant nor the broker were able to pay them, and the defendant had taken the benefit of the Insolvent Act. *Hiskett v. Biddle*, 3 Dowl. P. C. 634; 1 Hodges, 119. 698

After an arrest of a defendant, the plaintiff re-

moved his furniture, and absconded, to avoid a charge of bigamy:—Held, that the defendant was entitled to security for costs. *Rogers v. Banger*, 4 Dowl. P. C. 411. 698

Security for costs may be applied for at any time before plea pleaded: even after the defendant has had an order for time to plead. *Gurney v. Key*, 3 Dowl. P. C. 559; 1 Har. & Woll. 203. 699

So at any time after plea pleaded. *Fletcher v. Lew*, 5 Nev. & M. 351; 1 Har. & Woll. 430. 699

Where security for costs has been given, the defendant will not be entitled to fresh security if the sureties become insolvent. *Jones v. Jacobs*, 2 Dowl. P. C. 442. 699

It is too late to apply for security for costs after judgment signed. *Borhs v. Sessions*, 2 Dowl. P. C. 710. 699

Unless a previous application is made, the costs of the rule will not be allowed. *Id.*

Where a party is served with a notice not to proceed without giving security for costs, and gives an undertaking to that effect, the notice and undertaking are waived by the opposite party taking a step in the cause. *Pulford v. Smithwick*, 1 Alcock & Napier, 55. (*Irish*). 699

The application for security for costs is *strictissimi juris*. *Ex parte Tull*, 1 Mont. & Ayr. 80. 699

Examining a witness before the commissioner, as to the matter of the petition, and an application to the court of Review that the registrar may attend at the hearing with such examination, is a waiver, of the right. *Id.*

Where a plaintiff is guilty of laches in declaring, the defendant is not deprived of his claim to security for costs by obtaining time to plead. *Fry v. Wills*, 3 Dowl. P. C. 6. 699

The court will not compel a plaintiff to give security for costs already incurred. *Oxenden v. Cropper*, 4 Dowl. P. C. 574. 699

During the pendency of a rule for a new trial obtained by the plaintiff, the court will not compel him to give security for the future costs in the cause. *Id.*

The court will not appoint any fixed time before which a plaintiff is to give security for costs. *Broughton v. Jeremy*, 1 Har. & Woll. 525. 699

A rule nisi for security for costs, with a stay of proceedings, will not be allowed on the last day of term. *Gronow v. Pointer*, 3 Dowl. P. C. 571. 699

An application for security for costs in bankruptcy must be made before any step is taken by the party applying. *Ex parte Tull*, 3 Deac. & Chit. 503. 699

*Taxation of Costs.*—An *allocatur* is the property of the person in whose favor it is made. *Doe d. King v. Robinson*, 2 Dowl. P. C. 503. 700

Notice of taxing costs is not necessary in any case where the defendant has not appeared in person, or by his attorney or guardian, notwith-



standing the general rule T. T. 1 Will. 4. Reg. Gen. K. B., C. P., and Exch., H. T. 4 Will. 4.

700

No notice to tax is necessary when a defendant appears in person and gives a cognovit which is good, though there is no declaration. *Clarke v. Jones*, 3 Dowl. P. C. 277.

700

Costs of increase form no integral part of the suit, as they are awarded by the court in consequence of the damages recovered by the plaintiff, and form the subject of a distinct and separate adjudication. *Taylor v. Wilkinson*, 5 Nev. & M. 189; 1 Har. & Woll. 451.

700

The rule for taxing to the defendant the costs of the two issues found for him was drawn up with this additional clause, "and that the costs, when so taxed, be paid by the said plaintiff to the said defendant."—Held, that the court had no power to make such an order. The court directed the record to be amended by an entry of a judgment for the costs of those two issues, upon which the defendant might proceed to obtain his costs if he thought proper. *Twigg v. Potts*, 4 Dowl. P. C. 266.

700

Where a cause is ready for trial, and postponed at the instance of either party, on the terms of paying the costs of the postponement, refreshing fees to the counsel of the opposite party form a portion of those costs. *Bourne v. Minchin*, 1 Alcock & Napier, 144. (*Irish*).

701

Where attested copies of equity pleadings are rendered necessary as evidence, the compensation to the attorney, who attends to compare them for loss of time, is costs in the cause. *Id.*

Costs of pleadings. *Ward v. Bell*, 1 C. & M. 848; 3 Tyr. 904; 2 Dowl. P. C. 76.

702

If, by an alteration in the state of the pleadings, after notice of trial, certain witnesses are unnecessary, the party who subpoenaed them must make reasonable efforts to prevent their attendance, or their expenses will not be allowed on taxation. *Allport v. Baldwin*, 2 Dowl. P. C. 599.

703

It is a question for the discretion of the Master, in each particular case, whether the expenses of witnesses brought from abroad should be allowed on taxation: the act 1 Will. 4, c. 22, for the examination of witnesses on interrogatories has made no alteration in this respect. *M'Alpine v. Poles*, *Powles*, or *Coles*, C. & M. 795; 3 Tyr. 871; 2 Dowl. P. C. 299.

703

It is a question for the discretion of the Master, whether a witness ought to be allowed for the whole time of his attendance at the assizes, or only a portion of it; but, where the Master has decided upon it, the court will not review his decision. *Platt v. Greene*, 2 Dowl. P. C. 216.

703

A plaintiff is bound to have his witnesses in attendance from the commencement of the assizes, and may therefore have the costs of their attendance previous to the trial. *Coegrave v. Evans*, 2 Dowl. P. C. 443.

704

Where the master has, in his discretion, allowed, upon taxation, the expenses of the witnesses of the successful party at the assize town for several days, during which their attendance

was not in fact necessary, the court will not interfere with the Master's decision, unless mala fides be shown in such successful party, as an intention unnecessarily to increase the costs. *Thomas v. Saunders*, 3 Nev. & M. 572.

704

Previously to the assizes, the plaintiff serves on the defendant a notice, importing that the cause will not be called on until the fourth day after the commission day, and that he shall object, upon the taxation of costs, to any allowance for the time and expenses of the defendant's attorney and witnesses, beyond what would be necessary if the trial should be had before that day; and that he undertakes to withdraw the record if the cause should be called on before. The defendant is not bound to pay any regard to such notice. *Id.*

Semble, such notice, served on the day before the commission day, after all the necessary arrangements had been made for conveying the witnesses to a distant assize town on the following day, would be too late, supposing it to be otherwise good. *Id.*

A party succeeding on an issue is entitled to the costs of any witnesses called to give evidence on a fact involved in that issue, though the jury or an arbitrator may find that fact against him. *Radcliffe v. Hall*, 2 C. M. & R. 258; 1 Gale, 140.

703

The Master ought not to allow costs exceeding the sum actually paid. *Id.*

The costs of executing a commission in a foreign country, under 1 Will. 4, c. 22, s. 4, are costs in the cause, unless some special ground is laid for ordering otherwise. *Prince v. Sarno*, 4 Dowl. P. C. 5.

702

If the officer of the court, in taxing a bill of costs, disallows charges which are usually allowed, the court of Bankruptcy will order a re-taxation. Aliter, where the charges are not usually allowed, unless a special application is made to the court, stating the reasons for enforcing such allowance. *In re Gray*, 1 Deac. 105.

705

A motion to review the Master's taxation must be supported by an affidavit that the Master has made his allocatur. *Cleaver v. Hargrave*, 2 Dowl. P. C. 689.

705

An application in bankruptcy, that the officer may be directed to review his certificate as to the taxation of costs, may be made by motion. *Ex parte Richardson*, 3 Deac. & Chit. 735.

705

It is not an objection to such application, that the amount of the taxed costs has not been paid into court, though it may be proper to make such payments one of the terms of the order for re-taxation. *Id.*

An application for a review of the Master's certificate of taxation, on the ground that certain items had been improperly allowed, is not regular, by way of motion. *Att. Gen. v. Brown*, 1 Mylne & K. 567.

705

Under the directions to taxing officers promulgated in H. T. 4 Will. 4, it is not necessary for the judge who certifies to enable a plaintiff to obtain full costs, to hear the cause throughout. *Nokes v. Frazer*, 3 Dowl. P. C. 339.

705



**Recovery of Costs.**—Where the plaintiff has been nonprossed in the Exchequer, and afterwards brings an action in K. B., that court will stay the proceedings till the costs of the former action are paid. *Nevitt v. Lade*, 3 Dowl. 396. 706

Where the plaintiffs recovered 1s. damages, although the surname of one of them was omitted in the *Nisi Prius* record, on which ground the court refused to increase the damages to the sum the plaintiffs sought to recover, and they sued out execution for the costs on the verdict for 1s., and brought another action for the sum they originally sought to recover, although they had refused to amend the record on payment of costs: the court stayed the proceedings in the second action, the defendant not having pleaded. *Longridge v. Brewer*, 7 Moore, 522; 1 Bing. 307. 706

Where a second action was brought for the same cause of action for which a former one was pending, the court discharged a rule for staying the proceedings in the second action, upon the affidavit of the plaintiff disclaiming the act of his attorney in bringing the first action. *Souter v. Watts*, 2 Dowl. P. C. 263. 706

Proceedings stayed in a second ejectment on the several demises of A., an insolvent debtor, and of B., his assignee, until payment of the costs of a former ejectment brought by A. *Doe d. Standish v. Roe*, 2 Nev. & M. 468; 5 B. & Adol. 878. 707

A second ejectment will be stayed until the payment of the costs of a former ejectment on the same title, where in the first ejectment the plea has been filed, and the draft consent rule drawn up but not entered into. *Doe d. Langdon v. Langdon*, 2 Nev. & M. 848; 5 B. & Adol. 864. 707

Where, in a country cause, a declaration in ejectment was delivered on the 30th of September, and, on the fifth day of the ensuing Hilary term, a motion was made to stay proceedings in that ejectment until the costs of a former ejectment were paid:—Held, that the motion was not too late, although a term had elapsed since the commencement of the action, and notice of trial had been given. *Doe d. Martin v. Packer*, 2 C. & M. 457; S. C. nom. *Doe d. Maslin v. Packer*, 4 Tyr. 144; nom. *Doe d. Green v. Packer*, 2 Dowl. P. C. 373. 707

A tenant who has been served with a declaration in ejectment, cannot move to stay proceedings until the costs of a former ejectment, in every way similar, are paid, before he has entered into the consent rule. *Doe d. Crockett v. Roe*, 1 Har. & Woll. 351. 707

The court refused to discharge an order of a judge, by which time was given to the defendant to rejoin, until after the plaintiff had purged himself of a contempt in the nonpayment of interlocutory costs in the cause, although an attachment had been issued for the same contempt, but it had not been executed. *Wenham v. Downes*, 5 Nev. & M. 244; 1 Har. & Woll. 324. 706

## COVENANT.

Construction of covenant to indemnify. *Carr v. Roberts*, 5 B. & Adol. 78; 2 Nev. & M. 42. 709

Executors, though not named, may sue upon a covenant made with their testator in reference to a chattel. *Doe d. Rogers v. Rogers*, 2 Nev. & M. 550. 718

In consideration of the sum of 300*l.*, T. D. & R. D. by deed, severally and respectively, and for their several and respective heirs, executors, and administrators, granted, covenanted and agreed, to and with L. & B., their heirs, executors, administrators, and assigns, to pay to L. & B., their executors, &c., one annuity or clear yearly sum of 30*l.* in the shares and proportions following, viz. the sum of 15*l.*, being one moiety of the annuity, unto L., his executors, &c., and the sum of 15*l.*, the remaining moiety, unto B., his executors, &c., to be respectively paid quarterly. The powers for better securing the payment of the annuity contained in the deed were all given to L. & B. jointly, and the deed also contained a joint power of attorney to them to enter up joint judgment; and a joint power was granted to them to dispose of the reversion of a close of land, with a joint power of attorney to sell certain stock; and the annuity was redeemable, on seven days' notice in writing being given, by the payment to L. & B. of the sum of 307*l.* 10*s.* and all arrears of the annuity. In an action brought by L. against T. D. to recover arrears of the annuity:—Held, that the covenant was a joint covenant, and that the interest in the annuity was joint, and that L. could not sue alone. *Lane v. Drinkwater*, 1 C. M. & R. 599; 5 Tyr. 40. 717

A covenant with the part-owners of a ship, and their several and respective executors, &c. to pay money, to accrue for the hire of the ship, for freight of goods, and for compensation for the use of the ship's tackle, &c. to the covenantees, their and every of their several and respective executors, &c., at a certain banking-house, in such parts and proportions as were set against their several and respective names, is a several covenant and cannot be sued upon by the covenantees jointly. *Servante v. James*, 5 M. & R. 299. 717

The lessees of a theatre, by deed under seal, agreed to pay certain money lent to them by the plaintiff, on a certain day, and that until payment the plaintiff, and such persons as he might appoint, should have the free use of two boxes in the theatre, one in the dress circle, and one in the circle above, no specific boxes being mentioned. The lessees afterwards assigned their interest in the theatre to the defendant:—Held, that this was a mere personal contract, and that no action could be maintained against the assignee for refusing to permit the plaintiff to use the boxes in the theatre. *Flight v. Glossop*, 2 Scott, 220; 2 Bing. N. R. 125; 1 Hodges, 263. 719

"A. by indenture, executed by himself and B., assigned to B. certain premises, subject to the payment of the rent, and to the performance of the covenants and agreements reserved and con-



tained in the original lease." B. entered under this assignment, and afterwards assigned over to a third person:—Held, that B. was not liable in covenant to A., for rent which the latter had been called upon to pay, in consequence of the default of B.'s assignee: the words "subject to the payment of the rent, &c." being words of qualification and not of contract. *Wolveridge v. Steward*, 3 M. & Scott, 561. 720

The 11 Anne, (Irish), c. 2, s. 6, renders the action of covenant against the assignee of the lessee transitory. *Grogan v. Magan*, 1 Alcock & Napier, 366. (Irish). 720

In declaring in covenant it is only necessary to set forth so much of the indenture as is requisite to support the action. *Id.*

Where an indenture of lease contained a proviso, that if a certain event should happen after the execution of the lease, the rent reserved should be reduced:—Held, that, in an action of covenant for nonpayment of rent, the covenant might be declared upon as an absolute covenant. *Id.*

A. & B. are lessees of a coal mine, A. being also lessee in trust for himself and B. of land adjoining, necessary for the working of the mine, covenant with C. that he will do nothing whereby an annuity, charged (with power of entry upon the mine, &c. and sale, in case the annuity should be in arrear), upon the profits which, after payment of the rent, taxes, &c. then charged thereon, might be made under the leases of the mine and land, by the sale of the coal or otherwise, may be impeached. In an action on the covenant, C. assigns as breaches—first, that A. surrendered the land, and took a new lease to himself and B. jointly, in trust for other persons, whereby the annuity became and was impeached, and the plaintiff lost his remedies to enforce it; 2ndly, that A. & B. accepted a new lease of the land, at an increased rent, and, in other respects, upon less advantageous terms, for the fraudulent purpose of obtaining from the lessor a demise of mines under the land upon terms advantageous to A. & B., whereby the annuity became and was impeached; 3rdly, that A. & B. assigned (amongst other things) such neighboring mine and the land to D., whereby the annuity became and was impeached:—Held, that the declaration was insufficient, for not showing in what manner the acts complained of operated to impeach the annuity. *Pitt v. Williams*, 4 Nev. & M. 412; 2 Adol. & Ellis, 419. 720

In an action on a covenant, to do no act whereby an annuity charged upon the profits of a coal mine shall be impeached, it is no ground of demurrer that the declaration does not allege that any profits have been made. *Id.*

Quære, whether such omission would disentitle the plaintiff to recover more than nominal damages? *Id.*

In an action to recover arrears of annuity, such allegation in the declaration would be required. *Id.*

In covenant the declaration stated that the de-

fendant covenanted to pay a certain sum of money at a certain time. Upon oyer, the covenant appeared to be to pay the money at that time, and also at a particular place. The defendant demurred, and assigned the variance as a cause of demurrer:—Held, that there was no material variance. *Paine v. Emery*, 4 Dowl. P. C. 191; 1 Gale, 266. 720

In covenant to allow a business to be carried on in a certain shop, a breach that defendant improperly shut up the shop is sufficient, without alleging that the shop was shut up at unreasonable or improper times. *Hodges v. Gray*, 4 Dowl. P. C. 733. 722

## CRIMINAL LAW.

### I. PERSONS CAPABLE OF COMMITTING CRIMES.

If larceny be committed jointly by husband and wife, the latter is entitled to be acquitted, as she must be presumed to be under his coercion and control; and where she was indicted as "the wife of A. B.:"—Held, to be sufficient proof that she was so, without adducing further evidence to prove that fact. *Rex v. Knight*, 1 C. & P. 116—Park. 727

A person, deaf and dumb, was to be tried for a capital felony: the judge ordered a jury to be impaneled, to try whether he was mute by the visitation of God; the jury found that he was so. The jury were then sworn to try whether he was able to plead, which they found in the affirmative; and the prisoner, by a sign, pleaded not guilty. The judge then ordered the jury to be sworn to try whether the prisoner was now sane or not; and on the question, his lordship directed the jury to consider whether the prisoner had sufficient intellect to comprehend the course of the proceedings, so as to make a proper defence, to challenge any juror he might wish to object to, and to comprehend the details of the evidence: and that if they thought he had not, they should find him not of sane mind. The jury did so, and the judge ordered the prisoner to be detained under the stat. 39 & 40 Geo. 3, c. 94, s. 2. *Rex v. Pritchard*, 7 C. & P. 303—Alderson. 727

It is no defence on behalf of a foreigner charged in England, with a crime committed there, that he did not know he was doing wrong, the act not being an offence in his own country. But though it is not a defence in law, yet it is a matter to be considered in mitigation of punishment. *Rex v. Esop*, 7 C. & P. 456—Bosanquet & Vaughan. 727

The case of *Rex v. Grindley*, in which it was said that the intoxication of a person charged with murder was a proper circumstance to be taken into consideration in order to show whether the act was premeditated, or done only with sudden heat and impulse, is not law. *Rex v. Carroll*, 7 C. & P. 145—Parke. 728

In a case of stabbing, where the prisoner has used a deadly weapon, the fact that the prisoner was drunk, does not at all alter the nature of the case; but if the prisoner had intemperately used



an instrument, not in its nature a deadly weapon, at a time when he was drunk, the fact of his being drunk might induce the jury to less strongly infer a malicious intent in him at the time. *Rex v. Meakin*, 7 C. & P. 297—Alderson. 728

## II. PRINCIPAL AND ACCESSORY.

A., a lad who was a clerk in a banking house, robbed his employers; after doing so, he went to the lodgings of B., who was much older than himself, and who had relations in America. A. stayed twenty minutes at B.'s lodgings; and after that, on the same night, A. and B. started together by the coach, and went from Reading to Liverpool, intending to embark for America:—Held, that, on this evidence, B. might be convicted as an accessory after the fact, in "harboring, receiving, and maintaining" A. the principal felon. *Rex v. Lee*, 6 C. & P. 536—Williams. 728

A. was indicted for larceny as a principal, B. being charged in the same indictment with having received the stolen property from A. B. was tried at the Clerkenwell sessions for the receiving, and was convicted, and sentenced to be transported. A. was afterwards tried at the Old Bailey as the principal, and acquitted:—Held, that, although B. was imprisoned in Newgate, in pursuance of his sentence, the judges at the Old Bailey had no jurisdiction to order his discharge. *Ex parte Palmer*, 6 C. & P. 122—Littledale. 728

## VII. OFFENCES RELATING TO STAMPS.

A person may be found guilty under the stats. 13 Geo. 3, c. 52, s. 14, and 38 Geo. 3, c. 60, s. 7, if he be proved to have transposed the mark of the Goldsmiths' Company from one gold ring to another, although both rings be genuine, and although the jury may be of opinion that he did so without any fraudulent intention. *Rex v. Ogden*, 6 C. & P. 631—Crim. Court. 734

## VIII. OFFENCES RELATING TO THE POST-OFFICE.

At the trial of a person on the stat. 52 Geo. 3, c. 143, s. 2, for embezzling a letter containing a bill of exchange, he being at the time employed under the Post-office, it is sufficient to prove that such person acted in the service of the Post-office, and it is not necessary to go into proof of his appointment. *Rex v. Rees*, 6 C. & P. 606—Parke. 735

On an indictment for embezzlement against a letter carrier charged under 2 Will. 4, c. 4, as a person employed in the public service of his Majesty, it is not necessary to prove his appointment as a letter carrier, but evidence of his having acted as such is sufficient. *Rex v. Borrett*, 6 C. & P. 124—Littledale. 735

If the wife of a party to whom a letter is directed pays the postage of the letter, she is entitled to demand an overcharge made for it; and a refusal on the part of the letter carrier to account for it to her is evidence of an embezzlement by him. *Id.*

## XIV. HOMICIDE.

*Murder.*—A child must be actually wholly in the world in a living state to be the subject of a charge of murder; but, if it is wholly born and is alive, it is not essential that it should have breathed, but the jury must be satisfied that the child was wholly born into the world at the time it was killed, or they ought not to convict the prisoner of murder. *Rex v. Brain*, 6 C. & P. 349—Park. 737

If two persons fight, and one overpower the other, and knock him down, and put a rope round his neck and strangle him, this will be murder. *Rex v. Shaw*, 6 C. & P. 372—Patteson. 738

A servant of Mr. C. attempted to apprehend A., who was out night-poaching in a wood, and the servant was killed by A. Mr. C. was neither the owner nor the occupier of the wood, nor the lord of the manor, Mr. C. having only the permission of the owner of the wood to preserve game there:—Held, that this was manslaughter only in A. *Rex v. Addis*, 6 C. & P. 388—Patteson. 738

In criminal cases, the definition of a wound is, an injury to the person, by which the skin is broken. *Moriarty v. Brooks*, 6 C. & P. 864—Lyndhurst. 738

*Manslaughter.*—A. being on board a ship, and B. in a boat alongside, they had a dispute about the payment for some goods, both being intoxicated. A., to get rid of B., pushed away the boat with his foot. B. reaching out, to lay hold of a barge, to prevent his boat from drifting away, overbalanced himself, and fell into the water and was drowned. A. was charged with manslaughter:—Held, that these facts did not constitute that offence. *Rex v. Waters*, 6 C. & P. 328—Park and Patteson. 739

If A. and B. be riding fast along a highway, as if racing, and A. ride by without doing any mischief, but B. rides against the horse of C., whereby C. is thrown and killed; this is not manslaughter in A. *Rex v. Mastin*, 6 C. & P. 346—Patteson. 740

A foot passenger walking at lamplight in the carriage road along a public highway, when the owner of a cart, who was proved to be near-sighted, drove along at the rate of eight or nine miles an hour, sitting at the time on a few sacks laid on the bottom of the cart, and ran over the foot passenger and killed him:—Held, that he was guilty of such carelessness as amounted to the crime of manslaughter. *Rex v. Grout*, 6 C. & P. 629—Crim. Court. 740

Where a mother, being angry with one of her children, took up a small piece of iron used as a poker, and on his running to the door of the room, which was open, threw it after him, and hit another child who happened to be entering the room at the moment, in consequence of which he died:—It was held to be manslaughter, although it appeared the mother had no intention of hitting the child with whom she was angry, and only intended to frighten him. *Rex v. Conner*, 7 C. & P. 438—Parke and Gaselee. 740



Where a person in loco parentis inflicts corporal punishment on a child, and compels it to work for an unreasonable number of hours, and beyond its strength, and the child dies, the death being of consumption, but hastened by the ill treatment, it will not be murder, but only manslaughter in the person inflicting the punishment, although it was cruel and excessive, and accompanied by violent and threatening language, if such person believed that the child was shamming illness, and was really able to do the quantity of work required. *Rex v. Cheeseman*, 7 C. & P. 454—Vaughan. 740

Where a person grossly ignorant of medicine, administers a dangerous remedy to one laboring under a disease, proper medical assistance being at the time procurable, and that dangerous remedy causes death, the person so administering it is guilty of manslaughter. *Rex v. Webb*, 1 M. & Rob. 405—Lyndhurst. 740

To make the captain of a steam vessel guilty of manslaughter, in causing a person to be drowned by running down a boat, the prosecutor must show some act done by the captain; and a mere omission on his part, in not doing the whole of his duty is insufficient. But if there be sufficient light, and the captain of a steamer is either at the helm or in a situation to be giving the command, and does that which causes the injury, he is guilty of manslaughter. *Rex v. Green*, 7 C. & P. 156—Park and Alderson. 740

The captain and pilot of a steam boat were both indicted for the manslaughter of a person who was on board of a smack, by running the smack down. The running down was attributed on the part of the prosecution, to improper steering of the steamboat, arising from there not being a man at the bow to keep a look-out at the time of the accident. It was proved that there was a man on the look-out when the vessel started, about an hour previous. According to one witness, the captain and pilot were both on the bridge between the paddle-boxes; according to another, the pilot was alone on the paddle-box:—Held, that under these circumstances there was not such personal misconduct on the part of either as to make them guilty of felony. *Rex v. Allen*, 7 C. & P. 153—Park and Alderson. 740

If a police constable, on being sent for at a late hour of the night to clear a beer-house, do so, and one of the persons on leaving the house, and being told to go away, refuse to do so, and use threatening language, the police constable is justified in laying hands on him to remove him; and if he cut the police constable with a knife, with intent to do grievous bodily harm, this is a capital offence, and the fact of the police constable having laid hands on the party, would not have reduced the crime to manslaughter, if death had ensued. *Rex v. Hems*, 7 C. & P. 312—Williams. 740

*Indictment.*—In an indictment for murder, where the death is alleged to have been caused by a wound, it is not necessary to describe either the length, breadth, or depth of the wound. *Rex*

*v. Tomlinson*, 6 C. & P. 370—Park and Patteson. 741

If in a case of murder the death of a deceased is charged to be by suffocation, by placing the hand on the mouth of the deceased:—Held, that this allegation is made out if the jury are satisfied that any violent means were used to stop the respiration of the deceased. *Rex v. Waters*, 7 C. & P. 250—Denman. 741

In an indictment for manslaughter, it is not necessary to allege the causes merely natural which conducted to the death of the party; it is sufficient to allege truly the acts with which the prisoner is charged, if that act accelerated the death. *Rex v. Webb*, 1 M. & Rob. 405—Lyndhurst. 741

*Evidence.*—A. was charged with manslaughter, in killing B., by driving a cabriolet over him. C. saw the cabriolet drive by, but did not see the accident, and immediately afterwards, on hearing B. groan, C. went up to him, when B. made a statement as to how the accident had happened:—Held, that this statement, being made at the moment of the accident occurring, was receivable in evidence on the trial of A. for the manslaughter of B. *Rex v. Foster*, 6 C. & P. 325—Park, Patteson, and Gurney. 742

An indictment charged a murder to have been committed by cutting the throat of the deceased:—Held, that the "throat" means what is commonly so called; and that this allegation was proved by showing that the jugular vein was divided, although the carotid artery was not cut, and although the surgeon stated that what he should call the throat was not cut. *Rex v. Edwards*, 6 C. & P. 401—Patteson. 742

*Declaration in Articulo Mortis.*—In order to render a declaration in articulo mortis admissible in a case of manslaughter, it is not necessary to prove expressions of the deceased, that he was in apprehension of almost immediate death; but the judge will consider, from all the circumstances, whether the deceased had or had not any hope of recovery. *Rex v. Bonner*, 6 C. & P. 386—Patteson. 743

On the question whether a declaration of a deceased person be admissible as a declaration in articulo mortis, the judge will consider whether the conduct of the deceased was that of a dying person, such as whether he gave directions respecting his funeral, his will, &c., and not merely the expressions he used, as to whether he thought he should or should not recover. *Rex v. Spilsbury*, 7 C. & P. 187—Coleridge. 743

If a declaration in articulo mortis be taken down in writing, and signed by the party making it, the judge will neither receive a copy of the paper in evidence, nor will he receive parol evidence of the declaration. *Rex v. Gay*, 7 C. & P. 230—Coleridge. 743

It is no objection against a declaration in articulo mortis, that it was made in answer to questions put to the deceased by the surgeon, and not a continuous statement made by the de-



ceased. *Rex v. Fagent*, 7 C. & P. 238—Gaselee. 743

If a person whose death is the subject of a charge of manslaughter express an opinion that she shall not recover, and make a declaration, and at a subsequent part of the same day ask a person whether he thinks she will "rise again:"—Held, that this showed such a hope of recovery as rendered the previous declaration inadmissible. *Id.*

#### XV. SHOOTING, STABBING, &c.

A. had the barrels of a double-barrelled percussion gun detached from the stock and lock, and by striking the percussion cap which was on the nipple of one of the barrels, he fired it and shot B.:—Held, to be within the stat. 9 Geo. 4, c. 31, ss. 11, 12. *Rex v. Coates*, 6 C. & P. 394—Patteson. 745

A. sent a tin box to B., containing three pounds of gunpowder, and two detonators, which were intended to ignite the gunpowder when any person opened the box, and so destroy the person who opened it:—Held, that this was not an attempt to discharge loaded arms at B. within the stat. 9 Geo. 4, c. 31, ss. 11, 12. *Rex v. Mountford*, 7 C. & P. 242—Williams. 745

Gamekeepers being in a preserve between twelve and one at night, heard the firing of two guns, and proceeding in the direction of the sound, met with two persons who neither had guns nor game upon them, nor were either found near them. The gamekeepers immediately seized them without calling on them to surrender, or in any way notifying to them who they were. The keepers were wounded, one of them seriously:—Held, that the prisoner who wounded them might, under the circumstances, and taking into consideration the situation and the time of the night, &c., be properly convicted under the stat. 9 Geo. 4, c. 31, ss. 11, 12. *Rex v. Taylor*, 7 C. & P. 266—Vaughan. 745

On an indictment for wounding, the jury, upon the question whether, if death had ensued, the offence would have been murder, should consider whether the instrument employed was, in its ordinary use, likely to cause death; or, if it be an instrument not likely, under ordinary circumstances, to cause death, whether it was used in such an extraordinary manner as to make it likely to cause death, either by continual blows or otherwise. *Rex v. Howlett*, 7 C. & P. 274—Alderson. 745

Biting off the end of a person's nose, is not a wounding within the meaning of the stat. 9 Geo. 4, c. 31, s. 12, nor is biting off a joint from a person's finger, as the statute is intended only to apply to wounding produced by some instrument, and not by the hands or teeth, &c. *Rex v. Harris*, 7 C. & P. 446—Patteson. 745

In an indictment under Lord Lansdowne's Act (9 Geo. 4, c. 31, ss. 11, 12), the question whether in case death had ensued it would have amounted to murder, is a question of law to be decided by the judge, and is not for the jury to pronounce their opinion upon, aided by the

judge's observations. *Rex v. Beeson*, 7 C. & P. 142—Parke and Littledale. 745

#### XVI. ADMINISTERING TO PROCURE ABORTION.

Seemle, that so far as the nature of the thing administered is concerned, the question on an indictment on the stat. 9 Geo. 4, c. 31, s. 13, for administering to procure abortion, is a question as to the intention of the party administering it, and not of the noxious or innoxious character of the article itself. *Rex v. Coe*, 6 C. & P. 403—Vaughan. 747

#### XIX. RAPE.

In cases of rape, &c., the capital offence is completed if there be penetration, although there has been no emission, and the prisoner has been interrupted in the commission of the offence. *Rex v. Cozins*, 6 C. & P. 351—Park. 748

On the trial of an indictment for a rape, the prosecutrix may be asked whether, previously to the commission of the alleged offence, the prisoner has not had intercourse with her by her own consent. *Rex v. Martin*, 6 C. & P. 662—Williams. 748

A count, charging A. with a rape as a principal in the first degree, and B. as principal in the second degree, may be joined with another count, charging B. as principal in the first degree, and A. as principal in the second degree. *Rex v. Gray*, 7 C. & P. 164—Coleridge. 748

#### XXIV. ASSAULT AND INDECENT EXPOSURE.

A count in an indictment charged, that a defendant "did attempt to assault" a girl "by soliciting and inducing her" to place herself in an indecent attitude, he doing the like:—Held, that such a count is bad. *Rex v. Butler*, 6 C. & P. 368—Patteson. 754

If a party be charged before two magistrates with an assault, and they dismiss the complaint, giving him a certificate under the stat. 9 Geo. 4, c. 31, s. 27, he cannot avail himself of this certificate as a defence to an action for the same assault, unless it be specially pleaded. *Harding v. King*, 6 C. & P. 427—Gurney. 754

On an indictment for an assault with an intent to commit a rape, evidence that the prisoner on a prior occasion had taken liberties with the prosecutrix, is not receivable to show the prisoner's intent. In order to convict on a charge of assault with intent to commit a rape, the jury must be satisfied, not only that the prisoner intended to gratify his passions on the person of the prosecutrix, but that he intended to do so at all events, and notwithstanding any resistance on her part. *Rex v. Lloyd*, 7 C. & P. 318—Patteson. 753

#### XXVII. OMITTING TO GIVE SUFFICIENT FOOD TO, AND ILL-TREATMENT OF SERVANTS, PAUPERS, AND HELPLESS PERSONS.

A married woman cannot be convicted of the murder of her illegitimate child three years old,



by omitting to supply it with proper food, unless it is shown that her husband supplied her with food to give to the child, and that she wilfully neglected to give it. A count charged a married woman with the murder of her illegitimate child of three years old, by omitting to supply it with sufficient food, and also by beating: it was not shown that her husband had supplied her with food to give to the child:—Held, that this count could not be supported. *Rex v. Saunders*, 7 C. & P. 277—Alderson. 754

### XXX. FORCIBLE ENTRY.

A conviction for a forcible detainer under 8 Hen. 6, c. 9, must show an unlawful entry as well as a forcible detainer. *Rex v. Oakley*, 1 Nev. & M. 58; 4 B. & Adol. 307. 755

Whether the holding over by a termor after the expiration of his term, is constructively an unlawful entry, *quære*? *Id.*

An indictment for forcible entry charged that defendants into one messuage, &c., then and there being in the possession of W. P., he the said W. P. then and there being also seised thereof, with force of arms, &c., did enter, and the said W. P., from the peaceable possession, with force and arms, &c., did put out. After conviction of defendants:—Held, that this was a sufficient averment of the present seisin of W. P. to warrant the court in awarding a writ of restitution. *Rex v. Hoare*, 6 M. & S. 266. 755

In a conviction under 8 Hen. 6, c. 9, for a forcible detainer, it must appear on the face of the conviction that there was an unlawful entry. *Rex v. Wilson*, 5 Nev. & M. 164; 1 Har. & Woll. 387. 755

A conviction under a forcible detainer, on the view merely of the justices, without any evidence of an unlawful entry, is bad, even though information and complaint of an unlawful expulsion be stated. *Id.*

In a conviction for a forcible detainer, under 8 Hen. 6, c. 9, where the magistrates proceed upon view, it is not necessary to set out the particular facts presented to their view. *Rex v. Wilson*, 3 Nev. & M. 753; 1 Adol. & Ellis, 627. 755

A conviction, under stat. 8 Hen. 6, c. 9, set forth a complaint made to two justices, of an entry into premises of the complainant, an unlawful ejectionment, and a forcible detainer by the defendant; that the justices, on personal view, found the defendant forcibly detaining, according to the complaint, and that he was therefore convicted by them, a forcible detainer, by their own view. The defendant gave written notices to the justices after the conviction, denying the force, and complainant's possession. On an inquisition afterwards had, the jury found a seisin in fee by the complainant, and an unlawful entry, ejection, and forcible detainer. The justices indorsed upon the inquisition a memorandum of having received the premises, and put the complainant into possession. The conviction, inquisition, and memorandum having been returned by the justices to a certiorari, requiring a return of the conviction and inquisition, and all things touching the same,

this court refused to grant a mandamus to amend the return by returning the information, and by returning on the face of the conviction the evidence given touching the entry, and the facts touching the conduct of the defendant on the view, it not being suggested in affidavit, that any evidence was received by the magistrates on the view. The court gave no opinion as to the validity of the conviction. *Id.*

### XXXI. SIMPLE LARCENY.

*The Taking.*—If a person picks up a thing when he knows that he can immediately find the owner, and instead of returning it to the owner, converts it to his own use, this is a larceny. *Rex v. Pope*, 6 C. & P. 346—Park. 756

A. went to a shop, and asked a boy there to give him change for a half-crown; the boy gave him two shillings and a sixpenny worth of copper. The prisoner held out a half crown, which the boy touched, but never got hold of, and the prisoner ran away with the two shillings and the copper:—Held, a larceny of the two shillings and the copper. *Rex v. Williams*, 6 C. & P. 390—Park. 756

A., the owner of a boat, was employed by B., the captain of a ship, to carry a number of wooden staves ashore in his boat; B.'s men were put into the boat, but were under the control of A., who did not deliver all the staves, but took one of them away to the house of his mother:—Held, that this was a bailment of the staves to A., and not a charge only; and that a mere non-delivery of the staves would not have been a larceny in A.; but that if A. separated one of the staves from the rest, and carried it to a place different from that of its destination, with intent to appropriate it to his own use, that was equivalent to a breaking of bulk, and therefore would be sufficient to constitute a larceny. *Rex v. Howell*, 7 C. & P. 325—Patteson. 756

If A. asks B., who is not a servant, to put a letter in the post, telling him it contains money, and B. breaks the seal and abstracts the money before he put the letter in the post, he is guilty of larceny. *Rex v. Jones*, 7 C. & P. 151—Crim. Court. 756

*Indictment.*—In an indictment for stealing property which had belonged to a deceased person, who appointed executors, who would not prove the will, it was held that the property must be laid in the ordinary, and not in a person who, after the commission of the offence, but before the indictment, had taken out letters of administration with the will annexed; because the rights of an administrator only commence from the date of the letters as distinguished from the letters of an executor, which commence, not from the granting of the probate, but from the death of the testator. *Rex v. Smith*, 7 C. & P. 147—Bolland and Coleridge. 761

*Evidence.*—Stolen property being found concealed in an old engine-house, and it being watched, the prisoners were seen taking it away:



—Held, that, to warrant the conviction of the prisoners on an indictment charging them as receivers, the jury must be satisfied that the property had been stolen by some other person to the knowledge of the prisoners, and that there should be some evidence to show that such was the case:—Held, also, that the evidence given in this case would warrant a conviction for the stealing. *Rex v. Densley*, 6 C. & P. 399—Patteson. 762

#### XXXIV. ASSAULT WITH INTENT TO ROB.

A. was decoyed into a house and chained down to a seat, and compelled to write an order for the payment of money and an order for the delivery of deeds. The paper on which he wrote remained in his hand half an hour, but he was chained all the time:—Held, that this was not an assault with intent to rob within the statute 7 & 8 Geo. 4, c. 29, s. 6. *Rex v. Edwards*, 6 C. & P. 521—Patteson. 765

If a person with menaces demand a sum of money of another, and that other does not give it to him because he has it not with him, this is a felony within the statute 7 & 8 Geo. 4, c. 29, s. 6; but if the person demanding the money knows that the money is not then in the possession of the party, and only intends to obtain an order for the payment of it, it is otherwise. *Rex v. Edwards*, 6 C. & P. 515—Patteson. 765

#### XXXVI. SACRILEGE.

A dissenting meeting-house is not within the stat. 7 & 8 Geo. 4, c. 29, s. 10, which makes it a capital offence to "break and enter any church or chapel, and steal therein," &c. *Rex v. Richardson*, 6 C. & P. 335—Gaselee, Vaughan, and Taunton: 8 P. *Rex v. Warren*, Id. n.—Gaselee and Vaughan. 767

A prisoner was indicted under the 7 & 8 Geo. 4, c. 29, s. 10, for breaking and entering a chapel, and stealing several fixtures, and a bell not fixed. It appeared the chapel was a Wesleyan chapel, and not a chapel of the church of England:—Held, that the case must be confined to the act of simple larceny for stealing the bell. *Rex v. Nixon*, 7 C. & P. 442—Patteson and Gurney. 767

#### XXXVII. BURGLARY.

A shutter-box partly projected from a house, and adjoined the side of the shop window, which was projected by wooden panelling, lined with iron:—Held, that the breaking and entering the shutter-box did not constitute burglary. *Rex v. Faine*, 7 C. & P. 135—Crim. Court. 767

A room door was latched, and one person lifted the latch and entered the room and concealed himself, for the purpose of committing a robbery there, which he afterwards accomplished. Two other persons were present with him at the time he lifted the latch, for the purpose of assisting him to enter, and screened him from observation by opening an umbrella:—It was held, that the two were in law parties to the

breaking and entering, and were answerable for the robbery which took place afterwards, though they were not near the spot at the time when it was perpetrated. *Rex v. Jordan*, 7 C. & P. 432—Crim. Court. 767

In burglary, where the breaking is one night after, a person present at the breaking, though not present at the entering, is in law guilty of the whole offence. *Id.*

A prisoner was indicted for burglary in the dwelling-house of J. B. J. B. worked for one W., who did carpenter's work for a public company and put J. B. into the house in question, which belonged to the company, to take care of it, and some mills adjoining. J. B. received no more wages after than before he went to live in the house:—Held, not rightly laid. *Rex v. Rawlings*, 7 C. & P. 150—Gaselee. 771

An indictment for burglary stated in one count that the prisoner "did break to get out," and in another that he did break and get out:—Held, sufficient, since the statute 7 & 8 Geo. 4, c. 29, s. 11, which uses the words "break out." *Rex v. Compton*, 7 C. & P. 139—Vaughan and Patteson. 771

#### XXXVIII. HOUSEBREAKING.

A. broke into a house and took two half sovereigns from a bureau, which he, being disturbed, threw under the grate in the same room:—Held, that this was sufficient to constitute the felony of breaking into a house and stealing therein within the stat. 7 & 8 Geo. 4, c. 29, s. 12. *Rex v. Amier*, 6 C. & P. 344—Park. 772

Raising a window which is shut down close, but not fastened, though it has a hasp which might have been fastened, is a breaking of the dwelling-house. *Rex v. Hyams*, 7 C. & P. 441—Parke and Coleridge. 772

An entry to a house through a hole in the roof, left for the purpose of light, is not a sufficient proof to constitute house-breaking. *Rex v. Spriggs*, 1 M. & Rob. 357—Bosanquet. 772

#### XXXIX. LARCENY IN A DWELLING-HOUSE.

Stealing in a bed-room over a stable in a yard, not under the same roof, nor having any direct communication with the house in which the prosecutor resides, cannot be properly charged as a stealing in his dwelling-house. *Rex v. Turner*, 6 C. & P. 407—Vaughan. 772

#### XLI. LARCENY ON RIVERS.

The luggage of a passenger going by a steam-boat, is within the words "goods or merchandize" in the 17th section of the stat. 7 & 8 Geo. 4, c. 29, which relates to property stolen from any vessel in any navigable river. *Rex v. Wright*, 7 C. & P. 159—Park and Alderson. 773

#### XLII. STEALING OR DESTROYING RECORDS, WILLS, OR WRITINGS OF REAL ESTATES.

On an indictment on the stat. 7 & 8 Geo. 4,



c. 29, s. 23, for stealing writings relating to real estate, the jury must be satisfied that the defendant took them under such circumstances as would have amounted to larceny, if the writings in question had been the subject of larceny. *Rex v. John*, 7 C. & P. 324—Patteson. 773

### XLIII. CATTLE-STEALING.

On an indictment for sheep-stealing, a rig sheep is properly described as "one sheep." *Rex v. Stroud*, 6 C. & P. 535—Alderson. 774

An indictment charged in the first count, that A. and B. killed a sheep, with intent to steal one of its hind legs; and, in the second count, that C. received nine pounds weight of mutton so stolen as aforesaid; and in the third count, that C. received the mutton "of a certain evil disposed person," scianter, &c.:—Held, that on this form of indictment, all the three prisoners might be properly convicted. *Rex v. Wheeler*, 7 C. & P. 170—Coleridge. 774

The phrase "bullock-stealing," in the stat. 7 Geo. 4, c. 64, s. 28, relating to the allowance of rewards in certain cases for the discovery of offenders, includes all cases of cattle-stealing of that particular description, e. g. ox, cow, heifer, &c. *Rex v. Gillbrass*, 7 C. & P. 445—Crim. Court. 774

### XLVI. NIGHT POACHING AND OFFENCES RELATING TO GAME AND RABBITS.

*Night Poaching.*—To support an indictment for night-poaching by three or more being armed, &c., it is not sufficient to prove that one of the prisoners was in the place laid in the indictment, and that the rest of the party were in another wood which was separated from the place mentioned in the indictment by a turnpike road. *Rex v. Dowsell*, 6 C. & P. 396—Patteson. 775

To sustain an indictment for night-poaching, armed, &c., the parties must have been in the place charged in the indictment, with intent to destroy game, &c. there, and it is incumbent on the prosecutor to convince the jury that the defendants had an intent to destroy game, &c. in the particular place mentioned in the indictment. *Rex v. Gainer*, 7 C. & P. 231—Coleridge. 775

The 9th sect of the stat. 9 Geo. 4, c. 63, which relates to night-poaching, creates two distinct offences. First, the *entering* in the night on land to the number of three, some one of them being armed; and second, the *being* in the night on land to the number of three, some one of them being armed. *Rex v. Kendrick*, 7 C. & P. 184—Coleridge. 775

The form of indictment given in *Jerv. Arch.* is good. *Id.*

On an indictment for night-poaching by four, one being armed; *semble*, that if two enter the land laid in the indictment, and the other two remain outside the preserve, but are of the same party, and are there for the same purpose, all ought to be found guilty. *Rex v. Lockett*, 7 C. & P. 300—Alderson. 775

*Semble*, that in case of night-poaching, all who are at the place, each acting his part with a common intent, are equally guilty, although some only are bodily upon the land:—Held, that those who are watching at the outside of a preserve, for the purpose of giving the alarm on the approach of the gamekeeper to others who are in the preserve, and who afterwards go into the preserve for that purpose, are equally guilty with those who enter the preserve at first. *Rex v. Passey*, 7 C. & P. 282—Alderson. 775

Whether the preferring of an indictment against a party for night-poaching, which is ignored, is a commencement of the prosecution within sect. 4 of the stat. 9 Geo. 4, c. 63, so as to warrant the conviction of the party on another indictment preferred four years after the offence, *quære?* *Rex v. Killminster*, 7 C. & P. 228—Coleridge. 775

The servant of the owner of a wood attempted to apprehend a poacher whom he found there at eight o'clock on the morning of the 17th December, and the poacher shot at him:—Held, that this was not a capital offence within the stat. 9 Geo. 4, c. 31, ss. 11, 12, as there was no proof that the poacher was in pursuit of the game an hour before sunrise. *Rex v. Tomlinson*, 7 C. & P. 183—Coleridge. 775

A person who is employed by a lord of a manor as a watcher of his game preserves, is a person having authority to apprehend night-poachers, and he need not have any authority from the lord of the manor. *Rex v. Prize*, 7 C. & P. 178—Park. 775

Where a person is found night-poaching on the manor of A. by one of his watchers, and is pursued off the manor, and then on to it again, and there snaps his gun at the watcher, he is guilty of a capital offence under the stat. 9 Geo. 4, c. 31, ss. 11, 12. *Id.*

*Offences relating to Rabbits.*—Destroying rabbits in the night time, in a rick yard in which they were kept, is not a misdemeanor under the stat. 7 & 8 Geo. 4, c. 29, s. 30. *Rex v. Garratt*, 6 C. & P. 369—Patteson. 776

### L. LARCENY BY SERVANTS.

The driver of a glass-coach hired for the day is not the servant of the party hiring it, so as to bring him within the statute relating to larceny by servants, 7 & 8 Geo. 4, c. 29, s. 46. *Rex v. Haydon*, 7 C. & P. 445—Patteson and Gurney. 777

### LI. EMBEZZLEMENT.

A., a servant of B., was sent to receive rent due to B.; A. received it, and immediately went off with it to Ireland:—Held, that A.'s thus leaving her place and going off to Ireland, was evidence from which the jury might infer that A. intended to embezzle the money. *Rex v. Williams*, 7 C. & P. 338—Coleridge. 777

A. owed 5*l.* to B., and A. paid it to C., a servant of B., who was not authorized by B. to re-



ceive money for him, though A. supposed that he was so. C. never accounted to B. for the money:—Held, that this was neither embezzlement nor larceny. *Rex v. Hawtin*, 7 C. & P. 281—Alderson. 777

If a servant be indicted under the stat. 7 & 8 Geo. 4, c. 29, for embezzlement, and the indictment contain only one count, charging the receipt of a gross sum on a particular day, if it turn out that the money was received in different sums, on different days, the prosecutor must make his election, and confine himself to one sum and one day; and if the money was paid to the prisoner as the servant of the prosecutor, it will be sufficient, although the payment was made by one of a class of customers of whom the prosecutor did not authorize the prisoner to receive any. *Rex v. Williams*, 6 C. & P. 626—Arabin, Serjt. 781

### LIII. FALSE PRETENCES.

The prisoner was charged with obtaining a filly by the false pretence that he was a gentleman's servant, and had lived at Brecon, and had bought twenty horses in Brecon fair. It appeared that he bought the filly of the prosecutor for 11*l.*, making him this statement, which was false, and also telling him that he would come down to the Cross Keys and pay him. The prosecutor stated that he parted with his filly because he expected the prisoner would come to the Cross Keys and pay him, and not because he believed that the prisoner was a gentleman's servant, &c.:—Held, that if the prosecutor did not part with his filly by reason of the false pretence charged, or any part of it, the prisoner must be acquitted. *Rex v. Dale*, 7 C. & P. 352—Coleridge. 782

If a party obtain money by a false pretence, knowing it to be false at the time, it is no answer to show that the party from whom he obtained the money laid a plan to entrap him into the commission of the offence. *Rex v. Ady*, 7 C. & P. 140—Vaughan and Patteson. 782

Where a forged request for the delivery of goods was addressed in her maiden name to a female, who, prior to the date of it had married; it was held that the party uttering it might properly be convicted, on an indictment charging the intent to be to defraud the husband. *Rex v. Carter*, 7 C. & P. 134—Crim. Court. 782

An attorney who had appeared for a person who was fined 2*l.* on a summary conviction, called on a person's wife and told her that he had been with another person, who was fined 2*l.* for a like offence, to Mr. B. and Mr. L., and that he had prevailed upon Mr. B. and Mr. L. to take 1*l.* instead of 2*l.*, and that if she would give him 1*l.* he would go and do the same for her. She gave the attorney a sovereign, and afterwards paid him for his trouble. It was proved that the attorney never applied to either Mr. B. or Mr. L. respecting either of the fines, and that both were afterwards paid in full:—Held, that the attorney was guilty of obtaining money by false pretences. *Rex v. Apterley*, 7 C. & P. 191—Park. 782

A. owed B. a debt, of which B. could not get

payment. C., a servant of B., went to A.'s wife and obtained two sacks of malt from her, saying that B. had bought them of A. C. knew this to be false, but took the malt to B., his master, to enable him to pay himself the debt:—Held, that if C. did not intend to defraud A., but merely to put it into his master's power to compel A. to pay him a just debt, C. ought not to be convicted of obtaining the malt by false pretences. *Rex v. Williams*, 7 C. & P. 354—Coleridge. 782

An indictment on a charge of obtaining goods under false pretences, is bad, if it states that the prisoner "unlawfully, knowingly, and designedly, did feloniously pretend," &c. *Rex v. Walker*, 6 C. & P. 657—Crim. Court. 784

### LVI. RECEIVERS.

If a receiver of stolen goods receive them for the mere purpose of concealment, without deriving any profit at all, he is just as much a receiver, under the stat. 7 & 8 Geo. 4, c. 29, as if he had purchased them. *Rex v. Richardson*, 6 C. & P. 335—Gaselee, Vaughan, and Taunton. 785

It makes no difference whether a receiver receives for the purpose of profit or advantage, or whether he does it to assist the thief. *Rex v. Davis*, 6 C. & P. 177—Gurney. 785

In an indictment for receiving stolen goods, knowing them to have been stolen by a person named, the stealing by the person must be proved, or the receiver must be acquitted. *Rex v. Woolford*, 1 M. & Rob. 384—Patteson. 785

### LVII. OFFENCES BY BANKRUPTS.

An indictment for a conspiracy to embezzle the goods of a bankrupt must state the trading, the petitioning creditor's debt, and the becoming bankrupt; and it is not sufficient to state that a commission issued, under which the party was duly found and declared a bankrupt. *Rex v. Jones*, 1 Nev. & M. 78; 4 B. & Adol. 345. 786

The balance sheet of a bankrupt given on oath under his commission is not admissible against him on a criminal charge. *Rex v. Britton*, 1 M. & Rob. 207—Patteson. 786

### LIX. BURNING.

Setting fire to a score of faggots which are piled one upon another in a loft, which was made by means of a temporary floor put over an archway roofed in between two houses, and under which carts could go, is not setting fire to a stack of wood within the stat. 7 & 8 Geo. 4, c. 30, s. 17. *Rex v. Aris*, 6 C. & P. 348—Park. 787

A cart hovel, consisting of a stubble roof supported by uprights, in a field at a distance from other buildings, is not an out-house within the meaning of the stat. 7 & 8 Geo. 4, c. 30, s. 2. *Rex v. Parrott*, 6 C. & P. 402—Vaughan. 787

A stack, of which the lower parts consists of cleve-seed straw, and the upper part of wheat stubble, is not a stack of straw: and the setting it on fire is not therefore a capital offence within the stat. 7 & 8 Geo. 4, c. 20, s. 17. *Rex v. Tottenham*, 7 C. & P. 237—Denman and Gaselee. 787



### LXII. INJURIES TO PROPERTY BY RIOTERS.

Every man has a right to work for the best price he can get, but if others choose to work for less than the usual prices, the law will not permit that violence should be committed towards them, or towards those by whom they are employed, or those with whom they are connected. Where a party of coal-whippers, having a feeling of ill-will towards a coal-lumper, who paid less than the usual wages, created a mob, and riotously went to the house where he kept his payable, and cried out that they would murder him, and began to throw stones, brick-bats, &c., and broke windows, and partitions, and part of a wall, and continued after his escape throwing stones at the house, till they were compelled to desist by the threats of the police:—Held, that they might be convicted of beginning to demolish under the stat. 7 & 8 Geo. 4, c. 30, s. 8, though their principal object was to injure the lumper; provided it was also their object to demolish the house, either on account of its being used by him, or by his men, and though they had not any ill-will against the owner of the house personally. *Rex v. Batt*, 6 C. & P. 329—Gurney. 790

### LXVII. FORGERY.

It is not any offence, under the stat. 1 Will. 4, c. 66, to forge an indorsement upon a warrant or order for the payment of money; nor if a party write on the back of a bill of exchange payable to R. A., "Received for R. A.," and signs his own name to it, is he guilty of forging a receipt within the provisions of that statute. *Rex v. Arscott*, 6 C. & P. 408—Littledale, Vaughan, and Bolland. 794

If a person presents a bill of exchange for payment, with a forged indorsement upon it of a receipt by the payee, and the clerk to whom he presents it objects to a variance between the spelling of the payee's name in the bill and the indorsement, upon which the person alters the indorsement into a receipt by himself for the payee: semble, that the act of presenting the bill to the clerk previous to his objection is sufficient to constitute the offence of uttering the forged indorsement. *Id.*

If A. put the name of B. on a bill of exchange as acceptor, without B.'s authority, expecting to be able to meet it when due, or expecting that B. will overlook it; this is forgery. But if A. either had authority from B., or, from the course of their dealings, bona fide considered that he had such authority it is not forgery. *Rex v. Forbes*, 7 C. & P. 224—Coleridge. 794

In a case of forging and uttering a forged bill, a letter written by the prisoner to a third person, saying that such person's name is on another bill, and desiring him not to say that that bill is a forgery, is receivable in evidence to show guilty knowledge; but the jury ought not to consider it as evidence that the other bill is forged, unless such bill is produced, and the forgery of it proved in the usual way. *Id.*

Held, that a receipt, signed by the captain of

a detachment, on the authority of which money is received from an army agent, on account of the monthly subsistence for such detachment, may be properly described as "a receipt for money," under the stat. 2 & 3 Will. 4, c. 123, s. 10, relating to forgery, although it appeared that such instruments were frequently cashed, upon indorsement, by tradesmen in the neighborhood of the place where the regiment was stationed, and the amount afterwards received by them of the army agent. *Rex v. Rice*, 6 C. & P. 634—Crim. Court. 794

If an engraving of a forged note be given to a party as a pattern or specimen of skill, the party giving it not intending that the particular note should be put in circulation, it is not an uttering within the statute. *Rex v. Harris*, 7 C. & P. 428—Littledale. 797

Where three persons were jointly indicted for feloniously using plates, containing impressions of forged notes; it was held that the jury must select some one particular time after all three had become connected, and must be satisfied, in order to convict them, that at such time they were all either present together at one act of using, or assisted in such one act, as by two using, and one watching at the door to prevent the others being disturbed, or the like; and that it was not sufficient to show that the parties were general dealers in forged notes, and that at different times they had singly used the plates, and were individually in possession of forged notes taken from them. *Rex v. Harris*, 7 C. & P. 416—Crim. Court. 798

In an indictment for forgery, a count which, since the stat. 1 Will. 4, c. 66, charges, that the prisoner "did falsely make, forge, and counterfeit, and did cause and procure to be falsely made, forged, and counterfeited, and did willingly act and assist in the false making, forging, and counterfeiting" a bill of exchange, is good, as are counts charging that he "did utter and publish as true," and did "after dispose of and put away" the bill. *Rex v. Brewer*, 6 C. & P. 368—Park. 799

Sewing to the parchment on which the indictment is written impressions of forged notes taken from engraved plates, is not a legal mode of setting out the notes in the indictment. Foreign notes were set out in an indictment in the original language, but the translation omitted some words which were in a margin or border round the body of the note, and denoted the year in which the notes were issued, and it appeared that without these words the notes would not be capable of being circulated in the country to which they belonged:—Held, that the translation was imperfect, and the special counts setting out the notes consequently bad. Describing a foreign note wholly in the English language is not sufficient in an indictment for forgery, notwithstanding the stat. 2 & 3 Will. 4, c. 123, s. 3; but this objection, provided the description is in the words of the statute creating the offence, can only be taken advantage of by demurrer, and is cured after verdict by the stat. 7 Geo. 4, c. 64, s. 21. On indictments for uttering forged Polish



notes, it was held that conversations with the prisoners respecting the forgery and circulation of forged Austrian notes were admissible in evidence to prove the scienter. *Rex v. Harris*, 7 C. & P. 429—Williams. 799

On an indictment for uttering a forged check in the name of J. W., on Messrs. C. G. & Co., who were army agents and bankers, it was proved by a clerk in the former department that he did not know any customer named J. W., and that he had been told by the other clerks that there was not any such customer in the banking department:—Held, that this was sufficient proof on the part of the prosecution to call upon the prisoner to show that there was in fact such a person as J. W. having an account with Messrs. C. G. & Co., and, in the absence of such proof, was sufficient by itself for the consideration of the jury. *Rex v. Brannan*, 6 C. & P. 326—Park, Patteson, and Gurney. 801

The supposed indorser of a forged bill is incompetent to prove the forgery of the indorsement, and when such bill is indorsed by the prisoner, and delivered by him to the prosecutor, no consideration having passed from the latter to the former, a release by the prosecutor is ineffectual to make such indorser competent, for the property of the bill still remained in the prisoner. *Rex v. Young*, Peake's Add. Cas. 228—Le Blanc. 801

A. was charged with a forgery, and B. was examined on oath before the magistrate as a witness against A.; after this B. was himself charged with a different forgery:—Held, that the deposition of B. was evidence against him on his trial for the forgery, notwithstanding that it was taken on oath. *Rex v. Haworth*, 4 C. & P. 254—Parke. 801

If a forged deed be in the possession of a prisoner, who is indicted for forging it, the prosecutor is not entitled to give secondary evidence of its contents, unless he has, a reasonable time before the commencement of the assizes, given the prisoner notice to produce it; and a notice given during the assizes is too late; but if the prisoner has said that he has destroyed the deed, no notice to produce it will be necessary. *Id.*

#### LXVIII. PERJURY.

To prove perjury, it is sufficient if the matter alleged to be falsely sworn be disproved by one witness, if, in addition to the evidence of that witness, there be proof of an account, or a letter written by the defendant contradicting his statement on oath. *Rex v. Mayhew*, 6 C. & P. 315—Denman. 808

On an indictment for perjury committed on the hearing of a parish appeal at the quarter sessions, the production of the sessions book is not sufficient proof that the appeal came on to be heard, and a regular record ought to be made up on parchment, the same as on a return to a certiorari, and that record, or an examined copy, must be produced. *Rex v. Ward*, 6 C. & P. 366—Park. See the case of *Porter v. Cooper*, post, p. 2333. 808

On the trial of an indictment for perjury, where the perjury was alleged to have been committed before a magistrate, the written deposition of the defendant taken down by the magistrate, was put in to prove what he then swore. After this it was proposed to call the attorney for the prosecution to prove some other matters which the defendant then swore, which were not mentioned in the deposition:—Held, that this could not be done. *Rex v. Wylde*, 6 C. & P. 380—Park. 808

Perjury cannot be assigned on an answer in Chancery, denying a promise absolutely void by the statute of frauds. *Rex v. Benesech*, Peake's Add. Cas. 93—Kenyon. 808

If in an indictment for perjury against C. D. it is averred that a cause was depending between A. B. and C. D. a notice of set-off intitled in a cause *A. B. v. C. D.*, and signed by the attorney of C. D., is not sufficient evidence to support the allegation. *Rex v. Stoveld*, 6 C. & P. 489—Denman. 808

On an indictment for perjury, committed by A. on the trial of an action against B. and others, B. is not rendered incompetent as a witness for the prosecution merely on the ground that he has not paid the debt and costs, and has filed a bill in equity; but it seems that if B. expects that A. will be a witness against him in a similar action coming on for trial soon after the indictment, that is such an immediate interest in B. as will disqualify him from being a witness. *Rex v. Hulme*, 7 C. & P. 8—Denman. 808

In an indictment for perjury, a suit in the Ecclesiastical court was stated to have been depending between W. P. and R. M. The proceedings of the suit, when produced, were between W. P. and R. M. the elder:—Held, no variance. *Rex v. Bailey*, 7 C. & P. 264—Williams. 805

#### LXIX. CONSPIRACY.

Indictment against B. and C. for conspiring to extort money from the prosecutor A., by means of a charge of forgery, in which indictment a letter written by B. in execution of the conspiracy, and charging A. with the forgery of a check on C.'s banker, is set out. The letter was given in evidence, as were also conversations referring to the check alleged to have been forged:—Held, that the prosecutor was not bound to produce the check, though it appeared that such check was actually in existence. *Rex v. Aldridge*, 1 Nev. & M. 776. 810

A conspiracy to procure a marriage between poor persons of different parishes, for the purpose of exonerating the parish of the woman and charging the other parish, is not an indictable offence, unless the parties were unwilling to marry, or some forcible or fraudulent means of bringing about the marriage were resorted to. A conspiracy to exonerate from the prospective burthen of maintaining a pauper, not at the time actually chargeable, and to throw the burthen upon another parish, by means not in themselves unlawful, is not indictable. In such an indictment, a statement that the woman was a poor unmarried woman with child, is not equivalent



to a statement of actual chargeability. *Rex v. Seward*, 3 Nev. & M. 557; 1 Adol. & Ellis, 706. 810

An indictment for a conspiracy to cheat and defraud a party of the fruits and advantages of a verdict obtained, is too general, and bad in point of law. *Rex v. Richardson*, 1 M. & Rob. 402—Denman. 811

### LXX. LIBEL.

Leave to file a criminal information for a libel should be applied for in a reasonable time, before the expiration of the second term after the publication of it, if it come to the knowledge of the prosecutor early enough to enable him to move within that period. *Rex v. Jollie*, 1 Nev. & M. 483; 4 B. & Adol. 867. 813

The court of K. B. will discharge a rule for a criminal information for a libel against the publisher of a newspaper, where in the affidavits upon which the rule had been obtained, and the affidavits sworn at the stamp-office, the defendant was described as of different places. *Rex v. Francis*, 4 Nev. & M. 251; 2 Adol. & Ellis, 49. 813

So, although the rule had been twice enlarged, and the sutor apply to have the rule again enlarged, that he may have an opportunity of amending his affidavit. *Id.*

Where a newspaper is filed, together with affidavits in support of a motion for a criminal information for a libel, the court will take notice of it, if it correspond in the necessary particulars with the stamp-office affidavit, though it be not annexed to and expressly identified by any affidavit. *Id.*

Where an information for libel states that certain transactions took place, and that the libel was published of and concerning them, and then sets out the libel as referring to them, and the prosecutor, at the trial, gives general proof of such transactions, to support the introductory part of his pleading, the defendant is not thereby authorized to give evidence of the particular history of those transactions, so as to bring into issue the truth or falsehood of the libel. *Rex v. Grant*, 3 Nev. & M. 106; 5 B. & Adol. 1081. 815

But if such evidence be adduced bona fide, to show that the transactions referred to in the alleged libel, are not the same with those which the information supposes it to have had in view, and the judge is informed that the evidence is offered for that purpose, it is admissible. *Id.*

The rule established at Nisi Prius in prosecutions for libels in a newspaper, viz. that, after production of the stamp-office affidavit, a paper corresponding with it in title, printer's and publisher's name, and place of publication, may be put in and read, as published by the parties therein named, without other proof on this point, applies equally on motions for criminal informations. *Rex v. Donnison*, 4 B. & Adol. 698. 815

A libel stated that there was a riot at C., and that a person fired a pistol at an assemblage of

persons, and upon this the libel imputed neglect of duty to the magistrates:—Held, that on the trial of a criminal information for this libel on the magistrates, the defendant's counsel, with a view of showing that the libel did not exceed the bounds of free discussion, could not go into evidence to prove that there was in fact a riot and that a pistol was fired at the people. *Rex v. Brigstock*, 6 C. and P. 184—Patteson. 815

In an information for a libel the jury are to consider whether the defendant published it with a criminal intent or not. *Rex v. Reeves*, Peake's Add. Cas. 83—Kenyon. 813

### LXXI. UNLAWFUL OATHS.

[37 Geo. 3, c. 123; 39 Geo. 3, c. 79; 53 Geo. 3, c. 104.]

The provisions of the stat. 37 Geo. 3, c. 123, which makes it a felony to administer an unlawful oath, are not confined to oaths administered with either a mutinous or a seditious object. *Rex v. Brodribb*, 6 C. & P. 571—Holroyd. 817

A party of sixteen persons were going out armed for the purpose of night-poaching. Before they went out the prisoner swore them all to secrecy:—Held, a felony within that statute. *Id.*

Where sixteen persons took the same unlawful oaths, two or three at a time, all being present:—Held, that the person who administered the oath might be convicted on an indictment for administering a certain oath to A., B., C., D. &c. (naming the whole sixteen persons). *Id.*

If the indictment state the oaths to have been, not to inform or give evidence against any person belonging to a confederacy of persons associated together "to do a certain illegal act," this is sufficient, without stating what the illegal act was. *Id.*

If the oath administered was intended to make the parties to whom it was administered believe themselves under an engagement, it is equally within the statute whether the book on which they were sworn was a Testament or not. *Id.*

Where an oath was administered, that the party taking it should not make buttons under certain stated prices, and should keep all the secrets of the lodge:—Held, to be an administering of an unlawful oath within the statutes. *Rex v. Ball*, 6 C. & P. 563—Williams. 817

The administering an oath or any agreement to any person not to reveal the secrets of any association, is an offence within those statutes. *Id.*

An association, the members of which are bound by oath not to disclose its secrets, is an unlawful combination and confederacy, (unless expressly declared by some act of Parliament to be legal), for whatever purpose or object it may be formed; and the administering of an oath not to reveal anything done in such association is an offence within 37 Geo. 3, c. 123, s. 1. *Rex v. Lovelass*, 1 M. & Rob. 349; 6 C. & P. 596—Williams. 817



The enacting part of the 37 Geo. 3, is not restrained by the preamble to oaths administered for purposes of sedition or mutiny. *Id.*

The precise form in which the oath is administered is not material; it is an oath within the meaning of the act, if it was understood by the party tendering, and the party taking it, as having the force and obligation of an oath. *Id.*

Every person who engages in an association, the members of which, in consequence of being so, take an oath not required by law, is guilty of an offence within the stat. 57 Geo. 3, c. 19, s. 25. *Rex v. Dixon*, 6 C. & P. 601—*Bosanquet*. 817

#### LXXXVIII. NUISANCE.

Where a statute enacts, that the erection of a building within certain limits shall be deemed "a common nuisance," and also gives a summary remedy by proceedings before magistrates, the offender may be indicted for the nuisance. *Rex v. Gregory*, 2 Nev. & M. 478. 822

In an indictment against a gas company for a nuisance in conveying the refuse of gas into a great public river, whereby the fish are destroyed and the water is rendered unfit for drinking, &c., the question for the jury is, whether the acts done by the particular company complained of amount to a nuisance. *Rex v. Medley*, 6 C. & P. 292—*Denman*. 822

The circumstance, that, by the diminution of fish, a considerable number of fishermen are thrown out of employ, is not of itself sufficient ground to sustain an indictment. *Id.*

The directors of a gas company are answerable on an indictment for a nuisance for an act done by their superintendent and engineer, under a general authority to manage the works, though they are personally ignorant of the particular plan adopted, and though such plan be a departure from the original and understood method which the directors had no reason to suppose discontinued. *Id.*

If a party, having a house in a street, exhibit effigies at his windows, and thereby attract a crowd to look at them, which causes the footway to be obstructed, so that the public cannot pass as they ought to do; this is an indictable nuisance, and it is not at all essential that the effigies should be libellous; and, *semble*, that it is not necessary to show that the crowd consisted of idle, disorderly, and dissolute persons. *Rex v. Carille*, 6 C. & P. 637—*Crim. Court*. 822

#### LXXXIX. HIGHWAYS AND BRIDGES.

Where a statute prohibits the erection of buildings within ten feet of a certain road, and directs that the footpaths shall be deemed part of the road, a building erected within ten feet of the footpath is within the prohibition. *Rex v. Gregory*, 2 Nev. & M. 478; 5 B. & Adol. 555. 824

A road dedicated to and used by the public becomes a highway which the parish must repair, although neither such dedication nor such user

have been adopted or acquiesced in by the parish. *Rex v. Leake*, 2 Nev. & M. 583. 824

Where drainage commissioners are directed by act of Parliament to purchase lands, cut drains, and cleanse them when cut, by placing the mud upon the banks, it is competent to such commissioners to dedicate such banks to the public as a highway—*Per Denman*, C. J., and *Parke*, J.; *diss. Littledale*, J. *Id.*

Whether one act of repairing on the part of the parish can be construed as an adoption of a highway, *quære*? *Id.*

After a verdict for the defendant upon an indictment for the non-repair of a highway, the court refused an application for a new trial, on the ground of the improper rejection of evidence, but suspended the judgment in order that another indictment might be preferred. *Rex v. Sutton*, 2 Nev. & M. 57; 5 B. & Adol. 52. 824

A parish may be indicted for non-repair of a bridge, without stating any other ground of liability than immemorial usage. *Rex v. Hendon*, 3 B. & Adol. 628. 824

A country bridge having been washed away, was, after the passing of the 43 Geo. 3, c. 59, built wider than before, and without notice to the county surveyor, by the parish, partly with the old materials and in the same line of passage over the river:—Held, that the county was liable to repair, and that this was not a new bridge within the meaning of the act. *Rex v. Devonshire*, 2 Nev. & M. 212. 824

A public footway, leading from A. to the gate of a church-yard, and communicating through that gate by a public path, through the church-yard with the church, may be described in an indictment as a footway leading from A. towards and unto the church. *Rex v. Downshire (Marchioness)*, 5 Nev. & M. 662. 824

So, although part of the path across the church-yard is ancient, and part has been recently dedicated to the public. *Id.*

So, although the path, instead of leading directly from the gate to the church, forms an acute angle in one part of it. *Id.*

If a parish be indicted for the non-repair of a pack and prime way, and it be proved that the way is a carriage way, this is a misdescription of the way, and the defendants are entitled to be acquitted. *Rex v. St. Weonards*, 6 C. & P. 582—*Alderson*. 824

In an indictment for non-repair of a highway, it is not necessary to state the termini; but if they are stated, they must be proved. *Id.*

On an indictment against a parish for non-repair of a highway, a plea of guilty to a former indictment against the same parish for non-repair of the same highway is conclusive evidence that it is a public way. *Rex v. Whitney*, 7 C. & P. 208—*Park*. 824

Evidence that a parish did not put guard fences at the side of a road, is not receivable on an indictment, which charges that the king's subjects could not pass as "they were wont to do" if no such fences existed before. *Id.*



An indictment charged that the inhabitants of the township of Bondgate in Auckland, Newgate in Auckland, and the borough of Auckland, in the parish of St. Andrew Auckland, were immemorably liable to repair a highway in the town of Bishop Auckland, in the parish of St. Andrew Auckland, and no consideration was laid:—Held bad, in arrest of judgment, as not showing that the highway was in the defendant's district.—Held, to be no objection that the inhabitants of the three townships were charged conjointly. *Rex v. Bishop Auckland, 1 Adol. & Ellis, 744: 1 M. & Rob. 266.* 824

## XCII. ATTEMPT TO COMMIT MISDEMEANOR.

An attempt to commit a misdemeanor created by statute is itself a misdemeanor. *Rex v. Butler, 6 C. & P. 363—Patteson.* 829

## XCIII. OFFENCES AT SEA.

A Spaniard, being in England, signed articles to serve in a ship "bound on a voyage to the Indian seas and elsewhere, on a seeking and trading voyage (not exceeding three years' duration), and back to the united kingdom." On the ship's arrival at Zanzibar, an island in the Indian seas, which was under the dominion of an Arab king, the captain left the vessel (in pursuance of an understanding in England), and set up in trade, and, without the consent of the rest of the crew, engaged the Spaniard as an interpreter, the new captain of the ship not requiring him to serve on board. The ship went two or three short voyages without him, and returned to anchor a few hundred yards from the shore, in a roadstead of seven fathoms water, between Zanzibar and several other islands. The crew being on shore, a quarrel arose between the Spaniard and one of them, which led to blows by the Spaniard, which killed the other. The death took place on board of ship. The Spaniard was brought to England, and indicted and tried in London under a special commission issued in pursuance of the 9 Geo. 4, c. 31, s. 7:—Held, that, under the circumstances, he could not be convicted—first as he was not a "subject of his Majesty" within the meaning of that section; and secondly, that as the death was on shipboard, though the blows were given on shore, the offence could not be said to have been committed according to the words of the statute, "on land out of the united kingdom." Whether, if the Spaniard had continued on board the ship, and had been at the time serving under the articles, he could have been tried as a British subject, *quære?* semble, that he could not. *Rex v. Matton, 7 C. & P. 458—Vaughan and Bosanquet.* 829

## XCIV. EXAMINATION.

The binding over to prosecute, which is necessary to give the grand jury of the Central Criminal Court jurisdiction in certain cases of misdemeanor, under the 13th sect. of the act 4 & 5 Will. 4, c. 36, must take place before a magistrate, &c., previous to the sessions of that court, and

cannot be done by the court itself. *Rex v. Carlton, 6 C. & P. 651—Crim. Court.* 831

## XCVIII. BAIL.

In order to entitle a defendant on a charge of felony to be bailed before a magistrate in the country, it is not necessary to produce an affidavit of poverty, if it appears from the other affidavits in the case that he is in an humble situation of life. *Rex v. Brooker, 2 Dowl. P. C. 446.* 832

Where bills for misdemeanors are found under the commission of oyer and terminer at the Central Criminal Court, the defendant must give 48 hours' notice of bail, unless the application for process is made on a Friday, in any case in which there is reason to think that there is a desire to keep the party in custody over Sunday. *Rex v. Carlile, 6 C. & P. 628—Criminal Court.* 832

The judges at the Central Court, after postponement till the next session, on motion for the prosecution, of the presentation of a bill for a capital offence, refused, on motion for the prisoner, to read over very long depositions, to enable them to decide whether they would admit him to bail; although the application was made on the ground that there was not sufficient time to prepare the proper affidavits before the breaking up of the court. *Rex v. Palmer, 6 C. & P. 654—Criminal Court.* 832

By 5 & 6 Will. 4, c. 33, s. 3, the provisions of 7 Geo. 4, c. 64, as to taking bail in cases of felony, are extended; and any two justices, of whom one or other shall have signed the warrant of commitment, may admit to bail any person charged with felony, in such sum, and with such sureties, as they shall think fit, notwithstanding such person shall have confessed, or such justices shall not think the charge groundless, or shall think that the circumstances are such as to raise a presumption of guilt. 832

## CI. CORONER'S INQUESTS.

[See ante, p. 833.]

The court will ex officio quash a coroner's inquisition in which the facts of the case are stated, and the verdict found is not warranted by such facts. *In re Cully, 2 Nev. & M. 61; 5 B. & Adol. 230.* 833

If a coroner's inquisition states it to have been taken on the affirmation of a man, it should state that man to be either a Quaker or a Moravian. *Rex v. Polfield, 2 Dowl. P. C. 469.* 833

The court will not grant a rule nisi to remove the depositions taken before a coroner, and to bail a party charged upon the coroner's inquest with manslaughter, without an affidavit of what took place before the coroner. *Rex v. Mills, 4 Nev. & M. 6.* 833

## CIV. INDICTMENT.

*Change of Venue.*—In felony, the court refused to allow the defendant to enter a suggestion for



changing the venue, on the ground of prejudice pervading the county. *Rex v. Penpraze*, 1 Nev. & M. 312; 4 B. & Adol. 573. 835

The court of K. B. has a discretionary power of ordering a suggestion to be entered on the record of an indictment for felony, removed thither by certiorari, for the purpose of awarding the jury process into a foreign county; but this power will not be exercised unless it be absolutely necessary for the purpose of securing an impartial trial. *Rex v. Holden*, 2 Nev. & M. 167; 5 B. & Adol. 347. 835

Where a defendant is in custody in the county of A., upon an attachment issuing out of the court of Exchequer, he may be removed to the county of B., to take his trial upon an indictment found in the latter county. *Re Wetton*, 1 C. & J. 459. 835

Quere, whether an application to change the venue in an indictment for libel can be entertained after a special jury are struck? *Rex v. Tarpeley*, 1 Har. & Woll. 58. 835

*Name of the Party injured.*—A. was indicted for stealing the property of Richard P. It appeared that the prosecutor's name was Richard Jeremiah P., but that he was generally known by the name of Richard P.:—Held sufficient. *Rex v. —*, 6 C. & P. 408—Denman and Vaughan. 838

In an indictment, the prosecutor (a boy) was described as "Edward Dobson." He gave his name to the constable as "Peach," and his master and most other persons so called him, and he was generally known by the name of "Peach." He stated that his right name was Dobson, and that his mother, who had married two husbands, Peach and Dobson, had always told him that he was the son of the latter, and had always called him Edward Dobson:—Held, that he was rightly described. *Rex v. Williams*, 7 C. & P. 298—Williams. 838

An indictment charged the murder of "Eliza Waters." It appeared that the deceased was the illegitimate child of the prisoner, whose name was Ellen Waters; and a witness said on the trial—"The child was called Eliza: I took it to be baptized, and said it was Eleanor Waters' child:—Semble, that it was not sufficient proof that the surname of the deceased was Waters. *Rex v. Waters*, 7 C. & P. 250—Denman. 838

*Contra formam Statuti.*—A count which charges B. with shooting at A., with intent to murder him, and then charges C. and D. with aiding and abetting B., and at the end of the count concludes with a *contra formam statuti*, is good; and it need not state that B. shot A. with intent, &c., *contra formam statuti*, and that C. and D. aided him, also *contra formam statuti*. *Rex v. Nelmes*, 6 C. & P. 347—Park. 838

*Other Things.*—A person who has pleaded to an indictment which was invalid, on account of its having been found upon the testimony of

witnesses not duly sworn to give evidence, may be required to plead to another indictment for the same offence, without the first indictment being quashed by the court. *Rex v. Chamberlain*, 6 C. & P. 97—Littledale. 834

An indictment for manslaughter charged, that A. gave to deceased divers mortal blows at P., in the county of M., and that the deceased languished and died at D., in the county of K.; and that the prisoner was then and there aiding in the commission of the felony:—Held, that the indictment was good, and that the word "there" referred to P., in the county of M. *Rex v. Hargrave*, 5 C. & P. 170—Patteson. 836

When there are counts in an indictment for forging a bill, acceptance, and indorsement, the prosecutor is not driven to elect on which he will proceed. *Rex v. Young*, Peake's Add. Cas. 228—Le Blanc. 839

A prosecutor cannot maintain two indictments for misdemeanor for the same transaction; he must elect to proceed with one and abandon the other. *Rex v. Britton*, 1 M. & R. 237—Patteson. 839

The word "guilder" is sufficiently an English word to justify its use in an indictment as a translation of the Polish word "zlotych," which is also called a guilder and a florin. *Rex v. Harris*, 7 C. & P. 416—Criminal Court. 837

Words of reference, as "there" and "said," in an indictment, will not be referred to the last antecedent, where the sense requires that they should be referred to some prior antecedent. *Wright v. Rex* (in error), 3 Nev. & M. 892. 837

Thus, where, in an indictment for a nuisance, it was alleged that the defendant, at the township of W., encroached upon a highway there (i.e. at the township of W.), leading from a highway in the said township, leading from the village of W. towards C. to another highway in the said township, from the village of W. to the township of X., by a certain wall there extending to the said highway, and erected by the defendant; it was held, that the words "there" and "said" must be taken as referring to the township of W. and the highway there, and not to the township of X., or to the highway leading from the village of W. to the township of X. Id.

Where a count in an indictment stated that the defendant made an assault upon a person who was in lawful possession of goods, under a levy for a specified sum of money, for arrears of assessed taxes, with intent unlawfully to force him out of possession:—Lord Denman, C. J., held, that it was necessary to prove that the specific sum was due, although he thought that no sum need have been stated. *Rex v. Ford*, 4 Nev. & M. 451. 837

If an indictment have an interlineation, and have a caret at the proper place, where the interlined words are to come in, the court will take notice of the caret, and read the indictment correctly. *Rex v. Davis*, 7 C. & P. 319—Patteson. 837



## CV. ARRAIGNMENT AND PLEA.

A party cannot be legally convicted upon an indictment found by the grand jury upon the testimony of witnesses, who were sworn by an officer of the court after the session had lapsed, in consequence of its having, on two successive days, been opened and adjourned without the presence of any judge. *Middlesex Special Commission*, 6 C. & P. 90—J. Parke. 840

The statute 7 & 8 Geo. 4, c. 28, s. 2, authorizing the court to direct a plea of not guilty to be entered for a party who stands mute of malice, or will not answer directly to an indictment, applies to the case of a party who refuses to plead, on the ground that he had previously pleaded to another indictment for the same offence, but which indictment was not valid in consequence of its having been found upon the testimony of witnesses not duly sworn to give evidence before the grand jury. *Rex v. Bitton*, 6 C. & P. 92—Littledale. 840

To an indictment in the King's Bench, a defendant will be allowed to plead in forma pauperis, on making an affidavit that he is not worth 5*l.*, &c. *Rex v. Page*, 1 Dowl. P. C. 507. 840

## CVIII. PLEA OF AUTRE FOIS CONVICT.

A plea of autre fois convict stated that the prisoner was indicted, convicted, and sentenced, at a session of the peace "duly holden by adjournment on the 5th of July:" replication, nuli tiel record. The record, produced in support of the plea, stated that the indictment was found at a session commenced and holden on Monday the 1st of July, and that the court was adjourned till Tuesday the 2nd; that the court, having re-assembled on Thursday the 4th, was adjourned to Friday the 5th, when the prisoner was tried and convicted. It was held, that the plea of autre fois convict was not proved by the record, inasmuch as for want of an adjournment from the Tuesday to the Thursday, the proceedings on the Friday were coram non iudice, and a nullity. *Rex v. Bowman*, 6 C. & P. 337—Gaselee, Vaughan, and Taunton. 840

The court will not reject a plea of autre fois convict on account of the informal manner in which it is handed in by the prisoner, but will assign counsel to put it into a formal shape, and postpone the trial, to give time for its preparation. *Rex v. Chamberlain*, 6 C. & P. 93—Littledale. 840

A plea of autre fois convict can only be proved by the record, and the indictment, with the finding of the jury, &c., indorsed by the proper officer, is not sufficient, although it appear that no record has been made up. But the court, before whom the prisoner is brought to be tried the second time, will postpone the trial at the request of the prisoner, on affidavit of the fact, to give time for an application for a mandamus to compel the making up of the record. *Rex v. Bowman*, 6 C. & P. 101. 840

## CXI. EVIDENCE.

*Confession.*—If a prisoner be told "You had

better split, and not suffer for all of them;" this is such an inducement to confess as will exclude what the prisoner said in consequence of it. *Rex v. Thomas*, 6 C. & P. 353—Patteson. 843

So, where the witness said to the prisoner, "It would have been better if you had told at first." *Rex v. Walkley*, 6 C. & P. 175—Gurney. 843

A prisoner was in custody on a charge of forgery, and was not allowed even to see his wife; he wrote to a friend "to ask Mr. G., or some other solicitor, whether the punishment was the same whether the names forged were those of real or fictitious persons." Mr. G. was not the prisoner's attorney, though he was an attorney:—Held, that this was not a privileged communication. *Rex v. Brewer*, 6 C. & P. 363—Park. 843

A. was in custody on a charge of murder. B., a fellow prisoner, said to him—"I wish you would tell me how you murdered the boy—pray split." A. replied—"Will you be upon your oath not to mention what I tell you." B. went upon his oath that he would not tell. A. then made a statement:—Held, that this was not such an inducement to confess as would render the statement inadmissible. *Rex v. Shaw*, 6 C. & P. 372—Patteson. 843

Where A. and B. were charged with the joint commission of a felony, and A., on his examination before a magistrate, stated, in the hearing of B., that he and B. jointly committed such felony, which B. did not deny:—Held, that these circumstances were not admissible as evidence against B. *Rex v. Appleby*, 3 Stark. 33—Holroyd. 843

A. and his wife were separately in custody on a charge of receiving stolen property. A person who was in the room with A. said—"I hope you will tell, because Mrs. G. (the prosecutrix) can ill afford to lose the money;" and the constable then said—"If you will tell where the property is, you shall see your wife:"—Held, that a statement made by A. afterwards was admissible in evidence. *Rex v. Lloyd*, 6 C. & P. 393—Patteson. 843

Where a person, who made a confession to a constable in consequence of a promise held out, was taken before a magistrate, who, knowing what had taken place, cautioned the prisoner against making any confession before him; but the prisoner, notwithstanding, did make a confession to the magistrate:—Held, that this second confession was receivable in evidence on the trial of the prisoner, though it did not appear that the magistrate told the prisoner that his first confession would have no effect, and he therefore might have acted under an impression that, having once acknowledged his guilt, it was too late to retract. *Rex v. Howes*, 6 C. & P. 404—Denman. 843

What a prisoner is overheard to say to his wife, or even what he is overheard to say to himself, is receivable in evidence against him on a charge of felony: it is, however, a species of evidence to be acted on with caution, as it is very



liable to be unintentionally misrepresented by the witnesses. *Rex v. Simons*, 6 C. & P. 540—Alderson. 843

A statement, made by a prisoner when he is drunk, is receivable in evidence; and semble, that, if a constable gave him liquor to make him so, in the hope of his saying something, that will not render his statement inadmissible, but it will be matter of observation for the judge in his summing up. *Rex v. Spilsbury*, 7 C. & P. 187 843

If a prisoner, during the examination of witnesses against him before the magistrate, make an observation, parol evidence may be given of such observation, if the magistrate's clerk prove that he only took down the evidence of the witnesses, and the statement of the prisoner, after the evidence against him was concluded. *Id.*

A prisoner charged with felony, being in custody handcuffed, in the house of the prosecutor, after a conversation with the prosecutor and another person, in which he was told that they would do all they could for him, said—"If the handcuffs are taken off, I will tell you where I put the property:"—Semble, that this statement was receivable in evidence, and could not be objected to, either as a confession made under a promise, or a statement obtained by duress. *Rex v. Green*, 6 C. & P. 655—Bosanquet and Taunton. 843

A witness stated, that a prisoner charged with felony asked him if he had better confess; and the witness replied, that he had better not confess, but that the prisoner might say what he had to say to him, for it should go no further. The prisoner made a statement:—Held, that it was receivable in evidence on the trial. *Rex v. Thomas*, 7 C. & P. 345—Coleridge. 843

A. being in the custody of a constable, on a charge of felony, was taken by the constable to an innkeeper, who, in the hearing of the constable, held out an inducement to A. to confess; and A. in the hearing of the constable, made a confession to the innkeeper, which, at the trial, the constable was called to prove:—Semble, that this confession was not receivable in evidence. *Rex v. Pountney*, 7 C. & P. 302—Alderson. 843

A prisoner was indicted for sending a threatening letter. The only evidence against him was his own statement, that he should never have written it, but for W. G.:—Held not sufficient. *Rex v. Howe*, 7 C. & P. 268—Abinger. 843

A magistrate returned with the depositions taken before him, that the prisoner said—"I decline to say any thing:"—Held, that under those circumstances, a witness for the prosecution could not be allowed to give evidence of the terms of a confession, which he stated the prisoner made in the presence of the magistrate, and while under examination. *Rex v. Walter*, 7 C. & P. 267—Abinger. 843

If a prisoner, when examined before a magistrate, say that the deposition of F. T. is true, the deposition of F. T. may be read at the trial as a part of the prisoner's statement, although F. T. has been examined at the trial as a witness for

the prosecution. *Rex v. John*, 7 C. & P. 324—Patteson. 843

Where a magistrate has signed the examination of a prisoner under 7 Geo. 4, c. 64, in order to allow it to be read on the trial, it is sufficient to prove the handwriting of the magistrate, and to show that the examination is that of the particular prisoner. *Rex v. Foster*, 7 C. & P. 148—Alderson. 843

An examination of a prisoner taken before a magistrate, signed with the prisoner's name, may be given in evidence on the prisoner's handwriting being proved by any one present at the time of such examination. *Rex v. Chappel*, 1 M. & Rob. 395—Denman. 843

When the prisoner has merely put his mark, it must be proved that the examination was correctly read over to him. *Id.*

It is not necessary to call either the magistrate or his clerk to prove the due taking in writing of a prisoner's confession. *Rex v. Hopes*, 7 C. & P. 136—Crim. Court. 843

If a prisoner's examination before a magistrate conclude, "taken and sworn before me," and under that is the magistrate's signature, it is not receivable in evidence; and the judge will neither allow the magistrate's clerk to prove that, in fact, it was not sworn, nor will he receive parol evidence of what the prisoner said. *Rex v. Rivers*, 7 C. & P. 177—Park. 843

*Accomplices.*—If an accomplice's evidence be confirmed only as to collateral facts, which do not either connect the accused with the offence, or connect the accused and the accomplice together, it is not sufficient. *Rex v. Addis*, 6 C. & P. 388—Patteson. 847

Proving by other witnesses that a robbery was in fact committed in the mode in which an accomplice states it to have been committed is not such confirmation of him as is required to warrant a conviction on his evidence. *Rex v. Webb*, 6 C. & P. 595—Williams. 847

There is a great difference between confirmations of an accomplice as to the circumstances of the felony, and those which apply to the individual charged. The former only show that the accomplice was present at the commission of the offence, but the others show that the prisoner was connected with it. Confirmation of an accomplice as to the commission of the felony, is really no confirmation at all, and though a jury may legally convict on the evidence of an accomplice only, the judges advise them not to act on the evidence of an accomplice, unless he is confirmed as to the particular person who is charged with the offence. *Rex v. Wilkes*, 7 C. & P. 272—Alderson. 847

In a case of felony the testimony of the wife of an accomplice, is not such evidence as a jury ought to rely upon as confirmation of the statement of the accomplice. *Rex v. Neal*, 7 C. & P. 168—Park. 847

If A. is charged as a principal, and B. as a receiver, and A. plead guilty,—an accomplice



when called to give evidence against B., should be confirmed as to some matter affecting B., and a confirmation as to the guilt of A. does not advance the case against B. *Rex v. Moores*, 7 C. & P. 270—Alderson. 847

A jury may, if they please, act upon the evidence of an accomplice without any confirmation of his statement. *Rex v. Hastings*, 7 C. & P. 152—Denman, Park, and Alderson. 847

*Depositions.*—A., who was a witness for the prosecution against B., on a charge of arson, had first been examined by the magistrate before any specific charge was made against any person, and his deposition taken in writing. A. was next accused of the offence, and his statement as a prisoner was also taken down by the magistrate. After this, B. was charged with the offence, and A. examined as a witness, when A.'s statement made at that time was taken down, B. being then committed for trial:—Held, that all these statements of A. ought to be returned to the judge, and not merely the statement made when B. was committed. *Rex v. Simonds*, 6 C. & P. 540—Alderson. 848

It is the duty of a magistrate to return all the depositions taken against a prisoner, and not merely the depositions of those whom he thinks proper to bind over as witnesses. *Rex v. Fuller*, 7 C. & P. 269—Vaughan. 848

*Swearing and examining Witnesses.*—Where a witness for the prosecution at the Old Bailey, on being asked to repeat an answer which she had previously given before the whole of it had been taken down, omitted what the prisoner's counsel thought an important part of it, and denied that she had ever uttered such part; the judges allowed the short-hand writer of the court, who had taken down the answer, to be examined as a witness to show whether the words had been used or not. *Rex v. Slater*, 6 C. & P. 334—Gaselee and Vaughan. 850

A witness was asked by the prisoner's counsel on cross-examination whether he had not become bail for a witness previously examined. He replied, yes; and that he believed it was on a charge of keeping a gaming-house. In order to prevent any impression against the character of the party so accused, the court, on the suggestion of the counsel for the prosecution, allowed such party to be called up again, and asked whether the charge was in fact true or false. *Rex v. Noel*, 6 C. & P. 336—Gaselee and Taunton. 850

If a party robbed go within a few hours after the robbery to a constable, and mention the name of the person who robbed him, the party robbed may be asked at the trial whether he named any person to the constable, but ought not to be asked what name he mentioned; and the constable may be asked whether, in consequence of the party mentioning a name to him, he went in search of any person; and if so, who that person was. *Rex v. Wink*, 6 C. & P. 397—Patteson. 850

The counsel for the prosecution in a case of

felony opened that he should call A. and B. as witnesses, the former being a king's evidence. Both before and after those persons were called, the prisoner's counsel were allowed to ask the other witnesses whether A. and B. were not persons of very bad character. *Rex v. Nichols*, 5 C. & P. 600—Parke. 350

In a case of burning, it had been opened by the counsel for the prosecution, that evidence would be given of expression of ill-will, used by the prisoner towards the prosecutor:—Held, that the prisoner's counsel might cross-examine the prosecutor, to show that other persons besides the prisoner had used expressions of ill-will towards him. *Rex v. Stallard*, 7 C. and P. 263—Williams. 850

Whether, after the examination of witnesses to fact on behalf of a prisoner, the judge (there being no counsel for the prosecution), calls back and examines a witness for the prosecution, the prisoner's counsel has a right to cross-examine again if he thinks it material. *Rex v. Watson*, 6 C. & P. 653—Crim. Court. 850

It is not usual to cross-examine witnesses to character, except the counsel cross-examining have some distinct charge to which to cross-examine them. *Rex v. Hodgkins*, 7 C. & P. 298—Alderson. 850

*Witnesses ordered out of Court.*—The witnesses had been ordered out of court, but the attorney remained in court:—Held, that after this order he could not be examined as a witness. *Rex v. Webb*, 3 Stark. L. of Ev. 1733—Best. 856

In a case of burglary, a witness for the defence remained in court after an order for the witnesses to leave the court:—Held, that it depended on the circumstances of the case, whether the judge would allow the witness to be examined. *Rex v. Colley, M. & M.* 329—Littledale and Gaselee. 856

On a trial for arson, witness for the prisoner had left the court, on an order being given for the witnesses to go out of court; but he had afterwards come into court again, and heard a part of the evidence: he was allowed to be examined. *Rex v. Brown*, 4 C. & P. 588, n.—Patteson. 856

On the trial of an indictment for perjury, all the witnesses were ordered out of court. After this order, a witness for the prosecution remained in court: the judge would not allow him to be examined. *Rex v. Wyld*, 6 C. & P. 380—Park. 856

As to witnesses being examined in civil cases, after being ordered to leave the court, see the cases of *Att. Gen. v. Bulpit*, 9 Price, 4; *Pomeroy v. Baddeley*, R. & M. 430; *Beamon v. Ellice*, 4 C. & P. 585; and *Everett v. Lowdham*, 5 C. & P. 91.

*Proof of previous Conviction.*—The judges have determined that if a prisoner is indicted for a felony after a previous conviction, the proof of the previous conviction is to be given before the prisoner is called on for his defence. *Rex v.*



Jones, 6 C. & P. 391—Park. [See 7 & 8 Geo. 4, c. 23, s. 11.] 855

*Evidence of the Finding of an Indictment.*—An allegation, that “on, &c., at, &c., a certain indictment was preferred at the quarter sessions of the peace then and there holden in and for the said county of W., against the defendant and one T. E., which said indictment was then and there found a true bill,” is not supported by the production of the original indictment with the words “true bill” indorsed on it, it being necessary that a regular record should be drawn up and proved, either by its production, or by an examined copy of it. *Porter v. Cooper*, 6 C. & P. 354—Patteson. 855

## CXII. PRACTICE.

The court refused to discharge, without preferring a bill of indictment, the recognizances of prosecutors, being members of a society for promoting religious knowledge among the poor, who had caused a servant to be committed for embezzlement, the application being made not on the ground of any defect in the evidence, but on the ground that the prosecutors thought that the reformation of the offender would be best promoted by such a course. *Rex v. Paul*, 6 C. & P. 323—Park, Patteson, and Gurney. 855

But where, at the assizes, parish officers were under recognizances to prosecute a pauper for obtaining money by false pretences, the judge on motion permitted the recognizances to be discharged, the party having been in prison several weeks, and the parish being unwilling to indict. *Rex v. Adams*, 6 C. & P. 324, n.—Vaughan. 855

On an indictment on the prosecution of a private individual for keeping a common gaming-house, the solicitor of the treasury was allowed to have a new record of *Nisi Prius* engrossed, and the postea and verdict indorsed from the judge's notes, on an affidavit that the postea could not be found, and that the solicitor of the treasury was instructed by the secretary of state to call for the judgment of the court. *Rex v. Oldfield*, 3 B. & Adol. 659, n. 855

Where a party has been tried at a court of quarter sessions, which has previously lapsed for want of due adjournment, he has a right to have a record of the proceedings made up by the clerk of the peace, although the object of the application is to enable him to support a plea of *autre fois convict*. *Rex v. Middlesex (Justices)*, 3 Nev. & M. 110. 855

The prosecutor of an indictment for misdemeanor may obtain the usual crown office certificate of his bill having been found, for the purpose of taking out a judge's warrant against the defendant, without obtaining an office copy of the indictment. *Rex v. Redfern*, 2 Adol. & Ellis, 367; 4 Nev. & M. 198. 855

Where a document is in the custody of an officer of a court of equity, the court will, on grounds of public policy, order the production of that document at the trial of an indictment against any individual, whether he be a party to

the suit in which the document is in evidence or not. *Taylor v. Sheppard*, 1 Y. & Col. 280. 855

The court of King's Bench will, under special circumstances, remove an indictment for a misdemeanor from the Central Criminal Court. *Rex v. Caldecott*, 3 Dowl. P. C. 315. 855

A prosecutor in an indictment for a nuisance may be compelled to give a particular of the acts of nuisance intended to be relied on. *Rex v. Curwood*, 5 Nev. & M. 369; 1 Har. & Woll. 310. 855

A rule for this purpose may be granted without affidavit, upon reading the indictment only. *Id.*

If the counts of an indictment for a conspiracy be framed in a general form, the judge will order that the prosecutor shall furnish the defendants with a particular of the charges; and that particular should give the same information to the defendants that would be given by a special count. But the judge will not compel the prosecutor to state in his particular the specific acts with which the defendants are charged, and the times and places at which those acts are alleged to have occurred. *Rex v. Hamilton*, 7 C. & P. 448—Littledale. 855

The presentment of a bill for a capital offence may be postponed on affidavit of the attorney for the prosecution, stating the illness of a material and necessary witness, although such witness have been examined before a magistrate, and his deposition do not disclose matter of sufficient importance to show that his evidence was necessary, as the important facts may have been discovered since. *Rex v. Palmer*, 6 C. & P. 652—Criminal Court. 855

The court cannot, under the stat. 7 & 8 Geo. 4, c. 29, s. 57, relating to the restitution of stolen property, order a Bank of England note which has been paid and cancelled, to be delivered up to the prosecutor of an indictment against the party who stole it. *Rex v. Stanton*, 7 C. & P. 431—Criminal Court. 855

A constable who apprehends a prisoner has no right to take away from him any money which he has about him, unless it is in some way connected with the offence with which he is charged, as he thereby deprives him of the means of making his defence. *Rex v. O'Donnell*, 7 C. & P. 138—Patteson. 855

A police officer who apprehended a person on a charge of rape, took from him a watch and other articles. The judges of the court at which he was indicted, on motion supported by affidavit, directed the property to be given up to the prisoner, saying that ought not to have been taken from him. *Rex v. William Kinsey*, 7 C. & P. 447—Patteson and Gurney. 855

If a person taken on a charge of stealing a horse, have the horse in his possession when he is apprehended, any money found upon him ought not to be taken away from him. *Rex v. Jones*, 6 C. & P. 343—Patteson. 855

Where, in case of murder, which had occupied the whole of the day, the judge, after he had commenced his summing up, adjourned the court, in consequence of the noise made by the



crowd in the hall, his lordship ordered that two bailiffs should be sworn to keep the jury together till the next day, and that the jury should be supplied with suitable refreshments and accommodation by the high sheriff, and next day his lordship recommenced his summing up the evidence. *Rex v. Clay*, 7 C. & P. 276—Alderson. 855

Where a defendant indicted for a nuisance, conducted his own case, the judge, at the conclusion of the case on the part of the prosecution, warned him, that, if he called a witness or read any letter or paper in evidence, or opened new facts, the counsel for the prosecution would have a right to reply. *Rex v. Carlile*, 6 C. & P. 637—Crim. Court. 855

At sessions the jury gave a special verdict of not guilty, and it was entered in the book of the clerk of the peace. Afterwards, the chairman told the jury they must reconsider their verdict; and they gave a verdict of guilty generally, but recommended the defendant to mercy on account of his not doing the act with a malicious intent; and the verdict was then altered in the book of the clerk of the peace. The court refused to interfere by mandamus to cancel the alterations. *Rex v. Suffolk Justices*, 5 Nev. & M. 139; S. C. nom. *Rex v. Hughes*, 1 Har. & Woll. 313. 855

In addressing the court in aggravation of punishment, upon a conviction for a nuisance, it is competent to the prosecutor to advert to provisions contained in an act relating to a private company, if such act contain a clause declaring it to be a public statute, though it be not referred to in any of the prosecutor's affidavits. *Rex v. The Equitable Gas Comp.*, 3 Nev. & M. 759. 855

The charters of the city of London vest in that body, fines for misdemeanors committed within the city, though imposed or adjudged by the court of King's Bench, sitting in banc at Westminster, after a trial at the sittings at Guildhall. *Rex v. Mayor and Inhabitants of the city of London*, 1 C. M. & R. 1; 4 Tyr. 709. 855

#### CXIV. NEW TRIAL.

The rule as to payment of costs on a motion for a new trial is the same in principle in civil and criminal cases. *Rex v. Ford*, 1 Nev. & M. 776. 858

Quere whether a new trial is grantable after acquittal in any criminal case, except a penal action? *Rex v. Sutton*, 5 B. & Adol. 52; 2 Nev. & M. 57. 858

After a verdict for the defendant upon an indictment for the non-repair of a highway, the court refused an application for a new trial, on the ground of the improper rejection of evidence; but suspended the judgment in order that another indictment might be preferred. *Id.*

All the defendants convicted upon a criminal information must be in court upon a motion on their behalf for a new trial. *Rex v. Scully*, 1 Alcock & Napier, 262. (*Irish*). 858

#### CXV. JUDGMENT AND EXECUTION.

In a case of conviction for murder, in which the prisoners were brought up by habeas corpus, and the record by certiorari, the court gave the prisoners three days' time to examine the record and instruct counsel to show cause why execution should not be awarded against them. *Rex v. Garaid*, 4 Nev. & M. 33; 2 Adol. & Ellis, 266. 860

Seemle, that a pardon after judgment may be pleaded *ore tenus*, and in bar of execution; and there may be a demurrer to such a plea *ore tenus*. *Id.*

The court of King's Bench has authority to order the sheriff of any county, or the marshal of the court, to carry into execution the sentence of death, pronounced by a judge under a commission of oyer and terminer and general gaol delivery. *Id.*

A proclamation promising a pardon cannot be pleaded as a pardon. *Id.*

But where such proclamation had been made, the court, in their discretion, deferred the awarding of execution upon the sentence, until the prisoner should have had time to apply to the secretary of state for a pardon, according to the terms of the proclamation. *Id.*

The attorney-general, upon motion, is entitled, as of course, to a habeas corpus and certiorari, to bring up a prisoner and the record of his conviction in case of felony. *Id.*

The court refused to hear an application from a sheriff, into whose custody the prisoners had been removed, praying that the order to do execution might not be made upon him. *Id.*

A sheriff is not bound, upon service of a copy of the calendar of prisoners signed by a justice of gaol delivery at the assizes, to execute prisoners against whom sentence of death has been passed, unless such prisoners are in his legal custody. *Rex v. Antrobus*, 4 Nev. & M. 565; 2 Adol. & Ellis, 798; 6 C. & P. 784; 1 Har. & Woll. 96. 860

Therefore, where a county gaol and the custody of the prisoners in such gaol belonged to a patent officer, independent of the sheriff, it was held that the sheriff was not legally bound, upon receiving the calendar, to demand to have the prisoner delivered to him by such patent officer for the purpose of executing him. *Id.*

In such case, in order to make the liability of the sheriff complete, the court in which the prisoner is condemned, should, by a writ of habeas corpus or other mandate, require the patent officer to deliver the prisoner to the sheriff, and should by another writ or mandate require the sheriff to receive and execute him. *Id.*

Quere whether a special order of the court, to the patent officer and the sheriff, (they being both bound to be present in court), would be sufficient? *Id.*

Mere notice of the sentence, and of the liability of the sheriff to execute, is not sufficient



to warrant the patent officer to deliver the prisoner to the sheriff for execution. *Id.*

Where the sheriff has the custody of the prisoner, the judgment of the court passing sentence of death upon him, is, without any warrant or copy of the calendar, sufficient to authorize and require the sheriff to do execution; the copy of the calendar signed by the judge is a mere memorial. *Id.*

#### CXVI. ERROR.

Where error is brought on a conviction of felony, and after a four-day rule has been obtained and served on the attorney-general and prosecutor, and there is no joinder in error, the party convicted is entitled to be discharged out of custody. So in error upon a conviction for a misdemeanor. *Rex v. Howse*, 3 Nev. & M. 462. 862

#### CXVIII. COSTS.

A public body at its own expense preferred an indictment for a libel upon A., one of its officers, in the name of A., as prosecutor. The defendant removed the indictment by certiorari, and was convicted:—Held, that no costs could be awarded under the stat. 4 & 5 Will. & Mary, c. 11, s. 3. *Rex v. Dewhurst*, 2 Nev. & M. 253; 5 B. & Adol. 405. 865

Where an indictment on the 7 & 8 Geo. 4, c. 30, s. 16, is removed by certiorari into the King's Bench, and is tried on a record issuing out of that court, the expenses of prosecution cannot be allowed under the 7 Geo. 4, c. 64, s. 22. *Rex v. Kelsey*, 1 Dowl. P. C. 481. 865

If a prosecutor, having removed an indictment by certiorari, give notice of trial for the assizes, and bring down the record, and withdraw it after it has been entered for trial, the judge at the assizes cannot order the prosecutor to pay the defendant the costs of the day; but a motion must be made in the court of King's Bench. *Rex v. Watton*, 4 C. & P. 229—Bolland. 865

By the general Highway Act, 13 Geo. 3, c. 78, s. 64, the court, before which any indictment for non-repair of a road is tried, may award costs to the prosecutor, if any defence appear to have been frivolous, or to the defendant, if it appear that the prosecution was vexatious. This section applies only to cases tried in the ordinary course; and where on an indictment removed by the defendant by certiorari, the court above had ordered a new trial, and the prosecutor's costs of both trials to abide the event: it was held that this rule took away the authority of the judge to certify in favor of the defendant. *Rex v. Salwick*, 2 B. & Adol. 136. 865

A party who is bound over to prosecute at a superior court by a court of quarter session, is entitled to his expenses under the statute. *Rex v. Paine*, 7 C. & P. 135—Crim. Court. 864

Quere, whether under 7 Geo. 4, c. 64, a prosecutor under recognizances to prosecute at the sessions, who prosecuted at the assizes, is entitled to costs at all? *Rex v. Jeyes*, 5 Nev. & M. 101; 3 Adol. & Ellis, 416; 1 Har. & Woll. 325. 864

Semble, that the statute meant to give costs to those parties only who have previously gone before a magistrate. It does not apply to cases where an indictment is preferred after a magistrate has dismissed the complaint—*Per Littledale. Id.*

The prosecutor in a case of perjury, who has included his name in a subpoena, is entitled to his costs as prosecutor, though he is not bound over to prosecute by a magistrate, and he is not limited to his expenses incurred as a witness only. *Rex v. Sheering*, 7 C. & P. 440—Parke and Coleridge. 864

In the case of an indictment removed into K. B. by certiorari, the court has no power to order the payment of costs incurred before the removal. *Rex v. Pasman*, 3 Nev. & M. 730; 1 Adol. & Ellis, 603. 865

#### CXIX. INFORMATION.

A magistrate is entitled to notice before an application is made for a criminal information, where he is charged with misconduct in his magisterial capacity, although other misconduct be also charged. *Rex v. Heming*, 2 Nev. & M. 477; 5 B. & Adol. 666. 867

The court will not grant a rule nisi for a criminal information against magistrates, unless it appears they have acted from an oppressive, dishonest, or corrupt motive, under which fear or favor are included. In re Fentiman, 4 Nev. & M. 128; 1 Adol. & Ellis, 127. 867

A magistrate is entitled in all cases to six days' notice, of an intention to apply for a rule nisi for a criminal information; and it is not sufficient that in point of fact, six days have expired between the notice and the motion, if the notice contemplates an earlier application. *Id.*

Upon a motion for a criminal information against A. for challenging B., an affidavit, stating that in a correspondence between them, A. had intimated an intention, after the settlement of accounts between himself and B., to require an apology for offensive expressions contained in a letter received by him from B., or "such satisfaction as is usual on such occasions between gentlemen;" and that afterwards, C., a relation of A., came with a letter of B. in his hand,—settled the account by paying a balance due from A. to B., and, after saying that he had come in consequence of the letter in his hand, delivered a hostile message as from A.;—was held insufficient to connect A. with the challenge; and therefore the court refused the rule. *Rex v. Younghusband*, 4 Nev. & M. 850. 869

But the court afterwards granted a rule nisi against C. *Id.*

A rule nisi for a criminal information will not be granted where a former rule for the same matter against the same defendant has been discharged, although the second motion is made upon additional affidavits. *Rex v. Smithson*, 1 Nev. & M. 775; 4 B. & Adol. 861. 870

The court will not enlarge a rule for a criminal information, in order that the affidavit on



which the rule was obtained may be resworn. *Rex v. Cockshaw*, 2 Nev. & M. 378. 870

The county in which a deponent is sworn to an affidavit to ground a rule for a criminal information, made before a commissioner, must appear in the jurat. *Id.* 871

Leave to file a criminal information for a libel should be applied for in a reasonable time before the expiration of the second term after the publication, if it come to the knowledge of the prosecutor early enough to enable him to move within that period. *Rex v. Jollie*, 1 Nev. & M. 483; 4 B. & Adol. 867. 870

Semble, that an affidavit to found a criminal information for a libel published in England, in parts beyond seas, may be sworn abroad. *Rex v. Satirist (Editor)*, 3 Nev. & M. 532. 871

#### CXX. PRISON.

A. was to be tried for felony at the assizes for the county of W., and B., a material witness for A., was committed to the W. city prison for further examination on a charge of felony:—Held, that before the trial of A. the governor of the W. city prison ought to allow A.'s attorney to see B. in his presence. *Rex v. Simmonds*, 7 C. & P. 176—Park. 872

#### CXXII. ARTICLES OF THE PEACE.

The court of King's Bench cannot interfere to reduce the amount of security which the magistrates require a defendant to give for the preservation of the peace. *Rex v. Holloway*, 2 Dowl. P. C. 525. 873

A party gave information on oath before a magistrate, that from certain language used towards him, he was in bodily fear from another, and the magistrate upon hearing the complaint, required the latter to enter into recognizances to keep the peace. On motion to discharge the recognizances, on the ground that the language was used in a metaphorical sense only, the court refused to interfere, because it was for the magistrates to judge in what sense the language was used. *Rex v. Tregarthen*, 5 B. & Adol. 678; 2 Nev. & M. 379. 873

#### CUSTOM AND PRESCRIPTION.

A usage of trade must be proved by instances, and cannot be supported by evidence of opinion merely. *Cunningham v. Fonblanque*, 6 C. & P. 44—Park. 876

The general law as to a custom is, that if its existence at a distant time be shown, and there is no evidence that at any certain time it did not exist, a jury may infer that it went back as far as the reign of Richard the First, which is the time of legal memory. *Leuckhart v. Cooper*, 7 C. & P. 119—Tindal. 873

Quere, whether the same person can have a right by custom, and a prescriptive right to do

the same thing? *Blewitt v. Tregonning*, 5 Nev. & M. 308; 1 Har. & Woll. 432. 874

A jury cannot, from the same evidence, find a customary right in all the inhabitant occupiers of land within a district, and a prescriptive right to the same subject matter, in respect of a particular estate within the district. *Id.*

Whether, in point of law, a prescriptive and a customary right to the same subject matter, may exist in respect of the same land, if each be proved by proper evidence applicable to each, quere? *Id.*

Enjoyment of a profit-a-prendre by the owners and occupiers of a particular estate, during living memory, without any evidence of user or non-user at any antecedent period, is evidence of a prescriptive right, but will not support a plea of a lost grant. *Id.*

In order to support such plea of a lost grant, some evidence tending to point the user, as regards its commencement, to the period of the supposed grant, must be given. *Id.*

Where rights are claimed by prescription, the jury ought to be directed, that from modern usage they are warranted in presuming that the right claimed is immemorial, unless they are satisfied of the contrary by other evidence. *Jenkins v. Harvey*, 1 C. M. & R. 877; 1 Gale, 23. And see *S. C.* 2 C. M. & R. 393. 874

A custom that the town crier of a corporate town shall have the exclusive privilege of proclaiming, by the sound of the bell, the sale of all goods brought into the borough to be sold by auction is a good custom. *Jones v. Waters*, 1 C. M. & R. 713; 5 Tyr. 361; 1 Gale, 5. 876

#### DAMAGES.

A., having been illegally arrested on meane process, applied to the court to be discharged; the rule was referred to a judge at chambers, who ordered him to be discharged, and would have given him the costs of the rule if he would have undertaken to bring no action; but, as he refused to give such undertaking, nothing was ordered as to the costs. In an action for trespass and false imprisonment brought by A. for the arrest; it was held, first, that he was entitled to recover those costs as special damage if properly laid in his declaration: and secondly, that, as the declaration only alleged that he had been forced and obliged to pay and had paid C., he could not recover the whole of the bill of costs of his attorney which he had not paid, though he was liable to pay them; but that he might recover so much of the bill of costs as consisted of money actually paid by the attorney, as that might be considered as money paid through his agent. *Pritchett v. Boevey*, 1 C. & M. 775. 878

Semble, that under an averment that he had been forced and obliged to and had become liable, &c., he might have recovered damages for such liability. *Id.*

In assumpsit for a breach of contract, in not delivering a quantity of linseed pursuant to a contract of sale, it appeared in evidence, that the plaintiffs, pursuant to contract, had paid part of



the purchase-money to the vendor in advance; that the defendant, at the time when the linseed ought to have been delivered, had notice of his inability to perform the contract, but the money was not returned until after the action was commenced, when the amount was paid into court, with interest up to the time it was so paid in, as a consideration for a commission to examine witnesses abroad, and was only obtained out of court by the plaintiffs a short time before the trial:—Held, that, in estimating the damages, the plaintiffs were not entitled to take the price of linseed at the time of the trial as a criterion; and the plaintiffs not having proved that they had sustained any special damages from the non-delivery of the seed, and the non-return of the money, that the repayment of the money advanced, with simple interest upon it, and payment of the difference between the contract price and the price of the linseed at the time when it ought to have been delivered, was that to which the plaintiffs were entitled; and the jury having found accordingly, that the verdict was right. *Startup v. Cortazzi*, 2 C. M. & R. 165. 878

#### DEATH.

Presumption of death from absence. *Doe d. Knight v. Nepean*, 5 B. & Adol. 86: S. C. nom. *Doe d. Slade v. Nepean*, 2 Nev. & M. 219. 880

#### DEBT.

In an action of debt it is immaterial that the aggregate of the sums claimed in several counts exceeds the amount claimed in the queritur. *Gardner v. Bowman*, 4 Tyr. 412. 880

The words "undertook and agreed to pay," in a quantum meruit count, do not necessarily import the form of action to be assumpsit, but are good in debt. *Id.*

A. covenanted to pay B. 270*l.* on the 15th of December, with interest up to that time. He did not do so, and B. brought an action of debt, laying his damages at 10*l.*:—Held, that B. could not recover more than the principal, the interest up to the 15th of December, and 10*l.* more, although the interest up to the time of the action amounted to a larger sum; and the judge at the trial would not order the declaration to be amended by inserting a larger sum than 10*l.* as the damages. *Watkins v. Morgan*, 6 C. & P. 661—*Littledale*. 880

In an action of debt, for goods sold and delivered, the defendant pleaded *nunquam indebtedus*:—Held, that he could not give in evidence, under this plea, that the goods were sold on credit which had not expired. *Edmunds v. Harris*, 4 Nev. & M. 182. 880

A plea of the general issue in debt on simple contract, must be in the form given by rule 3, tit. "covenant and debt," of the rules of Hil. T. 4 Will. 4; and therefore a plea that the defendant "never did owe," was held bad on special demurrer, the former being "never was indebted." *Smedley v. Joyce*, 4 Dowl. P. C. 421; 2 C. M. & R. 721; 1 Tyr. 84. 880

If one sue several defendants in debt, and the evidence do not fix all the defendants, the plaintiff must be nonsuited; and the judge will not allow the declaration to be amended by striking out the names of those defendants who are not affected by the evidence. *Cooper v. Whitehouse*, 6 C. & P. 545—*Alderson*. 880

To debt for 20 years' rent, at 80*l.* a-year, upon a lease, the defendant pleaded the statute of limitations; and further as to 1420*l.* part of the demand, that 17½ years ago, the plaintiff by deed assigned his reversion, and that no part of the 1420*l.* had accrued before the assignment: verdict for the plaintiff upon the first issue, and for the defendant upon the second:—Held, that the defendant was entitled to the postea. *Paddon v. Bartlett*, 4 Nev. & M. 321. 880

To debt for 1600*l.* for 20 years' rent, at 80*l.* a-year, defendant pleaded to the whole action action non accrevit *infra sex annos*; and also as to 1420*l.* parcel, &c., that 17½ years before plaintiff assigned over his reversion, and that no part of the 1420*l.* accrued before the assignment. Verdict for the plaintiff on the first issue, and for the defendant on the second. Semble, that the plaintiff was entitled to judgment for 180*l.* *Paddon v. Bartlett*, 5 Nev. & M. 383. 880

#### DEBTOR AND CREDITOR.

*Change of Joint into Separate Debts.*—A. & B. being partners, A. retires and B. continues the business, having the partnership effects: C., a creditor, being told by B. that he must look for payment to him alone, draws a bill of exchange on B. for his debt; the bill is dishonored, and C. gives B. time to pay: these facts raise a question for the jury, whether it was not an agreement between B. & C., that C. should accept B. as his sole debtor, and should take the bill of exchange from him alone by way of satisfaction for the debt due from both. *Thompson v. Percival*, 3 Nev. & M. 167; 5 B. & Adol. 925. 881

Such an agreement followed by the receipt of the bill from B. would be a good defence by way of accord and satisfaction, in an action by C. against A. & B. jointly. *Id.*

The bankrupt kept an account open with A., B. & C., as bankers, who afterwards took into partnership D., the son of C.; after which the bankrupt executed a legal mortgage to A., B. & C., for securing the repayment of the loan of 6000*l.* Subsequently to this, the bankrupt addressed a letter to Messrs. A., B. & C. authorizing them to consider all the securities they then held as responsible for any advances made, or to be made by them to the bankrupt:—Held, that this letter must be taken to have been addressed by the bankrupt to the four partners, and amounted to an equitable mortgage to the four of the previous legal mortgage to the three, operating as a security for all the advances made either by the three or the four partners. *Ex parte Parr*, 4 Deac. & Chit. 426. 881

Mere knowledge by a creditor of the dissolution of partnership will not release the old partners from their liability to him, though he conti-



nue his account with the new firm, unless he appears expressly or by some act to have accepted the substituted credit of the new partnership instead of the retiring partners. C., M. & N. trading under the name of J. K. & Sons, were indebted to A.; C. retired from the partnership, and M. & N. undertook to liquidate the concerns; afterwards N. went out of the business, and on his retirement a new partner was taken in: at that time a notice of the previous dissolution of partnership was advertised in the Gazette, but there was no proof that the plaintiff ever saw that advertisement: no notice was given of the introduction of the new partner; the business was carried on in the old style of J. K. & Sons, and the plaintiff continued his account with them under that name. About eleven months after the dissolution, in a letter to one of the partners who had retired, plaintiff said he was aware that after the dissolution he had no claim against him, "but there was nothing to show that he accepted the substituted credit of the new partner in his stead."—Held, that the three original partners to whom the loan was made were not released from their liability. *Kirwan v. Kirwan*, 4 Tyr. 491. 881

The creditors of A. having issued a fiat in bankruptcy against him, and having at the close of the proceedings under the fiat received notice, by means of the examination of the bankrupt and others, that A. was only the agent of B. & Co., proceeded nevertheless to sign A.'s certificate:—Held, that this was not an election by the creditors to treat A. as their sole debtor. *Taylor v. Sheppard*, 1 Y. & Col. 371. 881

*Assignment of Debts.*—A. having contracted to pay to B. 2360*l.* by instalments, B. signed and gave to C., for value, a paper authorizing A. to pay parts of each instalment to C., and 400*l.* to be reserved in A.'s hands out of the balance of the contract, and C.'s receipt was to be a discharge to A.; A. was served with a notice of the order on the day on which it was signed:—Held, that the writing was an equitable assignment of the sums mentioned in it to C. *Lett v. Morris*, 4 Sim. 607. 882

An assignee of a debt has a right to use the assignor's name in suing for it, and it is a sufficient authority for the attorney, if he is instructed by the former to commence proceedings. *Pickford v. Ewington*, 4 Dowl. P. C. 453. 882

The plaintiffs in London, and the defendant at H., were correspondents of J. & Co. of R. J. J. & Co. informed the plaintiffs, that they had requested the defendant to pay the proceeds of certain coffee to them after a sale had been realized. The plaintiffs thereupon wrote to the defendant, and requested to know the particulars of the remittances from J. & Co., to which the defendant returned the following reply:—"We are directed by J. & Co. to remit to you the proceeds of 110 bags real ordinary coffee, which they consigned to us, but which are not yet disposed of."—Held, that this amounted to an undertaking on the part of the defendant, to hold the proceeds of the coffee for the use of the plaintiffs, and that

the defendant could not afterwards claim to set off the amount of the sale of the coffee against a balance due to himself from J. & Co.:—Held, secondly, that assumpsit for money had and received was the proper form of action; 3rdly, that the correspondence relating to a mercantile transaction, the effect of it was properly left to the jury; 4thly, that, notwithstanding the money might have been payable to J. & Co. with interest, that the interest could not be recovered by the plaintiffs from the defendant. *Frühling v. Schroeder*, 2 Scott, 135; 7 C. & P. 103; 1 Hodges, 105. 882

In assumpsit for money had and received, an admission in writing was in evidence by the defendant,—"I undertake to pay you 50*l.*, which I hold of C., and have by him been authorized to pay you." The defendant called C. as a witness, who proved that the defendant had been indebted to him, and he had been indebted to the plaintiff, but that he had never authorized the defendant to pay the plaintiff:—Held, that this was an answer to the plaintiff's case, and that the defendant was not estopped by the admission. *Pearce v. Evans*, 2 C. M. & R. 204; 1 Gale, 265. 882

Seem, also, that if the defendant had been authorized to pay the 50*l.* by C., the plaintiff would not have been entitled to recover after the payment of the debt by C. Id.

*Deeds of Composition.*—If partners by deed assign all their partnership effects, &c. to trustees for the benefit of their creditors, and some of the separate creditors of one partner do not assent to it, the assignment is fraudulent and void. *Eckhardt v. Wilson*, 8 T. R. 140. 884

A., a creditor of a firm, held securities from one of its members for money advanced by him at different times to the firm, but claimed a balance beyond what those securities would cover; all the creditors of the firm agreed to accept a composition "of 7*s.* for every 20*s.* due to the said creditors respectively." A. was the first to sign this deed, but added to his signature the words, "without prejudice to any securities whatever that I hold;" the other creditors signed in their respective order under A.'s signature:—Held, that such a composition, thus accepted, did not affect the rights of A. upon his previous securities, but only related to the balance beyond the sum they would cover, and that he might afterwards enforce those securities in equity. *Duffy v. Orr*, 1 Clark & Fin. 253; 5 Bligh, N. S. 620. 884

An agreement of composition entered into by one creditor, in contemplation and in consideration of a general composition being entered into by all the creditors, is not binding on him if the others refuse to come in. *Reay v. Richardson*, 2 C. M. & R. 422; 1 Gale, 219. 884

In an action on a bill of exchange, a plea of composition alleged that the defendant was indebted to A. B. and to divers other persons, and was in insolvent circumstances; and therefore, on &c., and before the said bill became due, with a view to induce and enable the defendant to induce



other persons, being creditors, to accept a composition of 10s. in the pound, the plaintiff agreed to accept it, and that this was afterwards made known to A. B., and that he, in consideration of the premises, and upon the faith thereof, was lured and induced to agree to accept 10s. in the pound, and that he had not ever since received or sought to receive more than 10s. in the pound:—Held, that the agreement stated must be understood to have been made in contemplation of a general composition, to which one creditor only had come in; that, consequently, the consideration of the agreement had not been received, and therefore notwithstanding a verdict for the defendant on the plea, that the plaintiff was entitled to judgment. *Id.*

In order to prove the agreement stated in the plea, the defendant put in a letter from one of the plaintiffs, containing the terms of the agreement for the composition:—Held, that evidence of a previous conversation, when the plaintiff made inquiries as to what the other creditors were likely to do, was admissible to show the motive which induced him to write the letter, and the intention with which the agreement was entered into. *Id.*

To a declaration in *assumpsit*, the defendant pleaded as to all except 20*l.* 9*s.* non *assumpsit*; and as to this sum, that the defendant being in embarrassed circumstances, the plaintiff and other creditors agreed to take 5*s.* in the pound, and that the defendant was ready and willing to pay the amount of the composition, but the plaintiff refused to receive it, and discharged the defendant from payment of it:—Held, that the plea was no answer to the sum agreed to be taken for composition, because no consideration was stated for the plaintiffs discharging the defendant from paying it, and that therefore the agreement as to that was void. The plea was allowed to be amended by paying that sum into court. *Cooper v. Philipps*, 3 Dowl. P. C. 196; 1 C. M. & R. 649; 5 Tyr. 166. 885

The bankrupt entered into a deed of composition with his creditors, by which they released him from his debts:—Held, that a promissory note subsequently given to a creditor for the remainder of the debt, was a *nudum pactum*, and consequently a bad petitioning creditor's debt. *Ex parte Hall*, 1 Deacon, 171. 886

Where a creditor compounds with his debtor under a false impression, in which the debtor knowingly leaves him, as to the extent of the debtor's estate, the creditor is not stopped from suing for the balance of his debt. *Vine v. Mitchell*, 1 M. & Rob. 337—*Tindal*. 887

By an agreement entered into between the plaintiffs, together with other creditors, and the defendant, the defendant agreed to pay a composition of fifteen shillings in the pound by two instalments; and a surety, in consideration of the creditors agreeing to discharge the defendant from all debts and demands on receiving such composition of fifteen shillings in the pound agreed to pay a sum of money in part payment, of the second, the creditors agreeing "to exone-

rate and discharge the defendant on payment of the said fifteen shillings in the pound;" it was also agreed that several bills of exchange, the amount of which was equal to the residue of the sum payable on the composition, which had been before indorsed by the defendant and handed over to the plaintiffs, "should be considered as part payment of the said fifteen shillings in the pound:"—Held, that the bills left in the hands of the plaintiff were not, under this agreement, to be considered as an absolute payment, unless they were paid when at maturity, and one of them having been dishonored, that the defendant remained liable upon his indorsement. *Constable v. Andrew*, 2 C. & M. 298; 4 Tyr. 206. 889

Action against the defendants as acceptors of a bill of exchange for 1039*l.*; it appeared that the defendants owed the plaintiffs a balance of 321*l.*, that the defendants failed, and their creditors, amongst whom were the plaintiffs, agreed to take a composition of five shillings in the pound on their debts, by notes at four and eight months; there was a dispute as to the balance due to the plaintiffs, and they promised to adjust their account with one of the defendants, and said they would do as the other creditors did; the defendants insisted for some time that 250*l.* 9*s.* 7*d.* was the balance due, but the defendants' attorney afterwards called on the plaintiffs' attorney, and told him that the defendants were ready to pay the composition on 321*l.*, the sum really due, but the plaintiffs' attorney refused, and said they must have the whole; no actual tender was made of the notes or of cash for the amount of the composition:—Held, that a tender was not necessary under the circumstances, and that the plaintiffs could only recover the amount of the composition on the balance. *Reay v. White*, 1 C. & M. 748; S. C. nom. *Reay v. Whyth*, 3 Tyr. 507. 889

An assignment for benefit of creditors, by a trader and farmer, of all her "effects, stock, books, and book debts," conveys the cattle on the farm. *Lewis v. Rogers*, 1 C. M. & R. 48; 4 Tyr. 872. 889

A trader, being in embarrassed circumstances, executed an assignment of all her "effects, stock, books, and book debts," for the benefit of her creditors; in an action after her death against the assignee, treating him as her executor *de son tort*, it was held that a list of creditors, made out about the time of the execution of the assignment, by the direction of the assignor, was evidence, as part of the transaction, for the purpose of disproving fraud. *Id.*

If property be conveyed by a debtor in trust for the benefit of creditors, who are neither parties nor privy to the deed, the deed merely operates as a power to the trustees to apply the property in payment of debts: such power is revocable by the debtor. *Acton v. Woodgate*, 2 Mylne & K. 492. 889

Quære, whether a communication, by the trustees to the creditors, of the fact of such a trust, will not defeat the power of revocation by the debtor? *Id.*



Rights and liabilities of trustees. *Emery v. Mucklow*, 2 Dowl. P. C. 735. 889

If a party obtains the benefit of a trust deed executed by his creditors, and in it is contained a consideration, that he shall make a full disclosure of his property, but he conceals a portion of it, the creditors signing the deed may still proceed against him. *Wenham v. Fowle*, 3 Dowl. P. C. 43. 889

Upon a composition, the original debt revives upon failure of the debtor in performing his undertaking. *Ex parte Crosbie*, 2 Mont. & Ayr. 393; *S. C. nom. Ex parte Crosley*, 1 Deac. 107. 884

Where a creditor enters into an agreement with his debtor to accept a composition of debt and to execute a release upon certain conditions, but the debt is never actually released, a subsequent promise of the debtor, either expressed or implied, will revive the debt. *Id.*

*Payment.*—Semble, that a payment made to an apprentice in his master's counting-house, not in the usual course of business, but on a collateral transaction, is not a good payment to the master: as where a deposit is paid by a stake holder to the apprentice of the party who makes the deposit at his counting-house. *Saunderson v. Bell*, 2 C. & M. 304; 4 Tyr. 224. 891

The acceptance by a creditor of a check in his favor, drawn by his debtor, operates as payment, unless dishonored. The mere fact of a person drawing such a check in favor of another is not evidence of a debt. *Pearce v. Davis*, 1 M. & Rob. 365—*Patteson*. 894

*Appropriation of Payment.*—Though payment of money on account generally, without a specific appropriation, would, in many cases, go to discharge the first part of an account, such payment is not conclusive; it is evidence of an appropriation only; and other evidence may be adduced to vary the application of the rule. *Wilson v. Hirst*, 1 Nev. & M. 746. 893

If a debtor pays money generally to his creditor without any direction as to its specific appropriation, the creditor may apply it in liquidation either of a judgment or simple contract debt. *Chitty v. Naish*, 2 Dowl. P. C. 511; *Brazier v. Bryant*, 2 Dowl. P. C. 477. 894

If the creditor under such circumstances, make no specific application, the money shall be applied to one or other account, according to the presumed intention of the parties, to be collected from all the facts. *Id.*

Where there was a running cash and bill account between the bankrupt and a banking company, who were under considerable advances to him, but part of these advances arose out of illegal transactions; and the bankrupt from time to time deposited bills and made payments, without any specific appropriation, or any settled account between him and the bankers:—Held, that the payments must be appropriated in reduction of the earlier items of the account, and of the legal

and not the illegal part of the demand. *Ex parte Randleson*, 2 Deac. & Chit. 534. 894

The plaintiffs (bankers) had an account with D. & Co., and had advanced D. & Co. large sums of money on credit, before the 11th of March, 1829; on the 11th of March, 1829, the defendant executed an indemnity bond to the plaintiffs, which recited that the plaintiffs were then about to enter into and have large dealings and transactions with D. & Co., in the course of which D. & Co. would require advances, &c.; and that defendant had agreed to secure and indemnify the plaintiffs against the same; and the condition of the bond was, that if the defendant should indemnify and save harmless the plaintiffs from and against all and all manner of engagements, debts, and lawful claims, not exceeding 10,000*l.*, which the said D. & Co. might legally make, contract, or come under, to and with the said plaintiffs, in the course of the said dealings and transactions, from the date of the bond till the 11th of March, 1831; or, if at the close of such dealings and transactions, within the period aforesaid, there should be a balance due to the said plaintiffs from D. & Co. not exceeding 10,000*l.*, and that the defendant should pay the said balance, then the obligation to be void:—Held, that, as between plaintiffs and the defendant, the former had no right to appropriate to the old account of D. & Co. sums of money paid in generally by D. & Co. subsequent to the date of the bond, but that these payments should go in liquidation of advances made after that date. *Sed quere. Parr v. Howlin*, 1 Alcock & Napier, 196. (*Irish*). 895

The appropriation of part payment of principal, or of payment of interest to a particular debt, may be shown by any medium of proof, and does not require an express declaration of the debtor at the time of the payment, to establish it; it may therefore be proved by previous or subsequent declarations of the debtor, although the fact of the payment must be proved by independent evidence. *Waters v. Tompkins*, 2 C. M. & R. 723; 1 Tyr. & G. 137. 893

*Receipts.*—A receipt for rent, stipulating that acceptance of rent shall not operate as a waiver of a previous notice to quit, does not require an agreement stamp under 55 Geo. 3. c. 184. *Doe d. Wheble v. Fuller*, 1 Tyr. & G. 17. 898

## DEED.

*Construction and Operation.*—Where a party to a conveyance is therein described as heir-at-law of J. P., a surviving devisee of the legal estate, such description is not evidence of the prior death of the co-devisees, or that such party is heir of J. P., even against another party who executed the conveyance. *Doe d. Pritchard v. Dodd*, 2 Nev. & M. 838. 902

As to premises. *Doe d. Dearden v. Maden*, 4 B. & Adol. 880; 1 Nev. & M. 533. 903

Under a lease of all that part of the park called B. situate and being in the county of O., and



now in the occupation of S., lying within certain specified abutments, with all houses, &c., belonging thereto, and which now are in the occupation of S., a house on a part which is within the abutments, but not in the occupation of S., will pass. *Doe d. Smith v. Galloway*, 5 B. & Adol. 43. 902

By the grant of a house all the fixtures pass; *secus*, where, by an enumeration of particular fixtures in the conveyance, an intention is shown to exclude other fixtures of greater value and importance. *Hare v. Horton*, 2 Nev. & M. 428; 5 B. & Adol. 715. 903

Under the word "appurtenances," an easement, which has become extinct (as by unity of possession), or which has no legal existence, though enjoyed *de facto*, does not pass. *Plant v. James*, 2 Nev. & M. 517; 5 B. & Adol. 791. 903

To revive an easement legally extinguished (as where there has been unity of possession), but subsisting *de facto*, the grantor should use express words of creation, or introduce the terms "therewith used and enjoyed." *Id.*

The word "appurtenances" in a declaration of uses is not to be construed in its strict technical sense, where, in creating the seisin to serve such uses, the more general words, "ways used, occupied, or enjoyed therewith," occur in the same deed. *Id.*

In an action of covenant on an indenture of lease by tenants in common, where the moiety of one of the plaintiffs is alleged in the declaration to have been conveyed to him by lease and release, but no profit is made of the deed of release:—Held, on special demurrer, that the declaration was on this ground defective; the deeds of lease and release, although contained in the same instrument, being separate and distinct deeds, and the latter deriving its entire efficacy from the common law. *Pentland v. Healey*, 1 Alcock & Napier, 165. (*Irish*). 904

G. having, in 1815, purchased the title of land of which he was seised in fee, in 1816, by a settlement on the marriage of his son, conveyed the land to trustees for his son's wife, "together with all profits, commodities, advantages, emoluments, hereditaments, and appurtenances, to the premises belonging or in anywise appertaining, and the reversion, &c.; and all the estate, right, title, interest, use, trust, possession, freehold, inheritance, reversion, possibility, property, challenge, claim, and demand whatsoever of him G. therein or thereto, or to any part or parcel thereof:"—Held, that the titles did not pass by this conveyance. *Chapman v. Gatcombe*, 2 Bing. N. R. 516. 903

Seemle, that a limitation in a settlement to the executors and administrators of A., for their own use and benefit, unconnected with any other limitation showing more specifically who are to take, is void for uncertainty. *Marshall v. Collett*, 1 Y. & Col. 232. 903

Seemle, that words at the end of a deed, following the "In cuius rei testimonium," &c., form no part of the deed. *Pearse v. Morrice*, 4 Nev. & M. 45; 2 Adol. & Ellis, 84. 899

A lease for years of tin mines and toll tin, determinable on lives, was granted in 1797, and was surrendered in 1810. Another was then granted on paying a fine, part of which was paid for the surrender of the former lease. In 1798, the lessor executed a lease of the surface:—Held, that a recital in that lease was admissible in evidence against the lessee of the mines and toll in 1810, for he cannot claim by any title prior to that date. *Crease v. Barrett*, 1 C. M. & R. 919; 5 Tyr. 458. 902

Where the truth appears by recitals in a deed, professing to convey a possibility, the party conveying is not barred by estoppel, although he has received the purchase money. *Doe d. Lumley v. Scarborough*, 4 Nev. & M. 724; 3 Adol. & Ellis, 2. 902

There may be an estoppel by matter of recital. *Rowman v. Taylor*, 2 Adol. & Ellis, 278; 4 Nev. & M. 264. 901

Declaration stated the execution of a deed by plaintiff and defendant. The plea did not traverse the execution, but alleged new matter, upon which the replication took issue. The deed was put in at the trial, and its recital directly contradicted the new matter alleged in the plea:—Held, nevertheless, that the defendant was not precluded from submitting such matter of defence to the jury, inasmuch as the plaintiff had not pleaded the recital of the deed by way of estoppel. And the judge *at nisi prius* having treated such deed as conclusive, and directed a verdict for the plaintiff, the court granted a new trial without entering into the question whether the plea was or was not bad. *Bowman v. Rostrow*, 4 Nev. & M. 552; 2 Adol. & Ellis, 295. 901

A party to a deed of conveyance is not estopped by recitals contained in other deeds through which the title so conveyed is derived. *Doe d. Shelton v. Shelton*, 4 Nev. & M. 567; 3 Adol. & Ellis, 265. 1 Har. & Woll. 287. 902

If a man executes a deed, in which a former deed is recited, to which he is a party, but which he has not executed, he does not thereby bind himself by all the conditions of the former deed in the same manner as if that also had been executed by him. *Id.*

A deed of assignment of a mortgage by demise, to which the original mortgagor, who was tenant in fee, and the mortgagee, were parties, recited the mortgage deed:—Held, in ejectment by the executor of the assignee of the mortgage, that this recital afforded sufficient evidence of title without producing the mortgage deed. *Doe d. Rogers v. Brook*, 1 Har. & Woll. 400. 903

*Confirmation and Alteration.*—The necessary parties met to execute a marriage settlement. Immediately after the conveying party had executed, and before the execution or assent by any other party, the father of the intended wife objected to a clause; the objection was acquiesced in, and the clause was struck out, and then the conveying party immediately re-executed, and the



other parties executed :—Held, that the execution of the deed was in *feri* only when the alteration took place, and that the alteration did not make a fresh stamp requisite. *Jones v. Jones*, 1 C. & M. 721; 3 Tyr. 890. 905

*Fraudulent or void.*—If A., being in custody on a charge of felony, convey all his property in trust for his wife for life, and then in trust for his son, and on the next day A. be convicted of the felony, this conveyance will be void as against the crown. *Morewood v. Wilkes*, 6 C. & P. 144—Tindal. 906

Copyholds are within the stat. 27 Eliz. c. 4, which avoids all conveyances of any lands, tenements, or hereditaments, made for the intent and of purpose to defraud and deceive persons that shall afterwards purchase the same. *Doe d. Tunstall v. Bottrill*, 5 B. & Adol. 131. 906

Fraudulent conveyance of land. *Butcher v. Harrison*, 1 Nev. & M. 677; 4 B. & Adol. 129. 907

Quære, whether a post-nuptial settlement made by a husband upon his wife at the instance of her friends, she having, at the time of her marriage, been entitled to legacies which were then in the hands of executors, and one of which continued to be so at the time of the settlement, is or is not a fraudulent conveyance within the stat. 27 Eliz. c. 6, so as to be void as against creditors and subsequent purchasers for value? *Doe d. Sweetland v. Webber*, 3 Nev. & M. 586; 1 Adol. & Ellis, 733. 907

In an ejectment brought by a person claiming under a post-nuptial settlement against a subsequent purchaser from the husband, declarations and admissions by the husband that he had received valuable consideration from the purchaser are not admissible in evidence. *Id.*

*Other things.*—Where A. executes a deed, and delivers it to B. as an escrow, to be delivered to C. on a certain event, possession of the deed by C. is *prima facie* evidence of the performance of the condition. *Hare v. Horton*, 2 Nev. & M. 428; 5 B. & Adol. 715. 900

A. having received monies from B., privately and without any communication with B., prepared and executed a mortgage to him for the amount. A. retained the deed in his custody for 12 years, and then died insolvent. After his death, the deed was discovered in a chest containing his title deeds :—Held, that the deed was not an escrow, there being no evidence to show that it was executed conditionally, but that it took effect from its execution, and was good against A.'s creditors. *Exton v. Scott*, 6 Sim. 31. 900

*Stamps.*—The counterpart of a lease for a term of years exceeding thirty-one years must, under 47 Geo. 2, c. 50, have a 2*l.* stamp on it to render it available in evidence as an original instrument of demise. *Moore v. Macabe*, 1 Alcock & Napier, 47. (*Irish*). 910

A feoffment in consideration of natural affection and also of 10*s.* does not, under 55 Geo. 2, c. 184, require two separate stamps of 1*l.* 15*s.* each. *Doe d. Wheeler v. Wheeler*, 4 Nev. & M. 10; 2 Adol. & Ellis, 28. 910

A., an architect employed to superintend the erection of certain buildings upon commission, by deed, assigns to D., a creditor, all the commission to which he then was or might thereafter be entitled in respect of such superintendence, upon trust to pay C. a certain debt due from A., and to retain the residue towards satisfaction of a certain debt due from A. to D., and in which deed are contained a power of attorney to receive the commission, and covenants that A. would pay the debt due to D., would not receive the commission, or revoke the power thereby given, or do any act by which D. might be hindered in receiving payment; that he had a right to assign, had not encumbered, and for further assurance :—Held, that this deed was not a mortgage but an absolute conveyance of the commission money; and that a conveyance stamp, calculated upon the amount of commission eventually received, was sufficient. *Pooley v. Goodwin*, 5 Nev. & M. 466; 1 Har. & Woll. 567. 910

The transfer duty on a mortgage is imposed only where no further sum is advanced. *Doe d. Bartley v. Gray*, 4 Nev. & M. 719; 3 Adol. & Ellis, 89; 1 Har. & Woll. 235. 910

Where an additional sum is advanced, it is sufficient to pay the *ad valorem* duty on the sum advanced. *Id.*

So, where the original mortgage is assigned to secure the mortgage money. *Id.*

A mortgage for years was given, before the passing of the 3 Geo. 4, c. 117, to secure the payment of 150*l.* After the passing of that act, the mortgagor and mortgagee joined in a conveyance in fee to a new mortgagee for 350*l.* The latter deed consisted of four skins, and had a 1*l.* 15*s.* stamp on the first, with an *ad valorem* stamp of 2*l.*, and 1*l.* on the second, third, and fourth;—Held, that these stamps were sufficient. *Id.*

Such a mortgage is a transfer of the old mortgage as to the original sum, and a new mortgage as to the further sum advanced, within the meaning of the 3 Geo. 4. *Id.*

Quære, whether a common deed stamp was necessary? *Id.*

Seemle, a mortgage to secure a principal sum, and also the costs of the trustees, and a reasonable sum by way of compensation to them for their trouble, requires only a stamp of such an amount as will cover the principal sum. *Paddon v. Bartlett*, 4 Nev. & M. 1; 2 Adol. & Ellis, 9. 910

## DEFAMATION.

*Generally.*—The question in an action for words, is not what the party using them considered their meaning, by any secret reservation in his own mind, but what he meant to have un-



derstood as their meaning by the party to whom he uttered them. *Read v. Ambridge*, 6 C. & P. 308—Denman. 915

Where a verdict has been found with damages in an action of defamation for words imputing felony, the court will not stay the proceedings or grant a new trial, on the ground that since the trial the plaintiff has been convicted and attainted of the same felony: *a fortiori*, where the defendant has been examined as a witness upon the trial of the indictment. *Symms v. Blake*, 2 C. M. & R. 416; 4 Dowl. P. C. 263; 1 Gale, 182. 915

*Publication.*—If the publication of a libel consists in merely selling a few copies of a periodical, in which, *inter alia*, it is contained, one question for the jury is, did the parties know what it was they were selling? *Chubb v. Flannigan*, 6 C. & P. 431—Park. 917

On the trial of an action against the publisher of a monthly periodical for a libel contained in it, articles published from month to month alluding to the action, and attacking the plaintiff, are receivable as evidence *quo animo* the libel was published, and as showing that the publisher considered it as applying to the plaintiff. *Chubb v. Westley*, 6 C. & P. 436—Park. 917

If the printer and the editor of a magazine be sued for a libellous article contained in it, they are both liable for a libellous lithographic print which is contained in the work, though it was not printed by the printer, provided that the print is referred to in the letter-press part of the libellous article. *Watts v. Fraser*, 7 C. & P. 369—Denman. 916

A defendant cannot justify a repetition of slanderous words, by merely showing that at the time when he repeated them, he stated that he had heard them from another, whom he named; he must also show that he repeated them upon a justifiable occasion, and that he believed them to be true. *M'Pherson v. Daniels*, 5 M. & R. 251. 922

If a defendant in an action for verbal slander, at the time of speaking the slander, gave up the name of the person from whom he heard, this is no justification; but if he did this, and at the trial prove that he did in fact hear the slander from that person, it will go in mitigation of damages. *Bennett v. Bennett*, 6 C. & P. 586—Alderson. 922

A letter, written by the defendant, and containing a libel, was dated in Essex, and addressed to a person in Scotland. It was proved to have been in the Colchester post-office, and after being marked there, to have been forwarded to London, on its way to Scotland. It was produced at the trial with proper post-marks, and with the seal broken, but not by the party to whom it was addressed:—Held, sufficient *prima facie* evidence of a publication in Essex, and that it had reached its address in Scotland. *Warren v. Warren*, 4 Tyr. 850; 1 C. M. & R. 150. 616

*Confidential Communications.*—Confidential

communications. *Moore v. Terrell*, 4 B. & Adol. 871; 1 Nev. & M. 559. 918

A defamatory communication from A. to B. respecting the inmates of the house occupied by B. as his tenant, is privileged, when such communication is made *bona fide* in consequence of the relation of landlord and tenant, and without malice in fact. *Knight v. Gibbs*, 3 Nev. & M. 467; 1 Adol. & Ellis, 43. 917

A. was engaged to superintend the works of a railway company, and subsequently, at a general meeting of the proprietors, the engagement was not continued, but a former inspector was reinstated. A vacancy subsequently occurred in the situation of engineer to the commissioners for the improvement of the river Wear, and A. became a candidate. B. wrote to C., introducing D. as a candidate, and C., having written to B., informing him that another person had succeeded in obtaining the appointment, B. wrote an answer to C., reflecting on the conduct of A. whilst in the situation of engineer to the railway company. There was a subsequent election, at which A. was unsuccessful, in consequence of this letter having been shown. It appeared that B. and C. were both shareholders in the railway company, and that B. managed C.'s affairs in the railway. B. had not been applied to for his opinion, and the letter containing the libel was written after the termination of one election, and before the other was in contemplation:—Held, in an action by A. against B. for the libel, that the letter was not a privileged communication. *Brooks v. Blanchard*, 1 C. & M. 779; 3 Tyr. 844. 917

A., the tenant of a farm, required some repairs to be done to the farm-house, and B., the agent of the landlord, directed C. to do the work. C. did it, but in a negligent manner, and during the progress of it got drunk; and some circumstances occurred which induced A. to believe that C. had broken open his cellar door and obtained access to his cider. A., two days afterwards, met C. in the presence of D., and charged him with having broken open his cellar door, and with having got drunk and spoiled the work. A. afterwards told D., in the absence of C., that he was confident C. had broken open the door. On the same day A. complained to B. that C. had been negligent in his work, had got drunk, and he thought he had broken open his cellar:—Held, that the complaint to B. was a privileged communication, if made *bona fide*, and without any malicious intention to injure C.:—Held, also, that the statement made to C., in the presence of D., was also privileged, if done honestly and *bona fide*; and that the circumstance of its being made in the presence of a third person does not of itself make it unauthorized; and that it was a question to be left to the jury to determine from the circumstances, including the style and character of the language used, whether A. acted *bona fide*, or was influenced by malicious motives:—Held, also, that the statement to D., in the absence of C., was unauthorized and officious, and therefore not protected, although made in the belief of its truth, if it were in point



of fact false. *Toogood v. Spyring*, 1 C. M. & R. 181; 4 Tyr. 582. 917

Defendant having some cause for suspicion, went to the plaintiff's relations, and charged him with theft; it appearing, however, that his object in making the communication was rather to compromise the felony than to promote inquiry, or to enable the relations to redeem the plaintiff's character:—Held, that this was not a privileged communication, that malice must be implied, and that the existence of it was not a fact to be left for the consideration of a jury. *Hooper v. Truscott*, 2 Bing. N. R. 457. 917

A letter to the manager of a property in Scotland in which the plaintiff and defendant were jointly interested, related principally to the property and the plaintiff's conduct respecting it, but also contained a passage reflecting on his conduct to his mother and aunt:—Held, that the latter part could not be privileged as a confidential communication. *Warren v. Warren*, 4 Tyr. 850; 1 C. M. & R. 150. 917

The meaning, in law, of a privileged communication, is, a communication made on such an occasion as rebuts the prima facie inference of malice arising from the publication of matter prejudicial to the character of the plaintiff, and throws upon him the onus of proving malice in fact, but not of proving it by extrinsic evidence only; he has still a right to require that the alleged libel itself shall be submitted to the jury, that they may judge whether there is any evidence of malice on the face of it. *Wright v. Woodgate*, 2 C. M. & R. 573; 1 Tyr. & G. 12. 917

The defendant was a solicitor employed in an equity suit on behalf of the plaintiff, a minor. The plaintiff was desirous of changing his solicitor, and informed the defendant of it. The defendant thereupon wrote a letter to the plaintiff's next friend, (who was liable for the costs of the suit), dissuading him from giving any directions in the matter, and alleging, among other observations on the plaintiff's conduct, that a civil engineer, to whom the plaintiff had been apprenticed, had made him a present of his indentures, because he was worse than useless in his office:—Held, that this was a privileged communication. *Id.*

The plaintiff, a dissenting minister, accompanied by a friend to the defendant, who, in answer to questions put by plaintiff and his friend, stated that his (the defendant's) wife had been cautioned against the plaintiff as a drunkard, &c.:—Held, that this was a privileged communication, and that slanderous expressions used in it were not actionable, if the defendant spoke bona fide, and was not actuated by malice:—Held, also, that it was incumbent on the plaintiff to prove that the defendant was actuated by malicious motives. *Warr v. Jolly*, 6 C. & P. 497—Alderson. 917

A letter written to the postmaster general, or to the secretary to the general post-office, complaining of misconduct in a post-master, is not a libel, if it was written as a bona fide complaint to obtain redress for a grievance, that the party

really believed he had suffered; and particular expressions are not to be strictly scrutinized, if the intention of the defendant was good. *Woodward v. Lander*, 6 C. & P. 548—Alderson. 917

*Character of Servants.*—A statement made by a late master of a servant to another person who had thoughts of engaging that servant, is not privileged, where, from other evidence, though of a slight description, the jury has inferred actual malice. *Kelly v. Partington*, 2 Nev. & M. 460; 4 B. & Adol. 700. 919

*Reports of Proceedings.*—The defendant published an account of the proceedings under a commission of lunacy, which the plaintiff had attended as a witness, and stated that the plaintiff's testimony, "being unsupported by that of any other person, failed to have any effect on the jury." "The object was to set aside a will." "Mr. Jervis commented with cutting severity on the testimony of Mr. O." (the plaintiff):—Held, that the whole taken together was a libel, and that a plea justifying only the words, "Mr. Jervis commented with cutting severity on the testimony of Mr. O.," was ill. *Roberts v. Brown*, 10 Bing. 519; 4 M. & Scott, 407. 921

A libel purported to be a report of what occurred before one of his Majesty's commissioners of inquiry respecting corporations:—Held, that the defendant could not give evidence of the accuracy of the report as a matter of justification, but that he might give such evidence in mitigation of damages:—Held also, that, if he did so, the plaintiff might give evidence in reply, to show the inaccuracy of the report. *Charlton v. Walton*, 6 C. & P. 385—Patteson. 921

Though one part of a statement taken alone be injurious to a man's character, if the jury think that the effect of that part is removed by the other part of the statement, it is not a libel. *Chalmers v. Payne*, 2 C. M. & R. 156; 1 Gale, 69. 921

In an action for a libel, on not guilty pleaded, it appeared that the libel (which was contained in a newspaper) purported to be an account of the trial of a former action, brought by the same plaintiff for a libel against third parties; and after stating the libel in the original action, and the facts proved by the then defendants, and the summing up of the judge, stated that the jury found a verdict for the plaintiff, with 300. damages. No evidence was given as to any such trial having in fact taken place, or whether the report was fair or not. The judge left it to the jury to say, whether the report, although it contained some allegations injurious to the plaintiff, was, if taken altogether with the statement of the verdict being in his favor, injurious to the plaintiff on the face of it; and the jury having found for the defendant, the court refused to grant a rule for a new trial. *Id.*

*Words of Crime.*—Words of crime. *Williams v. Stott*, 1 C. & M. 675; 3 Tyr. 688. 924



The words, "he robbed J. W.," are actionable, as imputing an offence punishable by law—*Per Denman, C. J., and Parke, J.; Littledale dubitante. Tomlinson v. Brittlebank, 4 B. & Adol. 630; 1 Nev. & M. 455.* 924

If they were used in any other sense the defendant must show it. *Id.*

The words, "you have done an act for which I can transport you:"—Held, actionable without colloquium or innuendo. *Curtis v. Curtis, 4 M. & Scott, 337; 10 Bing. 447.* 924

The words, "he is a thief, and robbed me of my bricks:"—Held, actionable without any introductory averment. *Slowman v. Dutton, 10 Bing. 402; 4 M. & Scott, 174.* 924

A declaration for slander stated by way of inducement, that plaintiff was a pork-butcher, and then charged defendant with publishing to plaintiff, in the presence of other persons, these words of and concerning the plaintiff:—"You are a bloody thief! who stole F.'s pigs? You did, you bloody thief, and I can prove it: you poisoned them with mustard and brimstone." Innuendo, the plaintiff was guilty of pig-stealing. The jury found that the words were not intended to impute felony, but were spoken of plaintiff in relation to his trade:—Held, that the plaintiff was not entitled to recover, as the words used did not show that they were spoken of him in relation to his trade, and no colloquium concerning his trade was laid in the declaration. *Sibley v. Tomlins, 4 Tyr. 90.* 924

In an action for libel, to support a plea of justification, stating that the plaintiff had forged and uttered, knowing it to be forged, a certain bill exchange; to justify a verdict for the defendant, the same evidence must be given as would be necessary to convict the plaintiff, if he were on trial for those offences; but if the evidence falls short of satisfying the jury that the strict legal offence was committed, they may take the facts proved into their consideration, in estimating the damages. *Chalmers v. Shackell, 6 C. & P. 475—Tindal.* 924

The plaintiff brought an action for slander, and the words spoken were, "who stole the parish bell ropes?" Innuendo, that the plaintiff, whilst churchwarden, had stolen the parish bell ropes:—Held, that the churchwarden had the possession of the bell ropes belonging to the church, and that he could not be guilty of stealing them; and, therefore, no action would lie for the words spoken, as they did not impute an indictable offence. *Jackson v. Adams, 2 Scott, 599; 2 Bing. N. R. 402; 1 Hodges, 339.* 924

The words so laid in the declaration were held not to be proved by evidence of a conversation, in which the defendant charged the plaintiff with fraudulently selling the ropes for a smaller sum than he had given for them. *Id.*

**Charge of Fraud and Swindling.**—A libel contained in an advertisement by two tradesmen in partnership, stating that they deemed it necessary to caution their friends against a fraudulent re-

presentation that any part of their business had been removed, it being obvious that their concern was still carried on solely at No. 9, Mansion House Street, and that they had no connexion with a shop recently opened in another place, under circumstances grossly misrepresented, and highly discreditable, with a view of defrauding them of a part of their business—is not justified by proof that the person alluded to (who had been for several years in partnership with them) had issued a bill, in which, after thanking his friends for their favors during his residence at No. 9, opposite the Mansion House, he stated that he had removed his establishment to another place, where the business would be carried on under the firm of R. R. C. & Co.; and, in addition to this, had put over his shop door, "R. R. C. & Co., removed from opposite the Mansion House." *Chubb v. Flannigan, 6 C. & P. 431—Park, J.* 925

Defendants justified and proved the truth of a libel, charging the plaintiff with having acted in a grand swindling concern at Manchester, but omitted any justification of the following passage:—"As we have already stated, Clarke had been at Leeds for one or two days before his arrival in this town, and is supposed to have made considerable purchases there; it is hoped, however, that the detection of his plans in Manchester will be learned in time to prevent any very serious losses from taking place. We have already stated that Clarke referred Mr. Norris to a stockbroker in London, a Mr. Peacock we believe, to whom Mr. Norris wrote for information respecting Clarke's circumstances. He received a reply from Mr. Peacock, stating that Mr. Clarke had been introduced to him by a very respectable party; that he had sold stock for Clarke amounting to 1700*l.*, and had introduced him to Messrs. Jones, Lloyd & Co., with whom he had opened an account by depositing 2000*l.* We believe there is not the slightest reason to doubt the truth of Mr. Peacock's statement, and the probability is, that Clarke had been furnished with the stock, and an introduction had been obtained to the stockbroker for the purpose of giving color to his proceedings here and in Yorkshire." A jury having found for the defendants on the part of the libel which was justified, the court refused to enter a verdict for the plaintiff on the passage not justified. *Clarke v. Taylor, 2 Bing. N. R. 654.* 925

**Professional Misconduct.**—It is no objection to maintaining an action for a libel on an attorney, that it appeared that, during the time of the grievances stated in the declaration, the plaintiff had omitted to take out his certificate as required by the stat. 37 Geo. 3, c. 90, for more than a year, as he might still sue as an attorney for damages in consequence of a libel, imputing improper conduct to him in his character as such. *Jones v. Stevens, 11 Price, 235.* 926

In an action of slander for words spoken of the plaintiff as a physician, importing a denial that the plaintiff is duly qualified to practise as a physician, the plaintiff must, under the general issue, prove the inducement in the declaration, alleging



that the plaintiff had exercised the profession of and was a physician, and show not only that he practised as a physician, but also that he practised lawfully. *Collins v. Carnegie*, 3 Nev. & M. 703; 1 Adol. & Ellis, 635. 927

In an action on the case for defamation, for words charging a physician with adultery, it is not sufficient (unless special damage be alleged) to state that the misconduct was imputed to the plaintiff in his profession. *Ayre v. Craven*, 4 Nev. & M. 220; 2 Adol. & Ellis, 2. 927

The declaration ought also to set forth in what manner such misconduct was connected by the speaker with that profession. *Id.*

Therefore, where the declaration alleged that words containing such an imputation were spoken of and concerning the plaintiff's carrying on the profession of a physician, and of and concerning him in his profession, without more, judgment was arrested. *Id.*

Quere, whether words imputing to a physician that he had taken advantage of the opportunities afforded him by his profession to commit acts of adultery, would be actionable without special damage? *Id.*

In an action for slander of an attorney, the judge nonsuited the plaintiff, on the ground that the words were mere general abuse, and not of and concerning him in his professional character, and it was not insisted on at the trial that the question ought to be submitted to the jury; the court refused to set aside the nonsuit and grant a new trial. *Tomlinson v. Brittlebank*, 1 Har. & Woll. 573. 927

*Ridicule and Contempt.*—Words of ridicule and contempt. *Digby v. Thompson*, 4 B. & Adol. 821; 1 Nev. & M. 435. 928

Where one newspaper copied a libellous paragraph from another, adding the word "fudge" at the close:—Held, in an action by the party libelled against the publisher of the paper in which the word "fudge" was added, that it was for the jury to say whether the object was to vindicate the character of the party by the addition of the word, or whether it was only introduced for the purpose of creating an argument in case proceedings should be afterwards taken. *Hunt v. Algar*, 6 C. & P. 245—*Lyndhurst*. 928

*Special Damage.*—In order to support an action for defamatory words actionable only in respect of special damage, it is not necessary that the person whose act constitutes the special damage should have believed the defamatory charge, provided that he acted in consequence of the words having been spoken. *Knight v. Gibbs*, 3 Nev. & M. 467; 1 Adol. & Ellis, 43. 930

Words are not actionable, with special damage, unless they are of themselves disparaging. *Kelly v. Partington*, 3 Nev. & M. 117; 5 B. & Adol. 645; 2 Nev. & M. 460; 4 B. & Adol. 700. 930

Declaration in slander. The second count stated that the defendant, contriving and intend-

ing to injure the plaintiff as a shopwoman and servant, maliciously spoke of her as such the following words:—"She (meaning the plaintiff) secreted 1s. 6d. under the till, stating these are not times to be robbed." The declaration alleged as special damage that one S., by reason of the words, refused to take the plaintiff into his service. After a general verdict for the plaintiff, it was held, that the words in the second count, if actionable at all, were so only by reason of the special damage, and, therefore, that the plaintiff, if entitled to recover, ought to have full costs:—Held, secondly, on motion in arrest of judgment, that the words in that count were not defamatory in their nature, and therefore were not actionable, even though followed by special damage. *Id.*

Semble, that the proprietor of a newspaper, convicted and fined for the publication of a libel in the paper, inserted without his knowledge and consent by the editor, cannot recover against the editor the damages sustained by such conviction. *Colburn v. Patmore*, 1 C. M. & R. 73; 4 Tyr. 677. 930

*Action for Defamation.*—Action by husband and wife. *Saville v. Sweeney*, 4 B. & Adol. 514; 1 Nev. & M. 554. 932

An act of parliament, after reciting the difficulties experienced by joint-stock companies in suits for recovering debts and enforcing obligations, and in the prosecution of offenders, enacted, that actions commenced by the Hope Company for recovering debts, enforcing claims or demands then due, or which thereafter might become due or arise to the company, might be commenced, and indictments for offences be preferred in the name of the chairman:—Held, that the chairman might sue for a libel on the company, although it was not a corporate body. *Williams v. Beaumont*, 10 Bing. 260. 932

No valid judgment can be given upon an assessment of entire damages upon several counts in slander, one of which counts discloses no cause of action. *Day v. Robinson* (in error), 4 Nev. & M. 884; 1 Adol. & Ellis, 554. 937

And when a judgment had in fact been given for the plaintiff to recover damages so assessed, a venire de novo was awarded. *Id.*

In an action for slander after a verdict for the plaintiff with 100l. damages, the court refused to allow the defendant to have a new trial, and to be allowed to plead the truth of the words upon any terms, though it was alleged that there was ample evidence to support a justification, and the general issue only was pleaded through the mistake of the pleader, which was not discovered till the day before the trial by the counsel, when an application had been made for leave to add a justification; but the defendant did not swear that he had never used the words, and one of the witnesses had pointed out the want of a special plea a considerable time previously. *Kirby v. Simpson*, 3 Dowl. P. C. 791. 937

Where, after notice of declaration in an action of slander, the defendant signs a paper containing



an apology, and a statement, that at his request the plaintiff has consented, on his paying the costs as between attorney and client, and making such apology, to stay the proceedings thereon, and notice of trial is accordingly countermanded, the court will require the defendant to pay such costs, and empower the defendant to sign judgment as for want of a plea, in case of non-payment thereof. *Yardrew v. Brook*, 2 Nev. & M. 835; S. C. nom. *Tardrew v. Brook*, 5 B. & Adol. 880. 937

*Pleadings.*—An allegation that the defendant said to the plaintiff, "she secreted 1s. 6d. under the till," stating, "these are not times to be robbed," was held to import that the plaintiff, when secreted the 1s. 6d., had used the latter words, and that therefore the allegation did not contain that which was actionable per se, so as to disentitle the plaintiff to full costs where the verdict was under 40s. *Kelly v. Partington*, 2 Nev. & M. 460; 4 B. & Adol. 700. 932

*Innuendo.* *Williams v. Stott*, 1 C. & M. 675; 3 Tyr. 688. 934

*Innuendo.* *Sweetapple v. Jesse*, 5 B. & Adol. 27; 2 Nev. & M. 36. 934

Defendant wrote concerning plaintiff, "he is so inflated with 300l. made in my service, God only knows whether honestly or otherwise, that," &c.:—Held, without any preliminary averment, to warrant an innuendo that plaintiff had conducted himself in a dishonest manner in the defendant's service. *Clegg v. Laffer*, 3 M. & Scott, 727; 10 Bing. 250. 934

The declaration in an action for a libel stated that the defendant, in whose service the plaintiff had formerly been as a gardener, wrote to his master, "I have reason to suppose that many of the flowers of which I have been robbed are now growing in your garden." *Innuendo*, "meaning that the plaintiff had been guilty of larceny, and had stolen certain plants, roots, and flowers."—Held, that after verdict, it might be intended that the plaintiff had taken flowers before, and so the libel charged a second offence, which would be larceny; or that the flowers were not growing in the soil at the time of the taking. *Semble*, that the innuendo did not enlarge the sense of "flowers;" or that if it did, the words "plants and roots" might be rejected as surplusage. *Gardiner v. Williams*, 2 C. M. & R. 78; 1 Gale, 89. 934

In libel, one of the counts set forth the following passage of a letter from the defendant to one P.:—"I have reason to suppose that many of the flowers of which I have been robbed are growing upon your premises," (thereby meaning that the plaintiff had been guilty of larceny, and had stolen from the defendant certain plants, roots, and flowers of the defendant, and had unlawfully disposed of them to P., and unlawfully placed them in P.'s garden). The previous part of the letter stated that the plaintiff, whom P. had taken into his employ as a gardener, had been in the defendant's service in the same capacity, and had been discharged for dishonesty:—Held, on error, that the innuendo was not too large, and that the

count was good. *Williams v. Gardiner* (in error), 1 Mees. & Wels. 245. 934

A count in a declaration for slander laid the words as follows:—"You have robbed me of one shilling tan money;" and the innuendo explained the meaning to be that the plaintiff had fraudulently taken and applied to his own use one shilling received by him for the defendant, being the produce of the sale of some tan sold by the plaintiff for and as servant to the defendant; but the facts stated in this innuendo were not alleged by any independent averment in the declaration:—Held, that the innuendo was bad, as introducing new facts; and that, without the innuendo, the count did not charge words actionable in themselves. *Day v. Robinson* (in error), 4 Nev. & M. 884; 1 Adol. & Ellis, 554. 934

A declaration for words imputing that tulips of the plaintiff, about to be sold by auction, were stolen property, whereby purchasers were deterred from bidding, and the sale was defeated, was held bad in arrest of judgment, for not setting out the words verbatim. *Gutsole v. Mathers*, 1 Mees. & Wels. 495. 933

The declaration, having stated that the tulips were about to be sold by auction, alleged that the defendant asserted and represented that the said tulips were stolen property:—Held, that this was sufficient without stating that he spoke the words of and concerning the said tulips, the property of the plaintiff. *Id.*

A declaration in case for words "that the plaintiff had set fire to his own barley stack," averred that the stack was insured, and was burnt without his own default, and that the defendant spoke the words of and concerning the plaintiff and the fire:—Held bad on demurrer. *West v. Smith*, 4 Dowl. P. C. 703. 933

A plea in bar, which merely denies that the plaintiff has sustained special damage, is bad, where the words are actionable in themselves. *Smith v. Thomas*, 2 Scott, 546; 4 Dowl. P. C. 333; 2 Bing. N. R. 372; 1 Hodges, 353. 934

In an action of slander, the plea of privileged communication must allege that the defendant made the communication on a lawful believing it to be true, and without malice; or at least bona fide. *Id.*

In an action for slander, the declaration alleged that the defendant falsely and maliciously spoke certain words insinuating that the plaintiff was in embarrassed circumstances, and unfit to be trusted in business. The plea justified the speaking of the words in a communication made by the defendant to a tradesman who made inquiries of him in the way of his trade, respecting the state of the plaintiff's affairs, and it was alleged that the defendant believed the statement to be true:—Held, on special demurrer, that the plea was insufficient, because it neither expressly denied malice, nor stated the publication to have been made honestly and bona fide, which might have amounted to an implied denial of malice. *Id.*

*Evidence.*—In an action of slander, imputing to the plaintiff that he was the writer of a scan-



dalous letter reflecting on the defendant, the latter in one of his pleas set forth the letter and justified the words spoken. The court permitted the plaintiff to inspect the letter with witnesses, in order that he might be prepared at the trial to show that it was not in his handwriting. *Curtis v. Curtis*, 3 M. & Scott, 819. 935

In an action for libel, the libel, as set out on the record, imputed to the plaintiff "mismanagement or ignorance." The evidence was, that the expression in the libel (which had been destroyed) was "ignorance or inattention:"—Held, a fatal variance. *Brooks v. Blanshard*, 1 C. & M. 779; 3 Tyr. 844. 935

If the declaration in case for a libel state, inter alia, that at a certain place certain meetings for the promotion of sedition and blasphemy had been held, and that the defendant published of and concerning the plaintiff, and of and concerning the other matters, and of and concerning the said meetings, a libel charging him among other things with having taken the chair at the said place, but not saying any thing of the character of the meetings there, it will not be ground of nonsuit should the plaintiff at the trial fail to prove that the meetings were such as he described in his inducement. *Chalmers v. Shackell*, 6 C. & P. 475—Tindal. 935

Slandrous words, charged as addressed to the plaintiff in the second person, are not supported by evidence of words spoken of him in the third person, though so spoken in his presence. *Stannard v. Harper*, 5 M. & R. 295. 935

If, in a case of libel, the defendant in his plea state certain specific facts on which he justifies the publication, a letter written by the plaintiff which does not go to prove any of the specific facts alleged in the plea, is not admissible in evidence for the defendant. *Moscatti v. Lawson*, 7 C. & P. 32—Alderson. 935

In an action for a libel against the printer of a newspaper, one of the proprietors of the newspaper is a competent witness for the defendant, as he is not liable for contribution. *Id.*

In an action for slander, a writ of inquiry issued in a former suit against the defendant for speaking similar slanderous words, may be received in evidence to prove malice. *Jackson v. Adams*, 1 Hodges, 78. 935

In an action for slander, the plaintiff may give evidence of anything that the defendant afterwards said, that goes to show malice in the defendant, provided that it cannot be the subject of another action; therefore, the plaintiff may give evidence that the defendant repeated the same words at a subsequent time, or spoke on the subject of this action, but cannot go into evidence of other words subsequently spoken, if those words may be the subject of another action. *Defries v. Davis*, 7 C. & P. 112—Tindal.

On the trial of an action for slander, the plaintiff may go into evidence to show that he had recovered in a previous action for slander against the defendant's son, and that after the trial of that action, he sent to the defendant's attorney to compromise the present action. *Id.*

If, in an action for libel, the defendant by his

pleading admits the publication, the plaintiff is still at liberty to show the manner of the publication, with a view to the amount of damages. *Vines v. Serell*, 7 C. & P. 163—Park. 935

In an action for a libel published in a newspaper, the defendant cannot go into evidence in mitigation of damages, to show that the same libel had appeared in another newspaper, from which the plaintiff had already recovered damages; but the defendant may show that he copied the libel from another newspaper, and omitted several passages contained in that newspaper which reflected on the character of the plaintiff. *Creevey v. Carr*, 7 C. & P. 64—Gurney. 936

In an action for a libel the defendant may, in mitigation of damages, give in evidence other libels published recently before by the plaintiff of the defendant, with a view of showing a provocation by the plaintiff; and a witness may be also asked, whether the plaintiff has not previously published attacks on the defendant, but the judge will caution the jury not to consider one libel as at all like a set-off against the other. *Watts v. Fraser*, 7 C. & P. 369—Denman. 936

In an action for libel, the defendant may give evidence of provocation in mitigation of damages, and may for that purpose show that the plaintiff had used expressions calculated to provoke him, both in writing and verbally. *Trapley v. Blaby*, 7 C. & P. 395—Tindal; *S. C. nom. Trapley v. Blabey*, 2 Bing. N. R. 437. 936

In order to the admission in evidence of libels by the plaintiff in mitigation of damages, it must be shown with precision that such libels relate to the libels by the defendant. *Id.*

A libellous paper, in the handwriting of the defendant, found in the house of the editor of a newspaper in which the libel complained of appeared, is admissible in evidence against the defendant, notwithstanding several parts of it have been erased, and are omitted in the newspaper, provided the passages erased do not qualify the libel. *Trapley v. Blabey*, 2 Bing. N. R. 437; *S. C. not S. P. nom. Trapley v. Blabey*, 7 C. & P. 395. 936

## DETINUE.

In detinue for several things, the court will not, on motion, assess the damages as to one article, and strike it out of the declaration on its being delivered up to the plaintiff. The object of the application was afterwards obtained by consent. *Phillips v. Hayward*, 3 Dowl. P. C. 362; 1 Har. & Woll. 108. 937

The bailment cannot be traversed in detinue. *Walker v. Jones*, 2 C. & M. 672; 4 Tyr. 915. 937

If, in an action of detinue against an attorney for not delivering up papers to his client after his bill has been paid, the defendant plead non detinet, the plaintiff must prove that the papers were in the defendant's possession; but evidence that they were produced by his agent before the Master, on the taxation of his bill, is sufficient proof of his possession. *Anderson v. Passman*, 7 C. & P. 193—Coleridge. 937

If a defendant, in an action of detinue for



papers, set up as a defence that he delivered up the papers to K., in pursuance of a notice from the plaintiff's attorney to that effect, the plaintiff's counsel may call K. as a witness in reply, to prove that he received the papers in another right, and not on behalf of the plaintiff; and K. is a competent witness to prove that he has a lien on the papers as against the defendant. *Id.*

In an action of detinue for papers, the jury must find the value of each paper separately; and it is the duty of the plaintiff to prove the value of the articles he sues for. *Id.*

### DISTRESS.

*Persons distraining, and Rent.*—Where a landlord is entitled to a term of years, and dies without appointing an executor, a distress for rent made after his death, and before any grant of administration, cannot be justified. *Keane v. Dee*, 1 Alcock & Napier 496, n. (*Irish*). 939

The goods of C. found upon land, out of which a rent-charge has been granted by A. to B., are liable to the distress of B., unless C. has an interest in the land paramount to that which A. had at the time of the grant. *Saffery v. Elgood*, 3 Nev. & M. 346; 1 Adol. & Ellis, 191. 940

Defendant reserved rent, payable quarterly, or half-quarterly, if required. Defendant having received the rent quarterly for a twelvemonth; held, that he could not, without notice, distrain for a half-quarter's rent. *Mallam v. Arden*, 10 Bing. 299; 3 M. & Scott, 793. 940

If a plea allege that the plaintiff held as tenant to the defendant under a demise, and the plaintiff replies generally, the law presumes that the reversion is in the landlord, and that, therefore, he has a right to distrain. Any question as to be landlord's reversion should be raised on a special replication. *Hooker v. Nye*, 4 Tyr. 477: 1 C. M. & R. 258. 939

Where a promissory note, payable after date, was given by a tenant to his landlord on account of rent due, without there being any distinct agreement between the parties, that it should operate as a suspension of the right to distrain:—Held, that it had not that effect. *Davis v. Gyde*, 4 Nev. & M. 462; 2 Adol. & Ellis, 623; 1 Har. & Woll. 50. 944

If a note given with such an agreement would have the effect of suspending the right to distrain, the agreement must be specially pleaded in bar to the avowry, as well as the fact that the note was given on account of the rent. *Id.*

A promissory note given by a tenant to his landlord, on account of rent due, is no extinguishment of the right to recover the amount by distress until it is paid. *Id.*

From an agreement to which the landlord of a farm is privy, for a sale by the tenant of some estate of pasture to A. B., the amount produced by the sale to be paid to the landlord, a contract by him may be inferred not to distrain cattle put on the demised land to consume the estate.

*Horsford v. Webster*, 1 C. M. & R. 696; 5 Tyr. 409; 1 Gale, 1. 944

*What may be distrained.*—Replevin for taking goods and standing corn. Cognizance, that, by deed of 25th September, 1806, A. granted to B. an annuity, charged on the premises, with power to enter and distrain for the arrears, and the distresses "to detain, manage, sell, and dispose of in the same manner in all respects as distresses for rents reserved on leases for years," and that C. as B.'s bailiff entered and distrained for arrears of that annuity. Plea in bar, that by (previous) deed of 7th May, 1806, A. granted to D. an annuity charged on the (same) premises; and for better securing the payment granted, sold, and demised them to E. for 99 years with power of distress; and that arrears had accrued and were due:—Held, first, that as no entry appeared by E., the first grantee, or by any person in privity with him, after the demise of 7th May, 1806, no estate vested in him at common law by that deed; secondly, that as no election appeared by E., the first grantee, to take under that deed as a bargain and sale, pursuant to the statute of uses, and as the plaintiff in replevin was not shown to be other than a stranger to that deed, the court could not, at his request, make that election for E., which would defeat the distress by B. under the subsequent deed of 25th Sept. 1806. *Miller v. Green* (in error), 2 C. & J. 143; 2 Tyr. 1; 8 Bing. 92; 1 M. & Scott, 199. 941

A tenant's growing crops, taken in execution and sold, and remaining on the premises a reasonable time for the purpose of being reaped, are not distrainable by the landlord for rent become due after the taking in execution. *Wright v. Dewes*, 3 Nev. & M. 790; 1 Adol. & Ellis, 641. 941

Such crops having been so taken, sold, and left on the premises, and the arrears of rent paid, pursuant to stat. 8 Anne, c. 14, s. 1, the landlord cannot distrain them for rent subsequently due, on the ground that the purchaser has not entered into the agreement with the sheriff, (to use and expend the produce in a proper manner), directed by stat. 56 Geo. 3, c. 50, s. 3. Nor is he entitled to presume, from the absence of such agreement, that the straw of such crops, was sold for the purpose of being carried off the land, contrary to sect. 1. *Id.*

All goods sent to a tradesman for the purpose of being wrought upon in the way of his trade, are, during the time that they remain in his custody, protected from distress. *Brown v. Shevil*, 4 Nev. & M. 277; 2 Adol. & Ellis, 138. 942

As the carcass of a beast in the custody of a butcher, sent to him for the purpose of being slaughtered for the sender. *Id.*

So, although the sender be also a butcher. *Id.*

An action is not maintainable for distraining beasts of the plough, when there is not other sufficient subject of distress on the premises but growing crops. *Piggott v. Birtles*, 1 Mees. & Wels. 441. 942



*When and how to be made.*—A landlord cannot justify making a distress for rent after dark. *Alldenburgh v. Peale*, 6 C. & P. 212—Parke. 943

The stat. 8 Anne, c. 14, s. 6, which enables a landlord to distrain after the determination of a tenancy, does not apply to cases where the tenancy is put an end to by the tenant's wrongful disclaimer. *Doe d. David v. Williams*, 7 C. & P. 322—Patteson. 942

A broker's man having taken possession of property under a distress for rent, after remaining two days, left the house in a state of great excitement, bordering on insanity. The landlord thinking that his leaving had been procured by the drugging of his liquor by the parties in the house, but which was not proved, six days after broke into the house and took away the goods, without any previous demand of admission:—Held, that he had no right to enter again after so long a delay, and that the owner of the goods might maintain trover for them. *Russell v. Rider*, 6 C. & P. 416—Bosanquet. 943

There is no statutory limit to the amount of the costs and charges for levying and impounding a distress for rent above 20*l.*, where it is impounded on the premises by virtue of 11 Geo. 2, c. 19, s. 10. *Child v. Chamberlain*, 3 Nev. & M. 520; 5 B. & Adol. 1049; 6 C. & P. 213. 943

The 57 Geo. 3, c. 93, regulating the costs and charges for levying and disposing of a distress for rent under 20*l.*, does not apply to a case of a distress taken for more than 20*l.* made of goods which are appraised at and sold for less than that amount. *Id.*

The statute of Westminster 2, c. 27, which requires distresses to be made by brokers sworn and known, does not extend to distresses for rent. *Id.*

If goods be distrained for rent, the landlord must wait five whole days, i. e. five times twenty-four hours, before he sells, and if he does not, he is liable to an action. Thus, where a distress was made on Friday at two, p. m., and the sale was on the following Wednesday at eleven, a. m., the sale was held to be wrongful. *Harper v. Taswell*, 6 C. & P. 166—Tindal. 944

In making a distress for rent, circumstances may occur which may require the presence of a police officer. But to justify the landlord in calling him in, it must be shown that his presence was rendered necessary either from threats of resistance, or the apprehension of violence, &c. *Skidmore v. Booth*, 6 C. & P. 777—Tindal. 943

The stat. 13 Edw. 1, c. 37, (West. 2), which enacts, that no distress shall be taken except by bailiffs "sworn and known," does not apply for distresses taken for rent in arrear. *Begbie v. Hayne*, 2 Scott, 193; 2 Bing. N. R. 124; 1 Hodg-es, 266. 943

Held, at Nisi Prius, on a distress for rent, where the rent distrained for does not exceed 20*l.*, only one sworn appraiser is necessary since the stat. 57 Geo. 3, c. 93. *Fletcher v. Saunders*, 6 C. & P. 747; 1 M. & Rob. 375—Lyndhurst. 944

Semble, that it is necessary that goods seized

under a distress for rent, should be appraised by two sworn appraisers, under 2 Will. & Mary, sess. 1, c. 5, s. 2, notwithstanding the schedule of the statute 57 Geo. 3, c. 93, directs that for an appraisement under 20*l.*, whether "by one broker or more," shall be charged only 6*d.* in the pound on the goods. *Bishop v. Byrant*, 6 C. & P. 484—Tindal. 944

If the tenant, to save expense, requests that appraisers may not be called in, and in consequence the broker who made the seizure values the goods, the tenant cannot, in an action, complain of that which was done as an irregularity. *Id.*

*Fraudulent Removal.*—In trespass for taking goods under a distress for rent, if they have been clandestinely removed, and are afterwards seized, the defence must be pleaded specially, as the statute 11 Geo. 2, c. 19, s. 21, does not apply to such a case. *Postman v. Harrell*, 6 C. & P. 225—Tindal. 946

A landlord has no right to follow, and take under a distress for rent, the goods of a lodger which have been taken off the premises, but only those of his own immediate tenant. *Id.*

The right of the landlord under the 11 Geo. 2, c. 19, s. 1, to follow the tenant's goods in the case of a fraudulent and clandestine removal, does not attach, unless the rent has actually become due before the removal of the goods. *Rand v. Vaughan*, 1 Scott, 670; 1 Bing. N. R. 767; 1 Hodges, 173. 946

It is not necessary that a party seizing goods fraudulently removed (under statute 11 Geo. 2, c. 19, s. 7), should first call to his assistance an ordinary peace officer; it is sufficient if he be assisted by a person appointed a special constable for the occasion. *Cartwright v. Smith*, 1 M. & Rob. 284—Denman. 946

An adjudication of justices under 11 Geo. 2, c. 19, s. 4, (inflicting penalties for fraudulently removing goods to avoid a distress), is an order and not a conviction, and cannot, therefore, like a conviction, be returned to the sessions in an amended form. *Rex v. Cheshire (Justices)*, 5 B. & Adol. 439; 2 Nev. & M. 827. 947

After notice of appeal against an informal order of two justices for payment of double the value of goods fraudulently removed to prevent a distress, a formal order is drawn up and filed, of which notice is given to the appellant. The court of quarter sessions is bound to try the appeal as an appeal against the original order. *Id.*

An order of justices under 11 Geo. 2, c. 19, s. 4, adjudging a party to pay double the value of goods fraudulently and clandestinely removed to prevent a distress, must show on the face of it that the party removing the goods was tenant; and this is not sufficiently shown by stating that, on complaint duly made, the party was charged with having fraudulently removed the goods from certain premises to prevent A. B. from distraining them for arrears of rent due to him for the said premises, and that it appearing that he did



so remove, &c., he is convicted thereof. *Rex v. Davis*, 5 B. & Adol. 551. 946

Seemable, also, that the order should state that the complainant was the party's landlord, or the bailiff, servant, or agent of such landlord. *Id.*

**Wrongful Distress.**—In case for an irregular distress, it is necessary to state correctly to whom the rent distrained for is due; and a variance in this respect is fatal. *Ireland v. Johnson*, 1 Bing. N. R. 162; 4 M. & Scott, 706. 946

In an action for an irregular distress, the only evidence at all affecting K., the landlord, was, that all the defendants appeared by the same attorney, and that the defendants' attorney had given the plaintiff notice to produce "the notice of distress for rent due to Mr. K.;" and that the managing clerk of the defendants' attorney, when he served it, had offered 10*l.* to settle the action:—Held, that this was not evidence to go to the jury as against K.; and the judge therefore directed the acquittal of K. *Crabb v. Killick*, 6 C. & P. 216—Parke. 949

If A., the tenant of B., has paid all his rent, and got his landlord's receipt for it, but fearing that his goods will be taken on legal process, agree with his landlord to destroy the receipt, and that the latter shall put in a distress for rent to protect the goods, and the landlord do so, and sell the goods, and keep the proceeds:—This distress is good, as between A. and B., though void as against a third person, and A. can maintain no action against B. for it. *Sims v. Tuffs*, 6 C. & P. 207—Parke. 949

But, if B. sold some articles not included in the inventory of the distress, A. may maintain an action in respect of these articles. *Id.*

In actions for irregular distresses, the correct practice is to make either the landlord alone, or the landlord and the broker, defendants, and not to join appraisers, &c.; and if a plaintiff do join them, the judge will oblige him to make out his case by strict rule, and not allow questions to be put to a witness who has been cross-examined, or a witness to be called back, with a view of fixing such appraisers, &c. *Child v. Chamberlain*, 6 C. & P. 213; 3 Nev. & M. 520; 5 B. & Adol. 1049. 949

A landlord is liable to some damages in an action on the case for an excessive distress, where the excess consists wholly in seizing growing crops, the probable produce of which is capable of being estimated at the time of the seizure; but the measure of damages is not the value of the crops, but the inconvenience and expense which the tenant sustains in being deprived of the management of them, or which he is put to in procuring surties to a larger amount than he would otherwise have been in replevying the crops. *Piggott v. Birtles*, 1 Mees. & Wels. 441. 949

Seemable, that an action on the case does not lie against a landlord for distraining for more than the actual arrears of rent, unless the distress taken be of larger value than will satisfy the actual arrears. *Wilkinson v. Terry*, 1 M. & Rob. 377—Parke. 949

In an action for a vexatious and excessive distress, the plaintiff having received the taxed costs of his replevin on the distress, was held not entitled to recover, as damages, the extra costs occasioned to him by the replevin. *Grace v. Morgan*, 2 Bing. N. R. 534. 949

If goods are removed by the landlord, which were not taken originally under the distress, nor included in the inventory, because they were not discovered at the time, the tenant may maintain trover. *Bishop v. Bryant*, 6 C. & P. 484—Tindal. 949

In an action of tort for an illegal sale of goods, the jury are not bound to find a verdict for the gross amount produced by the sale. *Clarke v. Nicholson*, 1 Gale, 21. 949

In an action for an excessive distress, the question is, what the goods seized would have sold for at a broker's sale. If it be excessive, the plaintiff is entitled to recover the fair value of them. *Wells v. Moody*, 7 C. & P. 59—Parke. 949

**Pound.**—If a hayward take cattle which are straying in a common or lane, and they are rescued as he is taking them to the pound, this rescue is indictable; but if the hayward take cattle which are damage feasant in the inclosed land of any private occupier, the rescue of them before they get to the pound is not indictable; as in the latter case, till the cattle get to the pound, the hayward is to be considered the mere servant of the occupier. *Rex v. Bradshaw*, 7 C. & P. 233—Coleridge. 950

By 5 & 6 Will. 4, c. 59, s. 4, *persons impounding cattle or animals in any common pound, open pound, or close pound, or in any inclosed place, are to supply them with good and sufficient daily food and nourishment, the value of which they may recover from the owner.* 950

By s. 5, *any person may enter a pound to supply such food and nourishment, without being liable to any action or proceeding of any kind by reason of such entry.*

## DISTRIBUTION OF ESTATE.

Under the statute 1 Jac. 2, c. 17, brothers and sisters of the half blood of an intestate are equally entitled with brothers and sisters of the whole blood to share with their mother, after the death of the intestate's father, in the personal property of the intestate dying without wife or children. *Jessopp v. Watson*, 1 Mylne & K. 665. 950

A., by articles previous to marriage, covenants that if he should die in the lifetime of his wife, his executors should, within three months after his decease, pay to her 3000*l.* A. died in his wife's lifetime, and by his will gave all his personal estate to his four executors, and directed them at the end of three years after his death to divide his property in such ways, shares, and proportions as to them should appear right. All the executors either died or renounced, and no division was made by them:—Held, first, that the property was divisible according to the statute of distribu-



tions, as in a case of absolute intestacy; and, secondly, that the widow's distributive share, being more than 3000*l.*, was a performance of the covenant in the marriage articles. *Goldsmid v. Goldsmid*, 1 Wils. C. C. 140. 951

### EASEMENT.

In trespass for cutting lines of the plaintiff, and throwing down linen thereon hanging, defendant pleaded that he was possessed of a close, and because the linen was wrongfully in and upon the close he removed it. Replication, that J. E., being seised in fee of the close and of a messuage with the appurtenances contiguous to it, by lease and release conveyed to W. H. the messuage, and all the easements, liberties, privileges, &c. to the said messuage belonging, or therewith then or of late used, &c.; that, before and at the time of such conveyance, the tenants and occupiers of the messuage used the easement, &c. of fastening ropes to the said messuage, and across the close to a wall in the said close, in order to hang linen thereon, and of hanging linen thereon to dry, as often as they should have occasion so to do, at their free will and pleasure; and that the plaintiff, being tenant to W. H. of the said messuage, did put up the lines, &c. Rejoinder took issue on the right as alleged in the replication:—Held, that proof of a privilege for the tenants to hang lines across the yard for the purpose of drying the linen of their own families only, did not support the alleged right. *Drewell v. Towler*, 3 B. & Adol. 735. 951

A verbal license is not sufficient to confer an easement of having a drain in the land of another to convey water, and such license may be revoked, though it has been acted upon. *Cocker v. Cowper*, 1 C. M. & R. 418; 5 Tyr. 103. 951

In 1815, A. cut a drain in the land of B. to a spring, the water from which he appropriated, as it ran through his own land. In 1833, B. stopped the drain:—Held, that B. was entitled so to do, no right having been acquired by user or length of possession. *Id.*

An easement is suspended as long as the same person having a term of years in the land a qua, and a fee-simple in the land in qua, is in possession of both; but it revives on a cessation of the unity of possession, though the change of possession be not accompanied with an alienation of the whole of either of the estates. *Thomas v. Thomas*, 2 C. M. & R. 34; 1 Gale, 61. 951

An user of the subject of an easement for 20 years will create a right, though interrupted by intervals of suspension by such an unity of possession, such intervals being excluded from the computation. *Id.*

When it is sought to establish a right to an easement by user, and it appears that the user has varied, it is for the jury to say, whether the user has been commensurate with the right claimed. *Id.*

Though a party, having an easement of eaves

droppings from a thatch resting on a wall, increases the height of the wall and the projection of the thatch, he may maintain an action against a neighbor who does an act which not only prevents the enjoyment of the extended easement, but which would also interrupt it if existing within its proper limits. *Id.*

Trespass for breaking and entering on the 1st January, 1830, and on divers other days and times, &c., one close called the Railroad, and one other close formerly used as a railroad, &c. Pleas (amongst others), that A., B., & C. were owners of the closes on each side of the locus in quo, which was a railway made by the plaintiffs under the authority of an act of parliament; that the adjoining closes contained minerals, and that, according to the custom of the country, the minerals could only be conveniently conveyed by means of a railway across the locus in quo. The plea then justified the trespasses for that purpose, and for the convenient and necessary occupation of the adjoining closes. Replication, protesting the soil and freehold, *de injuria absque residuo causæ*. Another plea alleged that the occupiers of the adjoining closes had, for twenty years, as of right, and without interruption, used and been accustomed to use the privilege and easement of passing and repassing, &c., and laying down railroads across the plaintiff's railroad. Replication to this plea, traversing the claim of right, new assignment of other and different purposes, to which there was judgment by default. The particulars complained of trespasses committed by the defendants in April and May, 1830, in a close, "which now is or heretofore was a rail or tramroad," and destroying the plates of the same, and laying down others. The evidence was, that the defendants, in February, 1829, took up some of the plates of the plaintiff's railway, and altered the course of part of it, carrying it over their own land, and made a transverse railroad, which crossed the site of the old railroad, and also the new railroad:—Held, that the particulars were sufficient. *Monmouth Canal Co. v. Harford*, 1 C. M. & R. 614; 5 Tyr. 68. 951

Upon the issue with regard to the more convenient occupation of the adjoining closes, there was much evidence on both sides, the plaintiffs giving evidence to show that, in constructing the transverse railroad, the defendants had an ulterior object in view. The judge left it to the jury to say, whether the transverse railroad was constructed bona fide for the more convenient occupation of the closes, or for some other object:—Held, that this direction was right. *Id.*

Upon the issue with regard to the twenty years' enjoyment of the easement:—Held, that the defendants were bound to show an uninterrupted enjoyment, as of right, during that period; and that the plaintiffs might prove, under that issue, applications by the defendants during the twenty years for leave to cross their railroad, and that it was not necessary for them to reply to such license specially, under 2 & 3 Will. 4, c. 71, s. 8. *Id.*



## ECCLESIASTICAL LAW.

*Advowson.*—The commissioners of woods and forests having power, under the statute 57 Geo. 3, c. 97, to make sale of any royalties, honors, hundreds, manors, lordships, or franchises, "or any rights, members, or appurtenances thereof," belonging to the crown, within the ordering and survey of the Exchequer, contracted for the sale of the crown manor of E., and all courts baron, courts leet, and all fines, reliefs, rents, profits, waifs, strays, deodands, and "all other rights, members, emoluments, and appurtenances thereunto belonging :"—Held, that, this being in effect a contract for sale by the crown, the advowson of E., which was appendant to the manor, did not pass under the contract, and consequently, that the purchaser was bound to take a conveyance of the manor without the advowson. *Att. Gen. v. Sitwell*, 1 Y. & Col. 559. 953

Seem, that if the contract had been between subject and subject, the advowson would have passed; although at the time of the contract, it was not known by either party to be appendant to the manor, and therefore the sale of it was not in their contemplation. *Id.*

Where a contract is entered into for the sale of an estate, and, under the general words, property passes, which the vendor insists he did not mean to sell, but the purchaser by his answer denies or does not admit that it was not in his contemplation at the time of the purchase; seem, that the vendor cannot sustain a bill against the purchaser to have the contract rectified on the ground of mistake, and carried into execution. *Id.*

*Curates and Clerks.*—The curacy of the parish of St. T. having become vacant, the vicar (in whom the right of nomination was vested) nominated a layman, who presented himself to the archbishop of D., for the purpose of being examined previous to ordination. The archbishop having refused to examine him :—Held, that his refusal was discretionary, and that the court would not in such a case grant a mandamus to the archbishop, requiring him to proceed with the examination. *Rex v. Dublin (Archbishop)*, 1 Alcock & Napier, 244. (*Irish*). 961

If a parish clerk has been deprived of his office, the mandamus to restore him must be directed to the incumbent, and not to the church wardens. *Ex parte Cirketh*, 3 Dowl. P. C. 327. 963

To authorize such a mandamus, it must clearly appear that he has been deprived of his office. *Id.*

Seem, that he may be deprived by the incumbent for cause. *Id.*

Where a vicar after summons to the parish clerk to attend and answer a charge of intoxication, removes him upon insufficient evidence of the intoxication, the court will issue a mandamus requiring the vicar to restore the clerk. *Rex v. Neale*, 4 Nev. & M. 868. And see *Bowles v. Neale*, 7 C. & P. 262. 963

Quære, whether it would be sufficient ground to remove a clerk, that amongst his neighbors

he was notorious as a drunkard, without proof of particular acts of intoxication and indecorum? *Id.*

If one act of intoxication be relied on, the intoxication and consequent incapacity of the clerk to perform the duties of his office, when required to do so, should, at all events, be distinctly proved. *Id.*

*Charge of Benefices.*—A composition with a clergyman in consideration that his future income may be received by a trustee, and applied in liquidation of his debts, after providing for a curate, is void under 13 Eliz. c. 20. *Alchin v. Hopkins*, 4 M. & Scott, 615; 1 Bing. N. R. 99. 963

A warrant of attorney, which appears upon the face of it to be to secure the payment of an annuity charged upon an ecclesiastical benefice, is void under 13 Eliz. c. 20. *Salmarsh v. Hewitt*, and *Skrine v. Same*, 3 Nev. & M. 656; 1 Adol. & Ellis, 812. 964

The court will set aside a warrant of attorney, judgment, and execution, where the defeazance of the warrant of attorney recites the grant of an annuity by A. to B., rector of R., (cum cura animarum), intended to be secured by an indenture, "whereby A. had charged the annuity upon the rectory of R.;" and that it had been agreed that such annuity should also be secured by that warrant of attorney; and that no execution should issue until twenty-one days' default in payment of the annuity, in which case B. might, toties quoties, sue out such execution as he should think fit, and also sequester the rectory, to the intent that B. might recover the arrears. *Id.*

Where the defeazance of a warrant of attorney to confess judgment, executed by A., a beneficed clergyman, stating that it is given to secure to B. the payment of an annuity granted by A. to B. for his life, described in a certain indenture of even date between the said A. and B., in which indenture it was agreed that judgment should be entered up on the warrant of attorney, but that no execution should issue until the annuity should have been in arrear fourteen days after any of the days for payment expressed in the indenture; but that if the annuity should be so in arrear, B. might sue out such execution upon or by virtue of the judgment, as he should think fit, for the recovery of the arrears and all costs; the court cannot, upon a question as to the validity of a sequestration granted by the bishop, in pursuance of a writ of *levari facias* issued upon the judgment entered up on the warrant of attorney, look at the indenture for the purpose of deciding whether it operated as a charge upon A.'s benefice. *Johnson v. Brasier*, 3 Nev. & M. 653; 1 Adol. & Ellis, 624. 964

A judgment entered up on a warrant of attorney, given by a beneficed clergyman in the North Riding of Yorkshire, to secure payment of an annuity, need not be registered under 8 Geo. 2, c. 6; for though it may be enforced by sequestration, the benefice is not affected by the judgment. *Cottle v. Warrington*, 5 B. & Adol. 447; 2 Nev. & M. 227. 964



A vicar, whilst the 13 Eliz. c. 20, against charging benefices, was repealed, charged his living with an annuity, and covenanted, if he should exchange his living, to secure the annuity by charging and demising the new living, and that in the meantime it should be charged with the annuity. He afterwards exchanged his living, but did not execute any deed until after the revival of the 13 Eliz. :—Held, that the covenant was a subsisting charge on the new living, and a receiver was appointed to provide for the annuity. *Metcalfe v. York (Archbishop)*, 6 Simon, 224. 964

*Dilapidations.*—The incumbent of a living is bound to keep the parsonage house, buildings, and chancel, in good and substantial repair, restoring and rebuilding, when necessary, according to the original form, without addition or modern improvement; but he is not bound to supply or maintain anything in the nature of ornament, as painting (unless necessary to preserve exposed timber from decay), and whitewashing and papering: and in an action for dilapidations by the successor against the representative of a deceased rector, the damages are to be calculated upon this principle. *Wise v. Metcalfe*, 5 M. & R. 235. 965

Under an inclosure act, lands are fenced in and allotted to the vicar and his successors, in lieu of tithes. The vicar dies, leaving the fences out of repair:—Held, that his executors were liable to be sued by the succeeding vicar for dilapidations. *Bird v. Relph*, 4 Nev. & M. 878; 2 Adol. & Ellis, 773. 965

Neglect to cultivate the glebe land in a husband-like manner, is not a dilapidation for which an incumbent can recover. *Bird v. Relph*, 4 B. & Adol. 826; 1 Nev. & M. 415. 966

*Tithes.*—Notwithstanding an endowment of 1374, conferring all small tithes on a vicar, the court refused to set aside a verdict finding the right to potatoes grown in fields to be in the rector, evidence having been adduced from which it might be presumed that, on good consideration, an alteration had been made in the endowment previously to the restraining stat. of 13 Eliz. *Gilbert v. Towns*, 4 M. & Scott, 735; 1 Bing. N. R. 173. 968

The words "white tithes" have no general meaning, but are applicable to distinct things in distinct parishes. The meaning, therefore, of those words, as applicable to a particular parish, is to be ascertained only from the usage in that parish. *Becher v. Clays*, 1 Y. & Col. 448. 966

By 5 & 6 Will. 4, c. 75, *turnips severed for the convenience of feeding on the land and fed off are to be tithed as if they had been eaten without being severed.* 970

By 5 & 6 Will. 4, c. 74, *facilities are given for the recovery of tithes under 10l.*

A new mill erected on the site of an ancient mill is exempt from tithes; but if it is built partly on an ancient mill and partly on a new site, it is not exempt. *Newcome v. Mathew*, 5 Sim. 243. 970

In a suit for tithes between a vicar and the occupier of a mill, an old map of the parish, belonging to the lord of the manor, was not admitted as evidence for the defendant. *Id.*

The mere non-payment of tithes is not a sufficient answer to a claim of tithes made by a lay impropriator. *Andrews v. Drever*, 2 Scott, 1; 2 Bing. N. R. 1. 971

The decisions against raising a presumption of a release or a grant, as against a lay impropriator of tithes, from continual non-payment of tithes, are so strong, that the court of errors in the Exchequer chamber refused to overrule them, though dissatisfied with the ground upon which the decisions rest, and referred the parties to their remedy by writ of error in parliament. *Bayley v. Drever* (in error), 3 Nev. & M. 885; 1 Adol. & Ellis, 449. 971

Perception of the tithe of corn is evidence of title to other rectorial tithes, as hay. *Id.*

In debt for not setting out tithes, it is competent to the plaintiff to give evidence of the perception of the tithes to the land in question by parties not shown to be in privity of estate with the plaintiff, and to produce leases of the tithes granted by those persons to former occupiers of the defendant's land. *Id.*

Though it is not necessary to produce the actual deed creating a composition real, still reasonable evidence must be given to make it probable that such a deed once existed; and the mere circumstance of the possession of a piece of land mentioned in various ancient documents as having been assigned to the curate, is not a sufficient ground for any such presumption. *Dent v. Rob*, 1 Y. & Col. 1. 972

The deanery-house, or residence of the dean of St. Paul's, is liable to tithes at 2s. 9d. in the pound, on the full value, under the stat. 37 Hen. 8, c. 12. *St. Paul's (Warden, &c.) v. St. Paul's (Dean)*, 1 Wils. Exch. 1. 977

On a bill filed to enforce the payment of certain specified sums in lieu of tithes, it was proved that the respective occupiers of certain houses, either ancient or built upon ancient sites, and situate in that part of the parish of St. Andrew, Holborn, which is without the city of London, had for the last 100 years uniformly paid certain specified and invariable sums in respect of each house; but such payments were never made by the owners or occupiers of houses built upon new sites. The payments varied in amount on different houses, and were not in any distinct rate or proportion to the value of the houses inter se, and were not general through this part of the parish:—Held, first, that the court were warranted in inferring from these facts, that the payments had been made from time immemorial; secondly, that they could assign a legal origin for such payments, and that they could legally be enforced by the rector of the parish. *Beresford v. Newton*, 1 C. M. & R. 901; 5 Tyr. 432. 976

In an action for tithes, the plaintiff introduced two counts into the declaration; one for the treble value of tithes not set out; the other for the same tithes bargained and sold:—Held, that



this was a violation of the rule of H. T. 4 Will. 4, reg. 1, s. 5, and the court ordered the last count to be struck out, with costs; but bound the defendant to agree not to set up a composition at the trial, or that if he did, the declaration might be amended. *Lawrence v. Stephens*, 3 Dowl. P. C. 777. 977

**Churchwarden.**—Where a meeting for the election of churchwardens takes place in the parish church, in pursuance of a notice that such meeting would be held at the parish church, and that in case a poll should be demanded, the meeting would be immediately adjourned to the town-hall, the chairman may, upon a poll being demanded, adjourn the meeting to the town-hall, although a majority of the voters present object to such adjournment. *Rex v. Chester (Archdeacon)*, 3 Nev. & M. 413. 978

The right of adjourning the business in progress at a meeting is vested in the persons assembled, and not in the chairman. *Id.*

Where two sets of persons have each a colorable title to the office of churchwarden, both ought to be sworn in. The ordinary is bound to swear in churchwardens elect immediately upon their applying to be sworn in, notwithstanding an usage not to swear in until the first visitation after Easter. *Rex v. Middlesex (Archdeacon)*, 5 Nev. & M. 494. 978

The rule for a mandamus commanding the ecclesiastical authorities to swear in a churchwarden duly appointed is absolute in the first instance. *Ex parte Lowe*, 4 Dowl. P. C. 15. 978

The property of the bell ropes of a parish church is in the churchwardens of the parish. *Jackson v. Adams*, 2 Scott, 599; 2 Bing. N. R. 402; 1 Hodges, 339. 978

A churchwarden has no authority to pledge the credit of his co-churchwardens for the repairs to the church. If he orders such repairs without the knowledge of the other churchwardens, he is liable individually. *Northwaite v. Bennett*, 2 C. & M. 316; 4 Tyr. 236. 978

**Church Rates.**—Semble, that justices have in no case jurisdiction, under 53 Geo. 3, c. 127, s. 27, to make an order for the payment of an assessment to a church rate, the validity of which has at any time been questioned in the Ecclesiastical court, although such court had also decided in favor of the rate. *Rex v. Sillifant*, 5 Nev. & M. 640. 979

Where magistrates are called upon, under 53 Geo. 3, c. 127, to enforce a church rate good upon the face of it, it is no ground of objection before them that the rate was in fact made for the reimbursement of the churchwardens. *Id.*

The court will not call upon justices to make an order for the payment of a church rate when there is any doubt whether the justices have jurisdiction to make such order. *Id.*

**Other things.**—The patron of a benefice with cure of souls, under the value of 8*l.* in the king's books, being also incumbent of the same benefice, accepted another with cure, and thereupon presented a clerk to the proper ordinary, who was afterwards admitted, instituted, and inducted, on his presentation, to the former living:—Held, that the first benefice thereby became actually void, from the time of presentation, within the meaning and provisions of the stat. 28 Hen. 8, c. 11, and the succeeding incumbent entitled to the tithes from such presentation. *Betham v. Gregg*, 4 M. & Scott, 230; 10 Bing. 352. 956

Where the incumbent of a benefice cannot be found, service of a monition, by leaving it at the parsonage-house, is sufficient, notwithstanding the incumbent does not habitually reside in it. *Green v. Corden*, 2 Bing. N. R. 627. 952

Where parishioners, dwelling within a chapel, contribute to the repairs of the parish church, it is strong, but not conclusive evidence, that the chapel is a chapel of ease to the inhabitants of the parish, and not a separate and distinct chapel. *Dent v. Rob*, 1 Y. & Col. 1. 954

If an incumbent contract to let lands belonging to the benefice for a term of years, his resignation of the living during the term is a breach of contract. *Price v. Williams*, 1 Mees. & Wels. 6. 952

In quare impedit, there is no general issue involving the question of the right to present. *Meath (Bishop) v. Winchester (Marquis)*, 1 Alcock & Napier, 508. (*Irish*). 958

Quare impedit against three. Two of the defendants were summoned upon a writ returnable on the 8th of January, 1834, and appeared on the 11th. The sheriff having received nihil as to the third defendant, an alias quare impedit issued against him, returnable on the 16th April, on which he was summoned and appeared. A joint declaration against the three defendants was delivered on the 10th January, 1835:—Held, that, as to two of the defendants, the cause was out of court. *Barnes v. Jackson*, 1 Scott, 520. 958

If a dissenting minister be appointed minister of the chapel by a part of the trustees of it, he cannot maintain an action against all the trustees for his salary; and the fact of all of them having signed a notice to him, demanding the possession of the chapel, will not make any difference. *Cooper v. Whitehouse*, 6 C. & P. 545—*Alderson*. 952

## EJECTMENT.

**Lessor's Title.**—The nominal plaintiff in ejectment cannot recover upon a joint demise by persons who, upon the evidence, appear to be tenants in common. *Doe d. Poole v. Errington*, 3 Nev. & M. 646; 1 Adol. & Ellis, 750. 955

An entry to avoid a fine must be made animo clauandi, but it need not be accompanied with a declaration that the object in the entry is to avoid the fine. *Doe d. Jones v. Williams*, 2 Nev. & M. 602; 5 B. & Adol. 783. 956

The usual entry in cases of vacant possession



will in certain cases be dispensed with. *Doe d. Frith v. Roe*, 2 Dowl. P. C. 431. 986

Where a rent-charge is granted with power to the grantee, in case the rent should be in arrear for a certain space of time, to enter and enjoy the lands charged, and to receive and take the rents, issues, and profits, for his own use and benefit, until satisfaction of the arrears of rent, with all costs; the grantee may, upon the rent becoming in arrear, maintain ejectment against the tenant, without proof of a previous demand of the rent. *Doe d. Blass v. Horsley*, 3 Nev. & M. 567. 987

In ejectment, evidence that the lessor of the plaintiff received rent for the premises from A., who formerly occupied them, and also from the parish officers, is admissible, although the defendant does not claim under A. or the parish officers. *Doe d. Litchfield (Earl) v. Stacey*, 6 C. & P. 130—Tindal. 988

In ejectment on the several demises of a mortgage and mortgagee, the defendant offered to prove that, seven or eight years back, and after the execution of the mortgage, he brought ejectment against the mortgagor (at that time in possession); that the cause was referred to arbitration; and that the award was in favor of the now defendant, who thereupon entered under a writ of possession, and had occupied the premises ever since.—Held, that these proceedings were not admissible evidence for the defendant against the mortgagee, although he was present at one meeting before the arbitrator; it not appearing that he took any part in the proceedings. *Doe d. Smith v. Webber*, 1 Adol. & Ellis, 119. 988

The mortgage was executed in 1815. From that time till the defendant obtained possession as above stated, the mortgagor had occupied the premises.—Held, that this, though a possession of less than twenty years, entitled the mortgagee to recover against the defendant, the latter having adduced no admissible evidence in support of his own claim. *Id.*

Where a vicar brings ejectment claiming in right of his vicarage, a letter written by a former vicar is admissible in evidence for the defendant; and a witness for the lessor of the plaintiff may be asked as to what is inscribed on a tablet fixed up in the church. *Doe d. Coyle v. Cole*, 6 C. & P. 350—Patteson. 988

If a lessor, who has only an equitable title, grants a lease, he has, as against his lessee, a good title by estoppel; but if, after the lease, the lessor, by a mortgage deed, grant all his interest in law and in equity to a mortgagee, the lessee may give in evidence this deed, and thus prevent the lessor from recovering in ejectment on a forfeiture of the lease. *Doe d. Marriott v. Edwards*, 6 C. & P. 208—Parke. 988

A consent rule in an ejectment for lands and mines, by which the party appeared to defend for "a certain tinbound (setting out its abutments) containing a certain mine," &c.; was held insufficient, on the ground that ejectment will not lie for a tinbound. The defence should be for the

mine which the defendant is working under the tinbound. *Falmouth (Earl) v. Alderson*, 1 Mees. & Wels. 210; 4 Dowl. P. C. 701. 984

*Between Landlord and Tenant.*—If a landlord allow his tenant to hold over above a year, without taking any step to recover the premises, he is not entitled to the benefit of the 1 Geo. 4, c. 87, s. 1. *Doe d. Thomas v. Field*, 2 Dowl. P. C. 542. 990

A notice given by a landlord in ejectment, under the 1 Geo. 4, c. 87, s. 1, signed "A. B., agent for the plaintiff," is sufficient. Such a notice is sufficient, although it only requires the tenant to appear and be made defendant, and find such bail, &c., "and for such purposes as are specified in the act of parliament," without going on to state those purposes in detail. *Beard v. Roe*, 1 Mees. & Wels. 360. 989

An application under the 1 Geo. 4, c. 87, that the defendant in ejectment should give security, may be made by one of several tenants in common, and it is not necessary that the attesting witness should depose to the execution of the lease, if it is sufficiently proved by other witnesses. *Doe d. Morgan or Mayor v. Rotherham*, 3 Dowl. P. C. 690; 1 Gale, 157. 989

The statute 11 Geo. 4 & 1 Will. 4, c. 70, s. 36, for expediting the remedy of the landlord, where his right of entry accrues during or immediately after an issuable term, does not apply to the case of a tenancy under an agreement, expiring the day before the first day of the term. *Doe d. Somerville v. Roe*, 4 M. & Scott, 747. 991

*Declaration.*—A declaration in ejectment must begin and conclude with the *quo minus* clauses, as before the 2 Will. 4, c. 39, the Uniformity of Process Act; the general rules of M. T. 3 Will. 4, No. 15, not being applicable to any but actions merely personal. *Doe d. Gillett v. Roe*, 4 Tyr. 649; 1 C. M. & R. 19; 2 Dowl. P. C. 690. 991

To found a motion for judgment against the casual ejector, a declaration intitled thus, "In the Common Pleas, June 12th, 1834," will suffice, notwithstanding the 15th rule of M. T. 3 Will. 4, does not apply to actions of ejectment. *Doe d. Ashman v. Roe*, 1 Scott, 166; 1 Bing. N. R. 253. 991

A declaration in ejectment, entitled by mistake of T. T. 6 Will. 4, instead of 5 Will. 4, dated August 1st, 1835, was held sufficient to warrant a rule for judgment against the casual ejector. *Doe d. Smithers v. Roe*, 4 Dowl. P. C. 374. 991

The rule of court, M. T. 3 Will. 4, that every declaration shall be entitled of the day of the month and year on which it is filed and delivered, does not apply to declarations in ejectment. The court refused to set aside a declaration in ejectment in which the notice was dated of a day after the service of declaration. *Doe d. Evans v. Roe*, 1 Adol. & Ellis, 11. 991

The statement of a term not yet arrived, in



intitling a declaration in ejectment, is immaterial, if such information as to the time of appearance is given in the notice. *Doe d. Gore v. Ross*, 3 Dowl. P. C. 5. 991

The venue in the margin in the declaration in ejectment is immaterial, if the venue in the body of the declaration is correct. *Doe d. Goodwin v. Roe*, 3 Dowl. P. C. 323. 992

If there is a dispute as to the inheritance, the court will not compel the trustee of an outstanding term attending the inheritance to lend his name to either party in an action of ejectment. *Doe d. Prosser v. King*, 2 Dowl. P. C. 580. 992

A demise in ejectment of fifty "messuages, one hundred acres of land in all those one moiety or full half of the town and lands of C.:"—Held sufficiently certain. *Coyne v. Bartley*, 1 Alcock & Napier, 310. (*Irish*). 992

A declaration in ejectment on the demise of the churchwardens and overseers of a parish, to recover parish property, containing two sets of counts; one specifying the names of the individuals, and the other not. The court ordered one set to be struck out:—Held, also, that a motion for that purpose, involving a point of law and the construction of an act of parliament, was properly brought before the full court. *Doe d. Llandudno v. Roe*, 4 Dowl. P. C. 222. 992

In an ejectment for non-payment of rent, the declaration described the premises as situate in the barony of M. The lease described them as in the barony of Upper M., and it was conceded that there were two baronies in the county, one called Upper M., the other Lower M.:—Held, that the defendant could not object to this ambiguity of description in the declaration. *Tyrrell v. Quinlan*, 1 Alcock & Napier, 135. (*Irish*). 992

Where the notice at the foot of a declaration in ejectment contains the names of many tenants, it is sufficient that the copy served on each should contain the name of that one only. *Doe d. Field v. Roe*, 1 Har. & Woll. 516. 992

Where the Christian name in the notice to a declaration in ejectment is incorrect, and there is an affidavit that the person served is the person intended, it is sufficient. *Doe d. Frost v. Roe*, 3 Dowl. P. C. 14, 563; 1 Har. & Woll. 217. 992

It is not sufficient to state in the notice at the foot of a declaration in ejectment, that the tenant is "to appear in due time." *Doe d. Forbes v. Roe*, 2 Dowl. P. C. 420. 992

If the service is regular, the substitution of "Jacob" for "Sarah" in the notice is immaterial. *Doe d. Folkes v. Roe*, 2 Dowl. P. C. 567. 992

A notice at the foot of a declaration in ejectment, omitting to state that the consequence of the action not being defended will be turning the tenant out of possession, is defective, but may be amended on terms. *Doe d. Darwent v. Roe*, 3 Dowl. P. C. 336. 992

*Service on Tenant.*—Service on an under joint tenant is good service on him and a joint tenant. *Doe d. Hutchinson v. Roe*, 2 Dowl. P. C. 418. 993

Where three sisters lived together, and there was service of a declaration in ejectment on one of them, by delivery to the other two the day before the term commenced, the court granted a rule nisi for judgment against the casual ejector. *Doe d. Grimes v. Roe*, 4 Dowl. P. C. 86, 691; 1 Har. and Woll. 369. 993

*Service on Wife.*—Service in ejectment on the wife of the tenant in possession on the premises is sufficient, although, from the conduct of the tenant and his wife, his Christian name is not stated in the notice at the foot of the declaration. *Doe d. Warne v. Roe*, 2 Dowl. P. C. 517. 994

Where there was service of a declaration in ejectment on the wife of the brother of the tenant on the premises, who afterwards said she should go and see the tenant, and she next day left the premises, the court granted a rule nisi for judgment against the casual ejector. *Doe d. Hubbard v. Roe*, 1 Har. & Woll. 371. 994

The court will not allow a wife's declaration, with respect to her husband being out of the way, to avoid being arrested or annoyed, to be used for the purpose of obtaining judgment against the casual ejector. *Doe d. Wilson v. Smith*, 3 Dowl. P. C. 379. 994

Service of a declaration in ejectment on the wife of the tenant at her husband's residence, is sufficient, although the husband does not reside on the premises sought to be recovered. *Doe d. Southampton (Lord) v. Roe*, 1 Hodges, 24. 994

*Service on Children and Family.*—Service on the daughter on the premises will not suffice, unless it is shown that the declaration came to the hands of the father with proper explanation. *Doe v. Roe*, 2 Dowl. P. C. 414. 994

Rule, that the service of a declaration in ejectment on the son of the tenant should be a good service, made absolute, where the affidavit of the tenant, on showing cause, did not deny having received the declaration from his son. *Doe d. Watts v. Roe*, 1 Har. & Woll. 199. 994

Where there was service in ejectment on the daughter of the tenant in possession, and he on the first day of term acknowledged the receipt of the declaration, but not that he had received it before the term:—Held, that it was not sufficient. *Doe d. Harris v. Roe*, 1 Har. & Woll. 372. 994

Service of a declaration in ejectment upon the sister of the tenant in possession, who says that she receives it on behalf of her sister, will not be good unless agency be shown. *Doe d. Tibbs v. Roe*, 3 Dowl. P. C. 380. 994

Service on the daughter on the premises is insufficient, even for a rule nisi, although there may be reason to believe the wife is aware of the proceeding, and keeps out of the way to avoid



being served. *Doe d. George v. Roe*, 3 Dowl. P. C. 9. 994

If a tenant in possession is clearly keeping out of the way to avoid being served, the court will grant a rule nisi for judgment, if the son is regularly served on the premises. *Doe d. Luff v. Roe*, 3 Dowl. P. C. 575. 994

Service of a declaration in ejectment on the daughter of the tenant in possession is not good service, unless it be shown to have come to the hands of the tenant. *Doe d. Brittlebank v. Roe*, 4 M. & Scott, 562. 994

Service of a declaration in ejectment on the wife of the son of the tenant of the premises:—Held, to be sufficient to grant a rule nisi for judgment against the casual ejector, where it appeared that the tenant was in America, and that his son managed his business. *Doe d. Potter v. Roe*, 2 Scott, 378; 1 Hodges, 316. 994

A declaration and notice in ejectment were served upon a servant of the tenant, whose wife subsequently admitted that she had received them, and had given them to her husband:—Held insufficient. *Doe d. Tucker v. Roe*, 4 M. & Scott, 165; 2 Dowl. P. C. 775. 995

Service of a declaration and notice in ejectment upon a servant of the tenant upon the premises, is not sufficient, unless the servant makes affidavit, (or it otherwise appears), that they came to the tenant's hand, or where this cannot be procured, unless considerable diligence is shown to have been used to serve the tenant personally. *Doe d. Pugh v. Roe*, 1 Scott, 464; 1 Hodges, 6. 995

Service of a declaration in ejectment on the bailiff of the tenant, is sufficient foundation for judgment against the casual ejector, where it appears to have duly come to the hands of the tenant's attorney, who promises to appear. *Jenny d. Mills v. Cutts*, 1 Scott, 52. 995

*Premises vacant.*—Where premises are totally deserted, and there is no one on whom service can be effected, judgment cannot be had against the casual ejector, but the proceeding must be as upon a vacant possession. *Doe d. Norman v. Rowe*, 2 Dowl. P. C. 399, 428. 995

An affidavit of service on W. D., tenant in possession, by affixing of the declaration on the door, no person being therein:—Held to be insufficient for judgment against the casual ejector. *Doe v. Roe*, 4 Dowl. P. C. 173. 996

Rule for judgment against the casual ejector refused, where the house was found shut up three days before the term, and the declaration was fixed on the door, it appearing that the tenant was in the habit of shutting up the house and staying away for several days together. *Doe d. Roupel v. Roe*, 1 Har. & Woll. 367. 996

Where part of the property for which an ejectment was brought, consisted of three unfinished houses which were untenanted, and there was no property in them, the court refused to allow the service of the declaration by sticking it up on the outer door, but obliged the

lessor of the plaintiff to proceed as upon a vacant possession. *Doe d. Schovel or Showell v. Roe*, 3 Dowl. P. C. 691; 2 C. M. & R. 42. 996

*Other Service.*—Where service of a declaration in ejectment was made at a house where it was sworn it was believed the tenant was, but was denied, for the purpose of avoiding the service, the court granted a rule nisi for judgment against the casual ejector. *Doe d. Turncroft v. Roe*, 1 Har. & Woll. 371. 996

The court granted a rule for judgment against the casual ejector, where the service had been by leaving the declaration with the turnkey of the prison in which the tenant in possession was confined, with directions to give it to him; and the tenant had acknowledged that he had received it before the first day of the term. *Doe d. Harris v. Roe*, 2 Dowl. P. C. 607. 996

An affidavit held sufficient, which stated that the party making it had gone to the premises, where he found the son of the tenant in possession, to whom he explained the nature of the declaration, and left a copy with him, having learned from him that the father was not at home, and would not return before midnight; and that he called again next day and saw the wife, who informed him that her husband had gone out, but she did not know where. *Doe d. Wetherell v. Roe*, 2 Dowl. P. C. 441. 996

So, an affidavit was considered sufficient for a rule nisi, which stated that the deponent went to the premises, but found the door closed, and knocked, but gained no admission; that he looked through a window, and saw the niece of the tenant in possession; that he again knocked, but could not get in; that he then explained through the door the nature and object of the service, and posted the declaration against the door; that two conversations afterwards took place between the deponent and the attorney of the tenant, from which it appeared that the declaration had been brought to that attorney. *Doe d. Mortlake v. Roe*, 2 Dowl. P. C. 444. 996

So, an affidavit, which stated that the deponent had gone to the premises and seen the tenant, to whom he offered the declaration, but who refused to take it; that he then laid it on a chair, and explained the nature and object of the service; that the tenant then left the room, saying that he would not take any paper from the deponent or any other person on the part of the lessor. *Doe d. Viager v. Roe*, 2 Dowl. P. C. 449. 996

So, where the deponent had on the premises presented the declaration to the wife, upon whose refusal to take it he had left it on a table, after the proper explanation; that the wife having thrown it after him, he had picked it up and affixed it on the most conspicuous part of the premises. *Doe d. Courthorpe v. Roe*, 2 Dowl. P. C. 441. 996

If the tenant in possession by fraud prevents a complete and regular service of the declaration in ejectment, judgment may still be obtained



against the casual ejector. *Doe d. Frith v. Roe*, 3 Dowl. P. C. 569. 996

Where a tenant in possession keeps out of the way to avoid being served, a rule nisi for judgment may be obtained by a service on the agent of the tenant on the premises. *Doe d. Morpeth v. Roe*, 3 Dowl. P. C. 577. 996

Where the tenant in possession has absconded to another country, the service of the declaration in ejectment may be effected on his agents on the premises. *Doe d. Robinson v. Roe*, 3 Dowl. P. C. 11. 996

In ejectment, if the tenant resides abroad, service on an agent who resides on the premises is sufficient. *Doe d. Treat v. Roe*, 4 Dowl. P. C. 273; 3 Har. & Woll. 525. 996

Where a tenant in possession was very unwell, and afterwards died, and a declaration in ejectment was served on a person at the house where he was staying on the day of his death, it is not a good service. *Doe d. Hartford v. Roe*, 1 Har. & Woll. 352. 996

Where proceedings are taken under stat. 4 Geo. 2, c. 28, affixing the declaration in ejectment upon the door of the demised premises, will not be allowed as good service, if there is any probability that the tenant can be personally served. *Doe d. Fugh v. Roe*, 1 Scott, 464; 1 Hodges, 6. 996

**Acknowledgment of Service.**—An acknowledgment by the tenant in possession of the receipt of the declaration in ejectment, made on the first day of term, 12th January, but not saying when it was received, is not sufficient to make good a service on his son on the 10th January on the premises. *Doe d. Martin v. Roe*, 1 Har. & Woll. 46. 996

On motion for judgment against the casual ejector, if the service of declaration is to be proved by the tenant's acknowledgment made in term, it must appear by such acknowledgment that the service was before term. *Doe d. Marshal v. Roe*, 2 Adol. & Ellis, 588; 4 Nev. & M. 553. 996

Service of a declaration in ejectment upon the tenant's daughter before the term, and an acknowledgment by the tenant within the term:—Held sufficient to ground a motion for judgment against the casual ejector. *Doe d. Smith v. Roe*, 4 Dowl. P. C. 265. 996

**Explanation.**—The court will grant a rule nisi for judgment against the casual ejector, where the nature and object of the process has been explained to the tenant, but, in consequence of his refusal, the declaration has not been left with him. *Doe d. Forbes v. Roe*, 2 Dowl. P. C. 452. 997

Where it became necessary to employ an interpreter, in order to explain to the tenant the object of the declaration in ejectment, but who was not upon oath:—Held, that the explanation was sufficient to entitle the lessor of the plaintiff to sign judgment. *Doe d. Probert v. Roe*, 3 Dowl. P. C. 335. 997

If the wife on the premises has received the declaration, and prevents the person serving it from giving an explanation, or reading it over, the service is sufficient. *Doe d. George v. Roe*, 3 Dowl. P. C. 541. 997

The court granted a rule nisi for judgment against the casual ejector on an affidavit, merely stating that the tenant "appeared to be acquainted with the intent of the declaration," without stating that it had been either read or explained to him. *Doe d. Downs v. Roe*, 4 Dowl. P. C. 665. 997

**Affidavit.**—Judgment against the casual ejector may, under special circumstances, be obtained on an affidavit, swearing the service to have been on the tenant in possession, "as the deponent believes." *Doe d. George v. Roe*, 3 Dowl. P. C. 22. 997

In ejectment on a vacant possession, the affidavit that six months' rent are in arrear, may be made by a receiver. *Anon.* 3 M. & Scott, 751. 998

The affidavit of there being no sufficient distress on the premises must be positive; the deponent's belief will not do. *Doe v. Roe*, 2 Dowl. P. C. 413. 998

Title of affidavit. *Doe v. Roe*, 3 Tyr. 602; 2 Dowl. P. C. 55. 998

Where the affidavit of service in ejectment appears defective, a party who has been served cannot take advantage of the defect before judgment is marked. *Gabbott v. Ejector*, 1 Alcock & Napier, 184. (Irish). 998

An agent of the lessor of the plaintiff may make an affidavit of rent in arrear, required in ejectment on vacant possession. *Doe d. Charles v. Roe*, 2 Dowl. P. C. 752. 998

Where a declaration in ejectment was served on the son of a tenant in possession, upon an affidavit that the father was in the house at the time, the court refused to interfere, on counter affidavits that he was not at home, but was absent on business, and not to avoid service, the affidavits not negating that the son gave the declaration to the father before the first day of term. *Doe d. Protheroe v. Roe*, 4 Dowl. P. C. 385. 998

An affidavit of the service of declaration in ejectment must state that the party served is tenant in possession. *Doe d. Talbot v. Roe*, 1 Har. & Woll. 367. 998

The affidavit of service of a declaration in ejectment on an administratrix, must call her tenant in possession, and state that the property was leasehold. *Doe d. Rigby v. Roe*, 1 Har. & Woll. 369. 998

The affidavit in support of an application for judgment against the casual ejector must swear to a service on the "tenant in possession," the word "occupier" not being sufficient. *Doe d. Jackson v. Roe*, 4 Dowl. P. C. 609. 998

An affidavit of service of a declaration in ejectment upon the person in possession is insuffi-



cient. *Doe d. Oldham v. Roe*, 4 Dowl. P. C. 714. 998

A memorandum at the back of a declaration in ejectment of the service four years back, in the handwriting of a person who had since left the country:—Held, not sufficient to allow judgment to be entered up against the casual ejector. *Doe d. Twiaden v. Roe*, 1 Har. & Woll. 218. 998

*Other Proceedings.*]—Where the notice at the foot of a declaration in ejectment was to appear in Michaelmas term, and the motion for judgment was not made till H. T., the court refused to grant a rule, unless the defendant had an opportunity to show cause. *Right d. Jeffery v. Wrong*, 2 Dowl. P. C. 348. 998

The rule of C. P. of T. T. 32 Car. 2, requiring motions for judgment against the casual ejector, in Middlesex and London, to be made in one week after the first day of Michaelmas and Easter terms, and within the first four days of Hil & T. terms, is still in force. *Doe d. Lawford v. Roe*, 4 M. & Scott, 681; 1 Bing. N. R. 161. 998

In this court the motion for judgment against the casual ejector must be made in conformity with the rule of Michaelmas term, 32 Car. 2. *Doe d. Glynn v. Roe*, 2 Dowl. P. C. 322. 998

If a regular service is effected before the term in which the appearance is to be made, and which elapses, a motion for judgment may be made in the following term on the same service. *Doe d. Thomson v. Roe*, 3 Dowl. P. C. 575. 998

Rule for judgment against the casual ejector must be to show cause, if not moved for until the second term after service of the declaration. *Doe d. Reeve v. Roe*, 1 Gale, 15. 998

The practice of allowing judgment to be signed against the casual ejector, where the term in which the appearance is required, and before which the service has been effected, has elapsed, in the following term only applies to country causes. *Doe d. Greaves v. Roe*, 4 Dowl. P. C. 88. 998

If one term is allowed to lapse in a town cause between the service of the declaration in ejectment and the motion for judgment against the casual ejector, the notice to appear being in the former term, a rule nisi only for judgment will be allowed in the C. P. *Doe d. Wilson v. Roe*, 4 Dowl. P. C. 124. 998

Where a judgment and execution in ejectment was regularly obtained without collusion with the tenants in possession, the court refused to set it aside, at the instance of a party who stated that he was landlord of the premises, and had not received any notice of the declaration in ejectment. *Doe d. Martin v. Roe*, 1 Hodges, 223; S. C. nom. *Doe d. Thompson v. Roe*, 2 Scott, 181; 4 Dowl. P. C. 115. 998

In order to entitle a defendant, tenant in possession in an action of ejectment, to enter into the consent rule, without confessing ouster, it is not sufficient to show that he holds under a tenant in common. *Doe d. Willis v. Roe*, 4 Dowl. P. C. 628. 1001

Twelve defendants in ejectment entered into

a general joint consent rule, not specifying the premises for which they severally defended. At the assizes the judge made an order that the record should be amended, by allowing two of the defendants to withdraw their plea, and suffer judgment by default, but no express order was made as to any amendment of the consent rule. The trial proceeded; these two defendants did not appear, but the other ten made a complete defence:—Held, that the order did not virtually operate as an amendment of the consent rule also, and that the plaintiff was, notwithstanding the order, entitled to a verdict against all the defendants. But the court directed that the ten defendants who went to trial should be allowed the costs of their defence on taxation. *Doe d. Bishton v. Hughes*, 2 C. M. & R. 281; 4 Dowl. P. C. 412. 1001

In ejectment, judgment was signed by the plaintiff as for want of a plea, and writs of possession were sued out and executed. The defendant had left a plea at the judge's chambers. The defendant obtained a judge's order to set aside the judgment and writs of possession, and commanding the sheriff to restore possession:—Held, the order ought not to have been on the sheriff, and that writs of restitution issued upon the order were irregular. *Doe d. Williams v. Williams*, 4 Nev. & M. 259; 2 Adol. & Ellis, 381. 1002

Whether it is a valid objection to a writ of restitution, that no præcipe had been issued, or that the writs themselves were only sealed and not signed, quære? Id.

After execution in an action of ejectment, the court will not set the proceedings aside on payment of the rent due and costs of the action, if there are other grounds of forfeiture besides the non payment of rent; and if such an application be made, the court will dismiss it with costs. *Doe d. Lambert v. Roe*, 3 Dowl. P. C. 557. 1003

*Messe Profits.*]—In an action for messe profits, the plaintiff is entitled to receive only the taxed costs of the ejectment, and not the extra costs. *Doe v. Hare*, 2 Dowl. P. C. 245; 2 C. & M. 145; 4 Tyr. 29. 1004

Where A. took possession of premises on the 2nd of June, and a sum of money became due for ground rent on the 24th for the quarter ending on that day, which A. paid:—Held, in an action for messe profits against A., that he was entitled to deduct the money so paid from the damages. Id.

Where there is judgment by default in an ejectment the plaintiff may, in the action for messe profits, recover all the expenses he has been necessarily put to in the ejectment, and is not limited to the taxed costs as between party and party. *Doe v. Huddart*, 2 C. M. & R. 316; 4 Dowl. P. C. 437; 1 Gale, 260. 1004

A judgment in ejectment is not conclusive evidence of title in the action for messe profits, unless it be pleaded by way of estoppel. Therefore, under a plea (to a declaration in the ordinary



form), that the premises in the declaration mentioned were not the premises of the plaintiff; it was held, that the defendant might give evidence of title in himself, though he had let judgment go by default in the ejectment. *Id.*

To a declaration in trespass by John Doe, as plaintiff, the defendant pleaded, that the premises were not the premises of the plaintiff:—Held, that under this plea the defendant was at liberty to prove title in himself, the judgment in ejectment not being conclusive against the defendant, unless shown upon record. *Id.*

Where an action of trespass for mesne profits is brought against a party who has a cross claim against the plaintiff at law, for money expended on land, the court will grant an injunction to restrain the proceedings at law, there being no right of set-off in such an action. *Cawdor (Earl) v. Lewis*, 1 Y. & Col. 427. 1004

### ERROR.

Where a defendant gives a cognovit, and expressly agrees not to bring a writ of error, but notwithstanding does so, the allowance of such writ of error is no supersedeas, and will not prevent the plaintiff from charging him in execution. *Beet v. Gompertz*, 2 Dowl. P. C. 395; 2 C. & M. 427; 4 Tyr. 280. 1007

Seemle, that there is a distinction between a release of errors, and an agreement not to bring a writ of error. *Id.*

The plaintiff and defendant by their respective attorneys agreed that a question at issue between them should be raised on demurrer, in order to a more speedy adjustment of it; and it was further agreed, that, whatever the decision of the court on the argument of the demurrer might be, "each party should pay his own costs and charges in and about the cause, and that such decision should bind the parties." Judgment having been given for the plaintiff on the demurrer:—Held, that it was not competent to the defendant to sue out a writ of error thereon. *Brown v. Granville (Lord)*, 4 M. & Scott, 333; 2 Dowl. P. C. 796. 1007

The court of Exchequer Chamber has jurisdiction under 11 Geo. 4 & 1 Will. 4, c. 70, s. 8, to correct errors in judgments in K. B. in criminal cases. *Wright v. Rex (in error)*, 3 Nev. & M. 692; 1 Adol. & Ellis, 434. 1006

Quære, whether the court of Exchequer Chamber can grant a repleader? *Paddon v. Bartlett*, 5 Nev. & M. 383. 1006

The want of a panel to the distringas is error, and the defect is not cured by the statutes of jeofails. *Rogers v. Smith*, 3 Nev. & M. 760; 1 Adol. & Ellis, 772. 1005

In a case where the point stated in the notice of an allowance of a writ of error, had been argued and decided on a rule granted to arrest the judgment, the court refused to allow execution to issue as upon a frivolous ground of error. *Gardiner v. Williams*, 3 Dowl. P. C. 796; 1 Gale, 91. 1008

A notice of the allowance of a writ of error in

an action of slander, stating the grounds of error to be, that the declaration and every count thereof is bad, the words not being actionable without special damage, and the innuendoes bad in law, sufficiently complies with 9 Reg. Gen. H. T. 4 Will. 4. *Robinson v. Day*, 2 Dowl. P. C. 501. 1010

An infant suing by prochein ami was non-suited, and then sued out a writ of error, but allowed the return day to pass without taking any steps towards the prosecution of it. The defendant then issued execution against him for the costs of the nonsuit:—Held, that the execution was regular, though the writ of error was not nonprossed; and that it was the plaintiff's duty to have prosecuted it, and not to have allowed it to expire. *Dow v. Clarke*, 2 Dowl. P. C. 302; 3 Tyr. 866. 1011

The House of Lords will not postpone the hearing and decision of any appeal on account of the absence of counsel, but will call on the counsel on either side in attendance to proceed with the argument. *Mellish v. Richardson*, 1 Clark & Fin. 224. 1011

A court of law has authority over its own record, which it may amend, even after error is brought. *Id.*

A court of error will not inquire into the propriety of amendments made in the court below; but though such amendments be made after error is brought, will consider them as part of the original record subjected to their revision. *Id.*

A court of error is bound by the transcript of a record which is sent up under the rule to certify the record. *Salter v. Slade*, 3 Nev. & M. 717; 1 Adol. & Ellis, 608. 1011

Such transcript is to be considered in the court of error, as the record of the court below. *Id.*

The court of error cannot amend such transcript. *Id.*

After allowance of a writ of error, the plaintiff in error neglected to transcribe the record within the time limited by Reg. 10 H. T. 4 Will. 4, whereupon the defendant applied to the officer of the court to sign judgment of nonpros which he was at liberty to do. The officer refused, and then the transcript was removed. The court below afterwards refused to allow the defendant in error to sign judgment of nonpros nunc pro tunc, though the fault was in the officer of the court. *Pitt v. Williams*, 4 Dowl. P. C. 70; 1 Har. & Woll. 363. 1011

In debt for goods; sold plea nil debet, except as to 1l. 12s. 5d.; and as to that tender, the jury in a county court having found that the defendant did not owe any thing except as to the 1l. 12s. 5d., and as to that, certain facts upon which they prayed the judgment of the court, which was given for the defendant in the court below and reversed on error:—Held, that upon plaintiff releasing damages, the court of error might enter judgment for the plaintiff for 1l. 12s. 5d., with the costs of the proceeding in the court below. *Finch v. Brook*, 2 Bing. N.R. 325. 1012

The court is bound ex officio to reverse a judg-



ment for errors of law apparent on the record, though not assigned as errors by the plaintiff in error. *Castledine v. Mundy*, 1 Nev. & M. 635. 1013

The House of Lords will not receive from the agent of the plaintiff in error a petition to refer to the judges the legal points in the case. *Rickets v. Lewis*, 1 Bing. N. R. 196. 1013

### ESCAPE.

In an action brought against a sheriff for a permissive escape, it is an essential fact to be established by the plaintiff, that at the time of the escape the defendant in the writ was in the legal custody of the sheriff at the suit of the plaintiff under the writ. *Duffy v. White*, 1 Alcock & Napier, 1. (*Irish*). 1014

The absence of an allegation to that effect would render the declaration bad on general demurrer. *Id.*

A return of *cepi corpus* coupled with evidence of an answer received at a sheriff's office, that no bail-bond was executed, is evidence to go to the jury in an action against the sheriff for the escape. *Neek v. Humphrey*, 4 Nev. & M. 707; 3 Adol. & Ellis, 130; 1 Har. & Woll. 419. 1014

In an action against a sheriff for escape of a prisoner arrested on mesne process, the plaintiff proved the arrest by producing the sheriff's return of *cepi corpus et paratum habeo*:—Held, that the latter words of the return produced by the plaintiff did not conclude him from proving the escape by parol evidence, that the prisoner was at large after the return, and no bail-bond lodged with the sheriff. *Id.*

### ESCHEAT.

Upon felony committed by the surrenderor before admittance of surrenderee, the copyhold escheats to the lord. *Rex v. Mildmay*, 2 Nev. & M. 778. 1016

So, although the surrender be by way of mortgage. *Id.*

### ESTATE.

Devise to A., B., C., and D.; successively, in strict settlement. Proviso that, if the title of Earl of S. shall come to A., B., C., and D., (devisees for life), or their sons, within the period of the lives of the said A., B., C., or D., or within the term of twenty-two years after the decease of the survivor of them, then, and in such case, as and when the title of the said Earl of S. shall come and fall into possession to him or them, the estate which he or they then shall be entitled unto, in all and every the manors hereinafter devised, shall cease and determine, and become void; and the same manors shall immediately thereupon go to the person or persons who, under the limitations aforesaid, shall then be next in remainder expectant on the decease and failure of issue male of the person to whom the title shall so descend or come, in the same manner as such persons so in remainder as afore-

said would take the same by virtue of the devise, in case he or they, to whom the title shall come and fall in possession as aforesaid, was or were actually dead without issue:—Held, that although the words "from time to time" are not inserted, yet the proviso attached to each of the estates created by the will, as they should successively vest in possession. *Doe d. Lumley v. Scarborough*, 4 Nev. & M. 724; 3 Adol. & Ellis, 2. 1017

The effect of this proviso, in the event of the title descending on a tenant for life, is not to let in the son of such tenant, but to carry the estate over to the next branch of the family. *Id.*

The will in which the above proviso was inserted, contained a devise to A. for life; remainder to trustees during his life, to preserve contingent remainders; remainder to F., the son of A., in tail; remainders over. A. and F. suffered a recovery. The title of Earl of S. descends upon A.:—Held, that the uses to arise under the proviso are not barred by this recovery. *Id.*

Semble, that the remainders over, subsequence to the estate tail limited to F., are barred. *Id.*

Gross error in judgment, without positive proof of impartiality, is sufficient to enable the court to set aside an adjudication made by commissioners of partition. *Story v. Johnson*, 1 Y. & Col. 538. 1018

An allegation that A. is tenant for the life of M. is supported by proof that A. and B., being joint tenants for the life of M., conveyed their estate by lease and release to A. without an intermediate party. *Avery v. Cheslyn*, 3 Adol. & Ellis, 75; 5 Nev. & M. 372; 1 Har. & Woll. 263. 1018

Livery of seisin is not rendered void by the fact of a child having remained on the premises at the time, even though such child were the descendant of a party having title, unless the child was placed there for the purpose of representing that party. If there be several co-parceners, and one only be in actual possession, a feoffment executed by her to a stranger, of the whole premises, will oust the other co-parceners. *Doe d. Reed v. Taylor*, 5 B. & Adol. 575. 1019

In the absence of evidence to the contrary, the entry of such co-parcener will be presumed to have been a general entry, and not for herself alone, or for herself and the other co-parceners. *Id.*

A devisee in fee may by deed disclaim the estate devised, and after such disclaimer has no interest in the estate. *Begbie v. Crook*, 2 Bing. N. R. 70; 2 Scott, 128. 1019

The father of the defendant, and, after his death, the defendant, had held lands by the permission of and under the father of the lessor of the plaintiff; the defendant continued to hold the lands. To show that the tenancy was determined, the lessor of the plaintiff offered in evidence the following letters. The first was a letter written by the defendant to the plaintiff, in



which, after acknowledging the receipt of a letter from the plaintiff on the subject of the premises in question, he says—"As the circumstances in it are not within my knowledge, I have placed it in the hands of Messrs. F., and have requested them to communicate with you." The second letter, which was from Messrs. F. to the defendant, was as follows—"Earl C. (the defendant) has given us a letter from you on the subject of some ground you state to have been let by the late Mr. L., (the father of the lessor of the plaintiff) in 1811, and which has ever since been in the possession of his lordship's family. We will thank you to let us have the proofs that it was not the late Earl's own." Another letter from Messrs. F. requested further information "as to the late Mr. L. having a right to let the piece of ground in question to Earl C., as it appears to us that the mere fact mentioned in your letter, at the utmost only shows that Mr. L. might claim it, and does not at all aver that Lord C. admitted it, even on the representation of his own agent:"—Held, that those letters did not amount to a disclaimer. *Doe d. Lewis v. Cawdor*, 1 C. M. & R. 388; 4 Tyr. 852. 1019

A disclaimer in such case must be before the date of the day of the demise. *Id.*

An admission, made after the day of the demise, of a disclaimer, must, to have the effect of determining a tenancy, amount to an admission that such disclaimer took place before the day of demise. *Id.*

Held also, that the letter of the defendant did not confer on the agent any authority to bind the defendant to make a disclaimer. *Id.*

In an ejectment by a landlord against his tenant, the landlord relied on a disclaimer. It was proved that the tenant disclaimed in March, 1833; in November, 1833, the landlord put in a distress for rent:—Held, a waiver of the disclaimer. *Doe d. David v. Williams*, 7 C. & P. 322—*Patteson*. 1019

An action of debt by a covenantor against the devisees of a covenantor will not lie under the stat. 3 Will. & Mary, c. 14, where the covenantor is only a surety, and the breach of covenant did not take place in his lifetime. *Farley v. Briant*, 5 Nev. & M. 42; 1 Har. & Woll. 297. 1022

In debt against the heir and devisee under 3 (or 3 & 4) Will. & Mary, c. 14, if the declaration does not show that the cause of action accrued in the lifetime of the devisor, and the defendant pleads that, before the cause of action accrued, the devisor died, and the plaintiff demurs, the defendant is entitled to judgment, on the ground that either the declaration is defective in not alleging that the cause of action accrued in the lifetime of the devisor, or that, if such an allegation is to be implied, the allegation is material, and it will be traversed by the plea. *Id.*

In a *sci. fa.* to revive a judgment against the heir and certain terre-tenants of the lands of the consur, where the heir of the consur is not returned as terre-tenant, a plea by the heir alleging non-*seisin* of the ancestor of the particular lands of which A. K. and J. W. are returned as terre-

tenants, is bad on demurrer. *Henry v. Jones*, 1 Alcock & Napier, 14. (*Irish*). 1022

Where the interest which the heir seeks to protect by pleading does not appear on the *sci. fa.*, it must be disclosed in the plea. *Id.*

*Sci. fa.* against the heir upon a judgment against the ancestor, of Easter Term, 1797. Plea of payment by the heir in 1823, he having become heir in that year:—Held, that this was a valid plea within the 8 Geo. 1 (*Irish*), c. 4, s. 2, and did not throw upon the defendant the onus of proving an actual payment—*Burton, J.*, dubitante. *Dunn v. Currin*, 1 Alcock & Napier, 400. (*Irish*). 1022

## EVIDENCE.

### I. MATTERS JUDICIALLY NOTICED.

Semble, that the courts will not take judicial notice of a plaintiff being an Irish peer. *Nugent (Lord) v. Harcourt*, 2 Dowl. P. C. 578. 1026

The court will take judicial notice of the day of the week on which a certain day of the month was. *Hanson v. Shackleton*, 4 Dowl. P. C. 48; 1 Har. & Woll. 542. 1026

### II. ADMISSIONS.

*Generally* ]—Upon a judgment by default or on demurrer, the contract or contracts are admitted as stated in the declaration, and evidence to contradict them, which would be good under the general issue, ought not to be admitted. *Stephens v. Pell*, 2 Dowl. P. C. 629. 1027

Quære, whether defendant, by demurring to a declaration for a libel, stated to have been published with intent to cause certain matters to be believed, admits particular words in the libel to have been published with that intent? *Digby v. Thompson*, 1 Nev. & M. 485; 4 B. & Adol. 521. 1027

The setting out a judge's order in pleading is not, upon demurrer, to be taken as an admission of the facts stated in the order. *M'Cormick v. Melton*, 1 C. M. & R. 525; 5 Tyr. 147. 1027

Quære, whether circumstances not denied on the record can be assumed to be true in point of fact, or whether they are admitted only so far as to exclude them from the issue? *Noel v. Boyd*, 1 Gale, 293. 1027

An admission on the face of one plea cannot be made use of to prove or disprove another plea. *Stracy v. Blake*, 1 Mees. & Wels. 168. 1027

But where it appears, from the whole conduct of a cause, that a particular fact is admitted between the parties, the jury have a right to draw the same conclusion as to that fact as if it had been proved in evidence, and to draw such conclusion as to all the issues on the record; and the court refused to grant a new trial, on the ground that the judge had stated to the jury a fact so admitted between the parties as being admitted on the record, and applied such supposed admission in support of another issue. *Id.*



*Admissions by Judge's Order.*—The court has not jurisdiction, under r. 20 of H. T. 4 Will 4, to order the admission of documents; and if a judge at chambers desires parties coming before him under that rule to go before the court, they will be heard; but the court will pronounce no judgment, leaving that to be done by the judge at chambers. *Smith v. Bird*, 3 Dowl. P. C. 641; 1 Hodges, 96 1027

On the plaintiff paying the defendant the expenses of examining a judgment and other documents abroad, an order was made for the defendant to pay the expenses of proving them at the trial, (such proof being satisfactory to the judge, and so certified by him,) whatever might be the result of the case, if after such examination the defendant did not admit them. *Id.*

Previously to the trial of an ejectment, the defendant's then attorney gave admissions, commencing, "We hereby agree to admit, on the trial of this cause," &c. The court of K. B. afterwards granted a new trial, and the attorney for the defendant died. The second trial took place on the 17th of February, and on the 7th of February the defendant's then attorney gave notice to the lessor of the plaintiff that he should make no admissions; and the latter sent back an answer, stating that the admissions already made were binding:—Held that, on the second trial, these admissions were receivable in evidence. *Doe d. Wetherell v. Bird*, 7 C. & P. 6—*Denman*. 1027

If, on a summons to admit the handwriting of the defendant, his attorney refuse to admit it, and the usual order be made, the judge at the trial will certify for the costs of a witness who is called to prove the handwriting, if such witness in his examination in chief deposes to no other fact. *Stracey v. Blake*, 7 C. & P. 404—*Abinger*. 1027

In an action for running down a ship, tried at Newcastle-upon-Tyne, the plaintiff having obtained a verdict, the Master refused to allow him the expense of proving certain documents, being the registers and transfers, &c., of the ship, upon the ground that reasonable notice had not been given to the defendant to allow copies to be given in evidence. The commission day was the 4th of March; notice of trial had been given on the 21st of February, and the notice to admit the documents was not served till Saturday the 28th of February, on the London agent. He, however, refused to admit the copies, and another application was made on the following Monday, and the copies were produced to him; but he again refused, and a summons was then taken out, returnable the next day, but not attended. On the previous evening the agent sent off the briefs. The court ordered the master to review his taxation. *Tynn v. Billingley*, 3 Dowl. P. C. 810; 2 C. M. & R. 253. 1027

### III. PRESUMPTIONS.

In all questions upon the existence of life at a particular time, the presumption in favor of life must be governed, and the weight that is to be attached to it, regulated by the circumstances of

each particular case: and the determination of the question is for a jury at the sessions. *Rex v. Harborne*, 4 Nev. & M. 341; 2 Adol. & Ellis, 540; 1 Har. & Woll. 36. 1028

The sessions were justified in presuming that a first wife was alive at the time of a second marriage of the husband, on evidence being given of a letter from her, dated at Van Dieman's Land, 25 days before the time of the second marriage. *Id.*

A case established by *prima facie* evidence, may be answered by another *prima facie* case of a stronger character. *Rex v. St. Mary, Leicester*, 5 Nev. & M. 215; 1 Har. & Woll. 330. 1028

### IV. WANT OF REASON IN WITNESSES.

Before a child is examined as a witness, the judge must be satisfied that the child feels the binding obligation of an oath on a general course of religious education; and the effect of the oath on the conscience of the child should arise from religious feelings of a permanent nature, and not from instruction recently communicated for the purposes of a trial. Therefore, where it appeared, that, up to a very recent period, a girl aged eight years was totally ignorant of religion, but had some religious instruction given to her with a view to her being examined, but at the trial showed that she had no real understanding on the subject of religion or a future state, the judge would not allow her to be examined. *Rex v. Williams*, 7 C. & P. 320—*Patteson*. 1029

A lunatic may be brought up by *habeas corpus ad justificandum*, on affidavit that he is not a dangerous lunatic, and is in a fit state to be brought up. *Fennell v. Tait*, 5 Tyr. 218; 1 C. M. & R. 584. 1029

### V. INFAMY OF WITNESSES.

If an affidavit be made by a convicted felon, the court will grant a rule to take it off the file, but it must be shown by affidavit, that his competency has not been restored. *Holmes v. Grant*, 1 Gale, 59. 1029

### VI. PARTIES ON THE RECORD.

In *assumpsit* against several defendants, a statement made by one is receivable in evidence, as the plaintiff may proceed by steps to fix each of the defendants separately. *Whitford v. Tutin*, 6 C. & P. 228; 4 M. & Scott, 166; 10 Bing. 395. 1031

The rule, with respect to defendants not fixed by the evidence, is, that the verdict in their favor is to be given at the close of the plaintiff's case. *Russell v. Rider*, 6 C. & P. 416—*Bosanquet*. 1031

Where in tort there are several defendants, if there be, at the close of the case for the plaintiff, no evidence against some of the defendants, the judges have resolved that those defendants, against whom there is no evidence, shall be immediately acquitted, and that their acquittal shall not be delayed till the case of the other de-



endants is gone into. *Child v. Chamberlain*, 6 C. & P. 213; 3 Nev. & M. 580. 1031

In replevin, the defendant makes cognizance, first, under a demise by A. to B.; secondly, under a demise from B. to the plaintiff. Plea in bar to each cognizance, non tenant. The defendant may, at the trial, abandon the second cognizance, and examine B. in support of the first issue, B. stating on the voir dire that he did not employ the attorney. *King v. Baker*, 4 Nev. & M. 228. 1031

Where a local act empowers the directors and overseers of the poor of a parish to sue and be sued in the name of their clerk; in an action for goods supplied to the directors, a person who was one of the directors at the time when the goods were supplied, is a competent witness for the defendant. *Fletcher v. Greenwell*, 1 C. M. & R. 754; 5 Tyr. 316; 1 Gale, 34. 1031

In assumpsit on five promissory notes, one for 100*l.*, two of 50*l.*, and two of 20*l.* each; on issue joined on a plea that the action did not accrue within six years, the plaintiff proved an application to the defendant for interest on a debt of 200*l.*; the defendant said his wife would have called to make a payment on account of it, but she had been prevented; the wife called shortly after and made a small payment, without saying any thing:—Held, that the admission of the defendant was receivable in evidence, and was sufficient to go to the jury, and to warrant them in finding that the payment by the wife was by the defendant's authority, and on the three notes which amounted to 200*l.* *Waters v. Tompkins*, 1 Gale, 323. 1031

#### VII. PARTIES SUBSTANTIALLY INTERESTED.

In an action by a landlord, who is a tenant for life, against a tenant from year to year for waste, the remainder-man in tail is a competent witness for the plaintiff. *Leach v. Thomas*, 7 C. & P. 328—*Patteson*. 1032

#### IX. PARISHIONERS.

In an action against an overseer, defending on behalf of the parish, an inhabitant is not rendered a competent witness for the overseer by the statute 54 Geo. 3, c. 170. *Tothill v. Hooper*, 1 M. & Rob.—*Denman*. 1036

Upon the trial of an ejectment brought by churchwardens and overseers to recover a house, alleged, on the part of the lessors of the plaintiff, to be a parish house, a rated inhabitant of the parish is a competent witness for the plaintiff under the statute 54 Geo. 3, c. 170, s. 9. *Doe d. Higgs v. Cockell*, 6 C. & P. 525—*Alderson*. 1036

If a right of way be pleaded for the inhabitant householders of M. to fetch water, an inhabitant householder of M. may be examined as a witness in support of this plea, under the stat. 3 & 4 Will. 4, c. 42, s. 26. *Knight v. Moore*, 7 C. & P. 258—*Williams*. 1036

Inhabitants rated, or liable for the highways, are incompetent witnesses for the district indicted for the non-repairs of a highway. *Rex v.*

*Bishop Auckland*, 1 Adol. & Ellis, 744; 1 M. & R. 286—*Bolland*. 1036

#### XI. PARTNERS.

In an action by A., a banker, against B. a customer, for the balance of an account, part of which arose whilst C. was a partner with B.:—Held, that C., after whose secession from the partnership B. and C. executed mutual releases of all demands, is a competent witness to disprove an item charged by A. in the account, although debts due to and by the firm of B. & C. are still unsettled, and although, since the dissolution of the partnership, B., as continuing partner, has asked his creditors for time. *Wilson v. Hirst*, 1 Nev. & M. 742; 4 B. & Adol. 760. 1039

In assumpsit for work and labor, the defendant pleaded that "the promise was made to the plaintiff and J. S., and not to the plaintiff alone;" replication, that the promise was made to the plaintiff alone, and not to the plaintiff and J. S.:—Held, that J. S. was a competent witness for the defendant, to prove that the contract was entered into by the defendant with the plaintiff and himself jointly. *Davies v. Evans*, 6 C. & P. 619—*Parke*. 1039

#### XII. AGENTS.

Payments were made by A. purporting to be on account of the defendant, who took credit in account for them. A letter was written by the plaintiff to the defendant, which was answered by A. in a letter stating that the defendant had handed the plaintiff's letter to him. A's letter contained an admission of the debt:—Held, that there was evidence of A.'s authority to make the admission. *Morell v. Harborough* (Lord), 1 Gale, 146. 1039

A. having assigned his stock in trade and business to two trustees, one of them directed the plaintiff to go to Brussels to procure the liberation of A., who was detained there as a prisoner for debt, and it was arranged that Mr. L. should remit the plaintiff money while there. The plaintiff went there, and Mr. L. sent a letter to him there, announcing that he had done so:—Held, that, in an action by the plaintiff against the trustees for a compensation for going that journey, the statements in Mr. L.'s letters were not evidence; and also, that the declarations of a person whom the trustees had placed at the house of business to manage the shop, were also not evidence to show that the plaintiff was entitled to be paid for taking an account of the stock. *Lawrence v. Thatcher*, 6 C. & P. 669—*Denman*. 1039

#### XIII. ATTORNEYS.

An offer made by the attorney of the defendant's father, is no evidence against the defendant, and the fact of the defendant afterwards employing the same attorney, makes no difference. *Burghart v. Angerstein*, 6 C. & P. 690—*Alderson*. 1041

A clerk of an attorney was asked whether A.



and B. did not, as executors, employ his master as their attorney. *Beckwith v. Benner*, 6 C. & P. 681—Gurney. 1042

Communications made to an attorney by his client respecting the sale of estates are privileged; the rule is not limited to suits existing or expected. *Mynn v. Joliffe*, 1 M. & Rob. 326—Littledale. 1042

What a mortgagor, in treaty to raise money, says to the attorney of the mortgagee, is not a privileged communication. *Marston v. Downes*, 6 C. & P. 381; 1 Adol. & Ellis, 31. 1044

In an action against a mortgagor, the attorney of the mortgagee, who has the mortgage deed, cannot be compelled to produce it, if he objects to do so, nor can he be compelled to give evidence of its contents; but he may be asked for what purpose the money was raised; and secondary evidence may be given of the contents of the mortgage deed. *Id.*

If an attorney for a person not a party to an action, having refused at the trial to produce a deed belonging to his client, be directed by the judge to give parol evidence of the contents, the parties to the action have no right to object to such evidence going to the jury, even upon the supposition that the judge acted erroneously. *Id.*

Semble, that the knowledge acquired by an attorney, as to the right of his client to grant freehold leases, is of that privileged nature that he would not be bound to disclose it if called on as a witness. *Moore v. Terrell*, 4 B. & Adol. 871; 1 Nev. & M. 559. 1044

A witness may be called upon by the plaintiff to state a conversation, in which the defendant proposed a compromise to the plaintiff, although the witness attended on that occasion as attorney for the defendant. *Griffith v. Davies*, 5 B. & Adol. 502. 1044

A prisoner was in custody on a charge of forgery, but was not allowed to see his wife: he wrote to a friend "to ask Mr. G., or some other solicitor, whether the punishment was the same whether the names forged were those of real or fictitious persons." Mr. G. was not his solicitor:—Held, that this was not a privileged communication. *Rex v. Brewer*, 6 C. & P. 363—Park. 1044

It seems, generally, that a solicitor cannot be compelled, at the instance of a third party, to disclose matters which have come to his knowledge in the conduct of professional business for a client, even though such business had no reference to legal proceedings, either existing or in contemplation. *Greenough v. Gaskell*, 1 Mylne & K. 98. 1044

In support of a plea of payment the defendant proved the payment of 11*l.* to H., the plaintiff's attorney, on the plaintiff's account. In answer to this the plaintiff tendered H. as a witness, to prove that the defendant afterwards called upon him and got the money back again, but his evidence was rejected on the ground of his being interested, and the defendant obtained a verdict:—Held, that the witness was competent, and

that the evidence ought to have been received. *Bowers v. Evans*, 1 Mees. & Wels. 214. 1044

Vendor had a draft of conveyance made by his own attorney, from which the deeds were afterwards prepared. The attorney was paid for this business by the vendor and purchaser in moieties, by agreement, but the latter employed an attorney on his own part to look over the draft. It remained afterwards with the vendor's attorney:—Held, that such draft was confidentially deposited with the latter, by the purchaser as well as the vendor, and could not be produced on trial against the interest of the purchaser's devisees, though with the consent of the vendor and his attorney. *Doe d. Strode v. Seaton*, 2 Adol. & Ellis, 171; 4 Nev. & M. 81. 1044

#### XVI. INTEREST OF WITNESSES.

*Statute 3 & 4 Will. 4, c. 42.*—The stat. 3 & 4 Will. 4, c. 42, s. 26, does not make the drawer of an accommodation bill a competent witness for the defendant in an action by the indorsee against the acceptor. The defendant, therefore, cannot examine him without a release. *Burgess v. Cuttill*, 6 C. & P. 282; 1 M. & Rob. 315—Lyndhurst. 1047

In an action by the indorsee against the acceptor of a bill of exchange, alleged to be an accommodation bill, the drawer was called as a witness for the defendant. The judge allowed him to be examined under the stat. 4 & 5 Will. 4, c. 42, s. 27, his name having been indorsed on the postea under the provision of the statute. *Faith v. McIntyre*, 7 C. & P. 44—Parke. 1047

In an action by A. against B. for use and occupation, C., who was called as a witness for the plaintiff, stated, that A. had let the premises to him, and that his (C.'s) tenancy was still undetermined. It was proposed on the part of the plaintiff to ask C. whether he had not let the defendant into possession:—Held, that this could not be asked, unless C. were released by A., and that the stat. 3 & 4 Will. 4, c. 42, ss. 26, 27, did not apply in the case. *Hodson v. Marshall*, 7 C. & P. 16—Denman. 1047

In an action for damage done to the plaintiff's horse and cart, by the negligent driving of the defendant's servant, the plaintiff's servant, who was driving his cart at the time of the accident, is not a competent witness for the plaintiff without a release; and the stat. 3 & 4 Will. 4, c. 42, s. 26, has made no alteration in the law on this point. *Harding v. Copley*, 6 C. & P. 664—Denman. 1047

In an action on the case for injuring the plaintiff's wall by digging a cellar near it, the workman who dug it is not made a competent witness for the defendant by the stat. 3 & 4 Will. 4, c. 42, s. 26, and therefore must be released by the defendant before he can be examined. *Mitchell v. Hunt*, 6 C. & P. 351—Patteson. 1047

In an action against a carrier for negligence in carrying a parcel, the carrier's servant is not made a competent witness for the defendant, by the statute 3 & 4 Will. 4, c. 42, s. 26, and cannot



be examined without a release. *Harrington v. Caswell*, 6 C. & P. 352—Patteson. 1047

The stat. 3 & 4 Will. 4, c. 42, s. 26, does not render a man, who was sworn before the act, a competent witness afterwards. *Barnes v. Stuart*, 1 Y. & Col. 119. 1047

Quære, whether that act extends to equitable proceedings? *Id.*

*Other Witnesses.*—A party who is directly interested in the event of an action or suit, by being liable for the costs, cannot be rendered a competent witness under the provisions of the stat. 2 & 3 Will. 4, c. 42, s. 26. *Jesus' College v. Gibbs*, 1 Y. & Col. 145. 1047

A witness cannot be rejected, unless he has a direct and immediate interest in the result of the case in which he is called to give evidence, nor unless the verdict in that case can be given in evidence for him in another suit. *Ralston v. Rowat*, 1 Clark & Fin. 424. 1047

The rules of law in England and Scotland are the same on this subject. *Id.*

If a witness is incompetent on the ground that he has made himself liable to pay the attorney, a release to him by the attorney of "all fees, costs, and charges" is sufficient to render him competent. *Doe d. Dully v. Allbutt*, 6 C. & P. 131—Gurney. 1048

In an action against executors, an unpaid legatee is a competent witness for the defendants. *Nowell v. Davis*, 2 Nev. & M. 745; 5 B. & Adol. 368. 1049

The interest of an auctioneer from his commission does not defeat his evidence. *Buckmaster v. Harrop*, 13 Ves. jun. 474. 1050

A. had let a horse and gig to B. for a journey. B. afterwards desired C. to drive it back for him, and return it to A.; as C. was doing so, the defendant negligently drove his gig against the horse of A., and killed it:—Held, that in an action brought by A. for the injury to his reversionary interest in the horse, C. was not a competent witness for the plaintiff without a release. *Heming v. English*, 6 C. & P. 542—Williams. 1050

Peacock having conveyed a close to Simpson, who built a house thereon, conveyed it again to Pickering, who pulled down the house and then mortgaged the property to Peacock as a security for the purchase money. Simpson having sued Pickering for trespass to the close:—Held, that as only a possibility appeared that Peacock might be a party interested, he was a competent witness for the defendant. *Simpson v. Pickering*, 1 C. M. & R. 527; 5 Tyr. 143. 1059

A person liable by bond for the costs of the action, may be rendered competent by depositing the penalty of the bond, as a security for the costs, with the officer of the court. *Lees v. Smith*, 1 M. & Rob. 329—Denman. 1047

H. F., being employed by the plaintiff to procure a bill to be discounted for him, placed it in the hands of the defendant for that purpose (without notice); the defendant detained the bill as a

set-off against a debt due to him from H. F. and another:—Held, that H. F., having an equal interest in the event of the suit, either way, was a competent witness to prove these facts in an action of trover brought by the plaintiff for the bill. *Faincourt v. Bull*, 1 Scott, 645. 1050

Persons who have refused to pay toll traverse, or a market-toll, are competent witnesses, ex necessitate, for the defendant, in an action of debt by the lessee of such tolls, to which the general issue is pleaded. *Lancum v. Lovell*, 6 C. & P. 457—Tindal. 1050

*Examination and removal.*—If a witness on the voir dire be asked whether he is liable to pay the attorney, and he say that he is not, a letter written by him may be put into his hands, and, after he has looked at it, the question may be put again. *Homan v. Thompson*, 6 C. & P. 717—Parke. 1050

The defendant executed a release to one of his witnesses in the usual manner, and gave it to his attorney. At the trial it appeared that another witness would require to be released. His name was accordingly inserted in the release, and the defendant re-executed it before it had been delivered to either witness:—Held, that this re-execution did not make a fresh stamp necessary. *Spicer v. Burgess*, 1 C. M. & R. 129; 4 Tyr. 598; 2 Dowl. P. C. 719. 1051

Quære whether one stamp is sufficient on a release to two witnesses? *Id.*

Where a defendant suffered an incompetent witness to be examined, on the undertaking of the plaintiff's attorney to execute a release to him after the trial, and the plaintiff obtained a verdict; it is no ground for a new trial that the release was not given, but the witness has a remedy on the undertaking. *Hemming v. English*, 1 C. M. & R. 568; 3 Dowl. P. C. 155; 6 C. & P. 542; 5 Tyr. 185. 1051

## XVII. ATTENDANCE OF WITNESSES.

*Process.*—A subpoena duces tecum, without being ad testificandum also, held good; and the party is bound to obey it by producing the document, and is not thereby made a witness. *Evans q. t. v. Moseley*, 2 Dowl. P. C. 364. 1052

A habeas corpus ad testificandum issued to bring up a prisoner to give evidence before an election committee of the House of Commons, on affidavit of service of a rule to show cause, on the different persons concerned, and no cause shown. In re Price, 4 East, 587; 1 Smith, 284. 1053

The rule for bringing up a defendant from criminal custody on a habeas corpus ad test. is nisi only in the first instance. *Rex v. Pilgrim*, 4 Dowl. P. C. 89. 1053

A rule nisi was granted for a habeas corpus ad testif. to bring up a prisoner in custody on the commitment of a magistrate, to give evidence before an election committee of the House of Commons; but the court intimated doubts as to the power of making it absolute. In re Pilgrim, 1 Har. & Woll. 319. 1053



The court has no power to compel a person to appear and give evidence before the master. *M'Dougal v. Nichols*, 4 Dowl. P. C. 76; 1 Har. & Woll. 341. 1053

In the statute 45 Geo. 3, c. 92, s. 3, for enforcing the appearance of persons served with subpoena in one part of the united kingdom, to give evidence in another, the "parts" signified are England, Scotland, and Ireland. *Rex v. Brownell*, 1 Adol. & Ellis, 598. 1053

Where a person has been served with a subpoena, not issued from the crown office, to appear and give evidence at quarter sessions, and makes default, the court of King's Bench cannot attach him for contempt, either by its general authority, or by virtue of the above statute. *Id.*

**Expenses.**—No conduct money need be tendered to a witness in town in a town cause. *Jacob v. Hungate*, 3 Dowl. P. C. 457. 1053

A witness is entitled to her reasonable expenses for travelling in the mode suited to her station in life, and the particular circumstances in which she may be placed; and, therefore, where the wife of an innkeeper was subpoenaed to attend a trial at Lancaster, which was sixty miles distant by the high road, and fifty by a more direct one, and she was tendered 2*l.* 1*s.* (the outside fare by the coach by the latter road being only 1*l.* 6*d.*), but it appeared that she had a sick child who must have travelled with her, and the money tendered was insufficient if she travelled inside, a rule for an attachment against her was discharged, but without costs, as she took the money tendered and made no objection at the time. *Dixon v. Lee*, 3 Dowl. P. C. 259; 1 C. M. & R. 645; 5 Tyr. 180. 1053

A master of a vessel detained here as a necessary witness, was allowed in the taxation of costs the expenses of his living here, and his travelling expenses, and disallowed a claim of 7*l.* per month for wages, which, if he had sailed, he would have been entitled to:—Held, that the allowance was proper. *White v. Brazier*, 3 Dowl. P. C. 499. 1053

In order to review a taxation by the master for disallowing the expenses of detention of a foreign witness in this country, it should be shown that the master did not exercise his discretion on the subject, after special grounds for the allowance had been laid before him. *White v. Mayor*, 5 Tyr. 487. 1053

The master, in taxing the expenses of witnesses according to a certain scale, cannot allow more than is actually paid for their travelling expenses. *Radeliffe v. Hall*, 3 Dowl. P. C. 802. 1053

**Remedy by Action.**—An action will lie against a witness for non-attendance in pursuance of a subpoena, although the plaintiff was not nonsuited, but withdrew his record in consequence of the absence of the witness. *Mullett v. Hunt*, 1 C. & M. 752; 3 Tyr. 875. 1053

A witness who was subpoenaed by the plaintiff in an action for use and occupation, and could

have given evidence as to the use and occupation, and could also have rebutted a set-off which was expected to be insisted on as a defence, did not appear in pursuance of his subpoena. There was another witness as to the use and occupation. When the cause was called on, the counsel on both sides were absent. The attorney for the plaintiff proved that he could have handed over the draft brief to other counsel who were in attendance, and that he withdrew the record solely on account of the absence of the witness who did not appear:—Held, that the witness was liable in an action for not appearing in pursuance to his subpoena. *Id.*

In a declaration in case for not attending as a witness in pursuance of a subpoena, there was no distinct allegation of a good cause of action in the original suit; but it was stated, that the defendant could have given material evidence for the plaintiff, and that without his evidence the plaintiff could not safely proceed to trial, and that by reason of his non-attendance, and because the plaintiff could not safely proceed to trial without his testimony, he was forced and obliged to and did withdraw the *Nisi Prius* record:—Held, sufficient after verdict. *Id.*

The same declaration alleged, that the subpoena was made known and shown to the defendant. The evidence was, that the subpoena was made known, and conduct-money was taken by the witness, but the original subpoena was not shown:—Held, that it was not necessary for the purposes of such action, that the original subpoena should be shown, (unless, perhaps, where the party demanded to see it), and that the part of the allegation as to showing the subpoena might be rejected. *Id.*

**Attachment.**—On a rule for an attachment for not obeying a subpoena to attend as a witness, it must appear that the party was called in court on his subpoena. In re *Jacobs*, 1 Har. & Woll. 123. 1053

It is a sufficient excuse that he was too ill to attend. *Id.*

On a motion for an attachment against a witness for not obeying a subpoena:—Held, no excuse that the witness would have been in time, if a previous cause on the list had not unexpectedly gone off. In re *Fenn*, 3 Dowl. P. C. 546; 1 Har. & Woll. 200. 1053

Nor that another person had answered for him, and would have fetched him in a few minutes. *Id.*

The court of K. B. has no power to grant an attachment against a witness for disobeying a subpoena issued out of the court of quarter sessions. *Rex v. Room*, 3 Nev. & M. 735. 1053

In order to subject a witness to an attachment for not obeying a subpoena, it must appear that he was called on it. *Rex v. Stretch*, 3 Dowl. P. C. 368. 1053

A motion for an attachment for not obeying a subpoena should be made at the earliest possible opportunity after the contempt has occurred. The court, on the ground of delay, discharged a rule for an attachment for not obeying a subpoena to give evidence at the trial of an indictment for a



misdeemeanor on 11th December, when the application was not made until the following Trin. Term. *Rex v. Stretch*, 4 Dowl. P. C. 30; 5 Nev. & M. 178; 1 Har. & Woll. 322. 1053

It is not indispensably necessary, that when a witness is called on his subpoena, the officer of the court should hold the writ in his hand; it is sufficient that the writ should be exhibited in court, and the officer call him three times. *Rex v. Fenn*, 3 Dowl. P. C. 546; 1 Har. & Woll. 200. 1053

Upon a motion for an attachment against a witness, (for disobedience to a subpoena), in not attending at the trial, an affidavit that she was called three times in open court is sufficient, without alleging that she was called upon the subpoena. *Dixon v. Lee*, 3 Dowl. P. C. 259; 1 C. M. & R. 645; 5 Tyr. 180. 1053

The court will not grant an attachment against a witness for contempt in not obeying a subpoena, if the circumstances are fully before them, and it appears his evidence could not have been material. *Dicas v. Brougham* (Lord), 1 Gale, 14. 1053

Where it appears from the notes and information of a judge, who tried a cause, that the attendance of a witness who has been subpoenaed would be wholly immaterial to the event, no attachment for contempt in not attending will be granted. *Dicas v. Lawson*, 1 C. M. & R. 934; 3 Dowl. P. C. 427; 5 Tyr. 235. 1053

A rule for an attachment against a witness will be discharged with costs, if it is denied that the original was shown at the time of service. *Jacobs v. Hungate*, 3 Dowl. P. C. 456. 1053

Since the 11 Geo. 4 & 1 Will. 4, c. 70, s. 4, it is no objection to an affidavit to ground an attachment against a witness for contempt, that it is sworn before a judge of a different court from that to which the contempt was shown. *Phillips v. Drake*, 2 Dowl. P. C. 45. 1053

### XVIII. EXAMINATION OF WITNESSES.

Where a witness for the prosecution, in a case of felony at the Old Bailey, on being asked to repeat an answer which she had previously given, before the whole of it had been taken down, omitted what the prisoner's counsel thought an important part of it, and denied that she had ever uttered such part, the judge allowed the short-hand writer of the court, who had taken down the answer, to be examined as a witness, to show whether the words had been used or not. *Rex v. Slater*, 6 C. & P. 334. 1054

A judge has a discretion whether or not a witness shall be recalled after the party who called him has closed his case. *Adams v. Bankart*, 1 C. M. & R. 681; 5 Tyr. 425; 1 Gale, 48. 1054

If a defendant's counsel, in cross-examining a witness, put a letter into his hand, and after asking him if he wrote it, desire him to read it, and then put questions upon it, the defendant's counsel is not bound to have the letter read till after he has addressed the jury. *Holland v. Reeves*, 7 C. & P. 36—Alderson. 1045

A defendant's attorney, who has been subpoenaed on the part of the plaintiff, may, at the desire of his counsel, remain in court during the trial of the cause, although an order has been made for the witnesses on both sides to withdraw. *Everett v. Lowdham*, 5 C. & P. 91—Bosanquet. 1055

If a witness come into court, and hear some of the evidence after the witnesses have been ordered out of court, it is entirely in the discretion of the judge whether he shall be examined or not; and this is so in the Exchequer as well as in other courts, the only difference in that court being confined to revenue cases, in which the rule is strict, that such witness cannot be examined. *Thomas v. David*, 7 C. & P. 350—Coleridge. 1055

It is no ground for rejecting a witnesses' evidence, that he remained in court after an order for all the witnesses to leave the court; it is merely matter of observation on his evidence. *Cook v. Nethercote*, 6 C. & P. 741—Alderson. 1055

If a witness refresh his memory from entries in a book, the opposite counsel may cross-examine on those entries, without making them his evidence, and the jury may see the entries if they wish to do so; but if the opposite counsel cross-examine as to the other entries in the same book, he makes them his evidence. *Gregory v. Tavernor*, 6 C. & P. 281—Gurney. 1055

Held, that a clerk might refresh his memory as to the deliveries of goods, by looking at entries made in his presence by his master in a ledger, from entries made by the clerk in a waste book, such entries in the ledger having been checked by the clerk while the facts were fresh in his memory, and that the waste book need not be produced. *Burton v. Plummer*, 4 Nev. & M. 315; 2 Adol. & Ellis, 341. 1055

Per Patteson, J., the rule that the best evidence must be produced, precludes a witness from refreshing his memory with a copy of an instrument which might itself be used for refreshing his memory, as much as it precludes the admission of evidence of the copy of an instrument, which would be evidence in itself. Id.

To prove a settlement by renting a tenement, under stat. 59 Geo. 3, c. 50, the following evidence of the taking was given:—A witness produced a book containing this entry, unstamped, in his handwriting, "agreed with T. S." (the pauper) "to have the house in P., now occupied by W., at '11l. per annum, to be paid quarterly, quarter's notice to be on either side, to leave in same repair as found it." The witness stated that he let the house as agent to the owner, and that the terms were reduced to writing to prevent mistake, and signed by the pauper's wife to bind her husband who was not present; but there was no other signature. The pauper occupied, and appeared to have paid rent quarterly for some time, at the rate mentioned:—Held, that the sessions not having found that the wife was authorized by the pauper, the above entry was not an agreement for a lease, and the witness might look at it to refresh his memory, without its being produced in evidence. The witness stated



that he had no memory of these things but from the book, but that on reading the entry he had no doubt. The *scissors* having affirmed the affidavit without stating expressly, and further evidence of the taking—Held, that this court could not infer that the *scissors* had no evidence of a parol letting, without taking the terms from the entry. *Rex v. St. Martin's*, *Leicester*, 2 *Add. & Ells*, 219; 4 *Nev. & M.* 312. 1655

A merchant at Sydney shipped goods for England on board the ship *C.*, and, by another that sailed after her, wrote to an agent in England, and desired him if he received the letter before the *C.* arrived, to wait thirty days in order to give every chance for her arrival, and then effect an insurance on the goods. The letter was received, and the agent having waited more than thirty days effected an insurance through the intervention of a broker, who told the underwriters when the *C.* sailed, and when the letter ordering the insurance was written, but did not state when it was received nor the order to wait thirty days after the receipt of it, before effecting the insurance. The *C.* never arrived. The assured brought an action on the policy against the insurers, but failed on account of the suppression of the facts by the broker. In an action by the assured against the broker, for negligence in effecting the policy:—Held, that the evidence of underwriters was not admissible to show, that in their opinion the matters not communicated were material. *Campbell v. Richards*, 5 *B. & Adol.* 840. 1055

Leading questions may always be put in cross-examination, whether the witness be a willing or an adverse one for the party calling him. *Parlin v. Moon*, 7 *C. & P.* 408—*Alderson*. 1058

Where a witness on cross-examination proves the handwriting of the opposite party to a paper, the counsel for such party has no right to see the paper, to enable him to found an examination as to whether it was really the writing of his client or not. *Russell v. Rider*, 6 *C. & P.* 416—*Bosanquet*. 1058

Collateral questions, trying the truth of a material part of the witness's story, may be put. *Ex parte Hardwell*, 1 *Mont. & Ayr.* 206. 1059

If a witness is called, and has only answered an immaterial question when his examination is stopped by the judge, the opposite party has no right to cross-examine him. *Creery v. Carr*, 7 *C. & P.* 64—*Gurney*. 1059

The judge will allow the defendant's counsel to cross-examine as to facts which appear to be irrelevant, as relating to a third person, if the defendant's counsel undertake that it shall be shown by other evidence that these facts are relevant to the issue. *Haigh v. Belcher*, 7 *C. & P.* 389—*Coleridge*. 1059

On the trial of an action for a nuisance, a witness may be asked whether he has not heard the plaintiff say that he had preferred eight indictments against the proprietors of the works, which in the present action were charged to be a nuisance:—Held, also, that a witness might be

asked what he had heard the plaintiff say when the plaintiff was examined as a witness on the trial of one of those indictments. *David v. Greenfield*, 6 *C. & P.* 684—*Parke*. 1059

Where an adverse witness upon his cross-examination, voluntarily gives evidence which would have been inadmissible as evidence in chief, and the counsel cross-examining does not object to such evidence being admitted or retained upon the judge's notes, the opposite counsel has a right to re-examine as to that evidence. *Stewart v. Trenggans*, 5 *Nev. & M.* 315; 1 *Har. & Woll.* 432. 1059

Where a witness gives evidence destructive of the case which he was called to prove, the party calling him may, in order to neutralize his evidence, show that he had before the trial given to the attorney an account of the transaction entirely different from that sworn to by him at the trial—Per Lord Deane. *C. J.*, (*disentente*, *Bolland, B.*) *Wright v. Beckett*, 1 *M. Rob.* 414—*Deane*. 1059

If a witness called for the plaintiff be asked, on the part of the defendant, whether the plaintiff had any conversation with him on a particular subject, and the witness state anything that the plaintiff said on that subject, the plaintiff's counsel may examine as to every part of the same conversation; but, if the witness state that the plaintiff had no such conversation with him, this does not let in the plaintiff's counsel to examine as to any thing else that the plaintiff said. *Dicas v. Brougham* (Lord), 6 *C. & P.* 249—*Lyndhurst*. 1059

A witness was asked, on cross-examination, whether he had not become bail for a witness previously examined. He replied, yes; and that he believed it was on a charge of keeping a gaming-house. In order to prevent any impression against the character of the party so accused, the court, at the suggestion of counsel, allowed such party to be called up again, and asked whether the charge was in fact true or false. *Rex v. Noel*, 6 *C. & P.* 336. 1061

In ejectment by heir against devisee, the solicitor who drew the will was called to prove its execution by the testator. On cross-examination it was sought to impeach his character:—Held, that the defendant could not be allowed to call witnesses to prove his good character, such evidence being only allowable where the attorney who prepared the will is dead. *Doe d. Reed v. Harris*, 7 *C. & P.* 330—*Coleridge*. 1061

In an action against the maker of a promissory note, one of the subscribing witnesses was asked if she did not constantly sleep with her master, the plaintiff. She said that she did not:—Held, that a witness might be called for the defendant to prove that she did so, and that this was not collateral to the issue; though, if the question had been, whether the witness had walked the streets as a prostitute, that would have been so, and had the witness denied it, other witnesses could not have been called to contradict her. *Thomas v. David*, 7 *C. & P.* 350—*Coleridge*. 1061



## XIX. EXAMINATION UPON INTERROGATORIES.

An application under the 1 Will. 4, c. 22, for the examination of a witness resident out of the jurisdiction of the court, must be made as early as possible after issue joined. *Brydges v. Fisher*, 4 M. & Scott, 458. 1062

The court of Exchequer has the same power as the court of King's Bench, since the 13 Geo. 3, c. 63, s. 44, to issue a mandamus or a commission for the examination of witnesses abroad. *Savage v. Binny*, 2 Dowl. P. C. 643. 1062

A witness for the defendant was examined on a commission granted under the stat. 1 Will. 4, sess. 2, c. 22, s. 4: on his cross-examination a paper signed by him was produced to him, and a portion of his cross-examination and re-examination related to it and was founded on it; the paper was annexed to the deposition:—Held, that this paper was not to be read as a part of the cross-examination of the witness, but that if the plaintiff's counsel wished it to be read before the cross-examination was read, it must be read as his evidence, so as to entitle the defendant's counsel to observe on it in a special reply. *Stephens v. Foster*, 6 C. & P. 289—*Lyndhurst*. 1062

The court will not stay the issuing of a commission to examine witnesses abroad, on the ground of the plaintiff being indebted to the defendant for certain costs in equity. *Oughan v. Parish*, 4 Dowl. P. C. 29. 1062

Under 1 Will. 4, c. 22, s. 4, the courts there named may order a commission to issue for the examination of witnesses abroad, omitting the usual clause, requiring the commissioners to take an oath as such, where it is shown that such omission is requisite for the purpose of rendering the commission effectual. *Clay v. Stephenson*, 5 Nev. & M. 318; 1 Har. & Woll. 409. 1602

Where, therefore, it appeared that witnesses residing at Hamburg, whose testimony was necessary to the case of a plaintiff suing in this court, refused to give evidence voluntarily before ordinary commissioners, and by the law of Hamburg could not in any manner be compelled to do so, and that the judges of the court of commerce there would have power to compel the attendance and examination of witnesses upon oath, under a commission directed to them by this court, and would be willing to render it effectual, provided they were not called upon to take any special oath as commissioners, this court ordered a commission to be directed to them, omitting the clause requiring the usual oath. *Id.*

The court refused to make any special order respecting the costs of a rule for such a commission, leaving them to be costs in the cause. *Id.*

A mandamus cannot be issued into Scotland under the 1 Will. 4, c. 22, s. 1, for the examination of witnesses there; but a commission may be issued for that purpose under the 4th section. *Wainwright v. Bland*, 3 Dowl. P. C. 653; 1 Gale, 103. 1062

Where it is sworn that a witness is in a precarious state of health, and cannot attend the

trial with safety, he may be examined before the officer of the court. *Pond v. Dimes*, 2 Dowl. P. C. 730. 1063

A rule for a mandamus to examine witnesses in India, under the 13 Geo. 3, c. 63, s. 45, is nisi in the first instance. *Doe d. Grimes v. Pattison*, 3 Dowl. P. C. 35. 1062

A commission to examine witnesses may be granted for the trial of an issue directed by the court of Chancery. *Bourdeaux, Bourdieu, or Bordieu v. Rowe*, 1 Bing. N. R. 721; 1 Scott, 608; 1 Hodges, 93. 1062

A motion for such a commission is properly made to the court in which the trial is to be had. *Id.*

Where a witness resides abroad at such a great distance that a commission sent out to examine him would necessarily occasion great delay, it is not a matter of course to grant such a commission on the application of the defendant, but it must be made out to the satisfaction of the court that the evidence of the witness would be admissible, and of service to the defendant when obtained; and therefore, where in an action on a bill by the indorsee against the acceptor, the defendant applied for a commission to examine the drawer in Upper Canada, to show that there was nothing due from the defendant to him, and it was sworn that it was believed that the plaintiff had not given value, but, upon a former hearing before a judge at chambers, it appeared to him that the plaintiff had given value, the court refused to interfere. *Lloyd v. Key*, 3 Dowl. P. C. 253. 1062

On an application by the defendant for a commission to examine witnesses abroad, the court refused to make it a part of the rule to call upon the plaintiff to produce a bill of exchange in his possession at the time of executing the commission. *Cunliffe v. Whitehead*, 3 Dowl. P. C. 634. 1062

By the stat. 1 W. 4, c. 22, the court has power to issue a mandamus to examine a witness in India, wheresoever the cause may have arisen. *Bain v. De Vettry*, 2 Dowl. P. C. 516; 1 Gale, 52. 1062

A rule of court for the examination of witnesses on interrogatories in a foreign country, is not an absolute stay of proceedings, but only a limited one. *Forbes v. Wells*, 3 Dowl. P. C. 318. 1062

If it appear to the court that a mandamus or commission to examine witnesses abroad is moved for to delay the plaintiff, the court will grant the writ only on bringing the money into court. *Dalton v. Lloyd*, 1 Gale, 102. 1062

The affidavit on which to ground a motion for a commission to examine witnesses abroad, must either specify the names of the witnesses proposed to be examined, or in some other way describe them. *Gunter v. M'Tear or M'Kear*, 1 Mees. & Wels. 201; 4 Dowl. P. C. 722. 1062

It is not necessary that the affidavit in support of a motion for a commissioner to examine witnesses abroad, should state either the names of the witnesses or the matters to which they are



to be examined, in a case where it is evident that such examination is necessary. *Carbonell v. Bessell*, 5 Simon, 636. 1062

Where an affidavit in support of an application for a commission to examine witnesses abroad, stated that the facts alleged in the pleadings, took place in the presence of the witnesses, that they were resident abroad, and that their evidence was material and necessary:—Held sufficient; and that the affidavit need not state that the evidence was admissible, or that the application was bona fide and not for delay; and also that no affidavit of merits was necessary. And the court, in granting such an application, will not impose terms upon the party applying. *Baddely v. Gilmore*, 1 Mees. & Wels. 50. 1062

The discretion as to the costs of a commission for the examination of witnesses out of the jurisdiction, given to the courts by the statute 1 Will. 4, c. 22, s. 3, will be regulated by the same principles upon which the courts of equity proceeded in like cases before the passing of that statute, or by the practice that obtained with respect to the costs of a mandamus under the 13 Geo. 3, c. 63, s. 44. *Brydges v. Fisher*, 1 Scott, 485; 1 Bing. N. R. 510; 1 Hodges, 36. 1062

Where a commission issued at the instance of the defendant for the examination of a witness abroad, under stat. 1 Will. 4, c. 22, s. 3, and the defendant obtained a verdict:—Held, that he is not entitled to the costs of the commission. *Id.*

Commissioners for the examination of witnesses ought not to be paid according to the number of office folios of the depositions, but according to the number of days on which they actually sit. *Small v. Attwood*, 1 Y. & Col. 53. 1062

## XX. ACTS OF PARLIAMENT.

A local act, with a clause declaring it to be a public act, and that it shall be taken notice of as such without being specially pleaded, need not be proved either to have been examined with the parliament roll, or to have been printed by the King's printer. *Woodward v. Cotton*, 1 C. M. & R. 44; 6 C. & P. 457; 4 Tyr. 689. 1064

An act for the regulation of the affairs of an insurance company contained a clause directing that it should be deemed and taken to be a public act, and should be judicially taken notice of as such by all judges, justices, and others, without being specially pleaded:—Held, that the act was sufficiently proved for all legal purposes, by the production of a copy purchased at the office of the King's printer. *Beaumont v. Mountain*, 4 M. & Scott, 177; 10 Bing. 404. 1064

## XXI. JUDGMENTS AND VERDICTS.

An allegation, that "on, &c., at, &c., a certain indictment was preferred at the quarter sessions of the peace, then and there holden in and for the said county of W., against the defendant and one T. E., which said indictment was then and there found a true bill"—is not supported by the pro-

duction of the original indictment with the words "true bill" indorsed on it, it being necessary that a regular record should be drawn up, and proved, either by its production or by an examined copy. *Porter v. Cooper*, 6 C. & P. 354—*Patteson*. 1066

On an indictment for perjury, committed in the hearing of a parish appeal at the quarter sessions, the production of the sessions book is not sufficient proof that the appeal came on to be heard; and a regular record must be made up on parchment, the same as on a return to a certiorari, and that record or an examined copy must be produced. *Rex v. Ward*, 6 C. & P. 367—*Park*. 1066

In an action brought by A. and B., for diverting water from their works, it appeared that A., when in the sole possession of the same works, had brought a former action for a similar injury, against the same defendants, in which he had recovered a verdict and judgment against them; and it being proved that A. and B. were now in possession of the same works:—Held, that this was abundant prima facie evidence, that the present plaintiffs were privy in estate to the former plaintiff, and that the verdict and judgment in the former action were admissible in evidence against the same defendants in this action. *Blakemore v. Glamorganshire Canal Comp.*, 2 C. M. & R. 133; 1 Gale, 78. 1066

Held, also, that the circumstances of B.'s having been examined as a witness in the former action, when he was disinterested, did not render such verdict and judgment inadmissible. *Id.*

In an action for use and occupation, a judgment in a former action for use and occupation between the same parties, given in favor of the plaintiff, is evidence of the defendant's having occupied, but is not conclusive; and the jury ought to take into their consideration all the circumstances under which that judgment was obtained. *Jones v. Reynolds*, 7 C. & P. 335—*Cole-ridge*. 1066

A judgment in ejectment is evidence to go to the jury in a subsequent ejectment brought upon the demise of the same lessor against the same defendant. *Doe d. Strode v. Seton or Seaton*, 2 C. M. & R. 728; 1 Tyr. & G. 19; 1 Gale, 303. 1066

In ejectment against A., on the demise of B., a mortgagee, a recovery in a former ejectment subsequently to the mortgage, on the demise of A., against C. the mortgagor, is inadmissible in evidence for the defendant. *Doe d. Smith v. Webber*, 3 Nev. & M. 746. 1066

So, although on the first action B. was examined as a witness on behalf of C. *Id.*

So, although the second action is brought on the several demises of B. and C., if the plaintiff elects to rely on the demise of B. only. *Id.*

In an action of debt by the lessee of the corporation of N. for toll traverse for a waggon, and a market toll for cattle, it was held, that an information quo warranto by the attorney-general of Queen Elizabeth against the corporation, in respect of the customs they claimed and used,



was not receivable in evidence, as it did not appear that it was prosecuted, such an information, like an indictment, not being evidence, unless there be the finding of a jury upon it:—Held, also, that an exemplification of a judgment in an action of trespass by the corporation, for setting up a stall in a market, with a justification pleaded of such right without paying toll, was not inadmissible, as it might connect itself with the issue in the progress of the cause. *Lancum v. Lovell*, 6 C. & P. 437—Tindal. 1066

## XXII. PROCEEDINGS IN CHANCERY.

A bill in Chancery filed by A. against B. and others, the answer of B. and his co-defendants, an order of the Master of the Rolls directing an issue of *devisavit vel non*, that being the question in controversy between the parties, and the *Nisi Prius* record with the *postea* thereon, containing the finding of *devisavit*, and judgment accordingly, being admitted and read upon the trial of an ejectment by Doe on the demise of A. against B., in which the same question arose, are not even *prima facie* proof of the due execution of the will. *Wright v. Doe d. Tatham*, 3 Nev. & M. 268; 1 Adol. & Ellis, 3. 1068

On a trial touching the right to lands, decrees in Chancery between other parties concerning the same lands, were held admissible in evidence, to show the character in which the possessor enjoyed the lands. *Davis dem., Lowndes ten.*, 2 Scott, 71; 1 Bing. N. R. 606. 1068

The admissions in a joint answer by the husband and wife are no evidence against the wife, such joint answer being considered as the answer of the husband alone. *Elston v. Wood*, 2 Mylne & K. 678. 1068

## XXIV. OTHER JUDICIAL DOCUMENTS.

Evidence is admissible to add to the examination of a party before a magistrate, though taken in writing. *Venafrá v. Johnson*, 1 M. & Rob. 316—Gaselee. 1069

A *cognovit* which is filed, may be proved by putting in an examined copy, without producing the original; and the subscribing witness may prove that he saw the party sign a *cognovit*, of which the paper produced is a copy. *Scott v. Lewis*, 7 C. & P. 347—Coleridge. 1070

The defendant in evidence read a part of a record roll of presentments before justices in eyre, and it appearing that there was one roll for each hundred, and that reference was made in one part to another part of the same roll; it was held that the plaintiff was entitled to have read such parts as he thought proper. *Lancum v. Lovell*, 6 C. & P. 455—Tindal. 1070

A horse having been killed by falling down an old shaft of a mine which had not been sufficiently covered over, the owner of the horse charged a person who was in the possession of a mine near to the spot with being also in possession of that shaft. The latter denied that the shaft was his, but said that if a miner's jury were called, and that they should say that the

shaft was his, he would pay for the horse. A miner's jury was accordingly called, and they found in writing that the shaft was his:—Held, that this finding of the jury, coupled with his declaration, was admissible in evidence against him in an action on the case, to recover compensation for the loss of the horse:—Held, also, that as the document in question did not, on the face of it, appear to be an award, it need not be stamped as an award. *Sybray v. White*, 1 Mees. & Wells. 435. 1070

## XXV. NON-JUDICIAL DOCUMENTS.

Land-tax assessments are not evidence of *seisin*, where it is shown to be usual to retain the name of deceased proprietors on the books until the estate is sold to a different family. *Doe d. Stansbury v. Arkwright*, 1 Nev. & M. 731; 2 Adol. & Ellis, 182. 1077

Assessments of commissioners of the land-tax, by which it appears, that at a certain time property was assessed in the name of S. (the family surname only), are evidence to show, in connexion with other facts, that at such time the property was occupied by a particular individual of the family. *Doe d. Strode v. Seaton*, 2 Adol. & Ellis, 171; 4 Nev. & M. 81. 1077

The manors of R. and of S., the parishes of C. and of Y., and the counties of B. and of G. were to terminate:—Held, in an action for disturbance of common, in which the boundaries of the two manors came in question, a county history of the county of B., which stated the boundaries of the counties at this spot, was not receivable in evidence. *Evans v. Getting*, 6 C. & P. 586—Alderson. 1074

An ancient survey of a manor made before commissioners appointed by the lord of the manor, and a jury of the tenants of the manor, is admissible as evidence to show the boundaries of the manor; but is not admissible as evidence of the lord's title to wreck. *Talbot v. Lewis*, 6 C. & P. 603—Parke. 1074

An entry in the baptismal register, that the defendant was born on a day there mentioned, is no evidence of that fact. *Burghart v. Angerstein*, 6 C. & P. 690—Alderson. 1075

If the vicar of a parish be applied to for an extract of a parish register of a particular date, and he state that there is no register book of that year, this is not sufficient proof of loss of the book to let in secondary evidence of the contents of the register without calling the vicar; but if the vicar had produced to the applicant a book as the original register, the judge at the trial would have held it to have been so, unless the contrary was shown. *Walker v. Beauchamp (Countess)*, 6 C. & P. 552—Alderson. 1075

Semble, that the returns made annually of transcripts of parish registers to the registry of the diocese, under the 70th canon, are not receivable in evidence instead of the original register, or an examined copy of it, without proof of the loss of the original register; but semble, that if the original be proved to have been lost,



examined copies of these returns would be admissible. *Id.*

But if the returns were made under the statute 52 Geo. 3, c. 146, ss. 6, 7; *semble*, that examined copies of them would be evidence, without proof of the loss of the original register. *Id.*

If an original parish register be produced on a trial, that certain entries in it should be read, the jury may look at the book to see whether the entries which have been read are in their proper places or not, but for no other purpose. *Id.*

### XXVI. DOCUMENTS OF A MIXED NATURE.

A record on the record book of a manor, of admittance to a copyhold, reciting a surrender of the same copyhold to the use of a will, is admissible evidence of the surrender, the steward not being able to find the surrender itself on the roll or elsewhere, and the surrender being irregularly kept in the manor, although all the other surrenders were either preserved or recorded on the roll. *Rex v. Thruscross*, 1 Adol. & Ellis, 126. 1080

Upon a bill of discovery in aid of an action to try whether the plaintiff's house was within the limits of a certain parish, and therefore liable to the parochial rates, the court ordered the defendants, the parish officers, to produce for his inspection the rate-books, account-books, minute-books, orders, and other documents, which related to the matter in question, and were admitted by their answer to be in their possession. *Burrell v. Nicholson*, 1 Mylne & K. 680. 1082

A local paving act authorizes commissioners, at a meeting to be called for that purpose, to order footpaths to be raised, &c., and directs that the entries in the commissioners' books may be read in evidence. An entry in the books, stating that such an order was made at a meeting held by public notice, does not prove that the meeting was duly holden, so as to legalize the order. It should appear by the entry, or be shown aliunde, that notice was given of the purpose for which the meeting was called. *Heysham v. Foster*, 5 M. & R. 277. 1081

Where a canal act gives the control over the company's affairs to a committee, and authorizes every proprietor to inspect the books in which the committee are directed to enter accounts, &c., a mandamus will not be granted to compel the company to permit a proprietor to inspect the books, where there has been no refusal by the committee, although there has been a direct refusal by the clerk, in whose possession the books are. *Rex v. Wiltshire Canal Comp.*, 5 Nev. & M. 344. 1081

So, although upon an application to the committee, they say that they must consider of the application, as it is a novel one, and inspection is afterwards positively refused by the clerk. *Id.*

Before the court will grant a mandamus, there must be a direct refusal by the proper parties to do the act. *Id.*

In trespass by the lord of a manor for wreck, a document, dated in 1630, was offered in evi-

dence, purporting to be the answer of certain persons, tenants of the manor, to a commission, issued by the lord of the manor, for surveying the same, in which document it was stated that the lord was entitled to wreck:—Held, that this evidence was inadmissible, the title of the lord not being a matter of public concern, and the juror having no peculiar means of knowledge. *Talbot v. Lewis*, 1 C. M. & R. 495. 1080

If an application to inspect the court rolls of a manor is made when no cause is pending, the rule is nisi in the first instance. *Ex parte Best*, 3 Dowl. P. C. 38. 1081

A canal act provided, that "proprietors, land-owners, and others interested in the said navigation," should have a right to inspect the books of the company:—Held, that a creditor by bond was a person interested in the navigation, within the spirit of the above enactment. *Pontet v. Basingstoke Canal Comp.*, 2 Bing. N. R. 370; 2 Scott, 543. 1081

### XXVII. PAROL EXPLANATION OF DOCUMENTS.

Ambiguity in description of thing given. *Doe v. Templeman v. Martin*, 4 B. & Adol. 771; 1 Nev. & M. 512. 1086

Ambiguity in description of thing given. *Richardson v. Watson*, 4 B. & Adol. 787; 1 Nev. & M. 567. 1086

The effect of an instrument under seal cannot be altered by a memorandum not under seal. *Wenham v. Fowle*, 3 Dowl. P. C. 43. 1083

On appeal against an order of removal, when the respondents produce a deed of feoffment for the purpose of showing a settlement by estate in the appellant parish, but the lands are described in the deed as situate elsewhere, the respondents (not being parties to such deed) may give parol evidence to show that the lands really were within the appellant parish. *Rex v. Wickam*, 4 Nev. & M. 406; 1 Adol. & Ellis, 517. 1083

Ejectment for a forfeiture. A., by an agreement in writing, let to B. a house at the rent of 60*l.* a year, to be paid quarterly; and B. agreed, within three calendar months, to erect a shop-front, and otherwise repair, paint, paper, and whitewash the house. And it was further agreed, that, if B. did not erect the shop-front within three months, it should be lawful for A. or his agents to retake possession of the premises, and the agreement should be null and void. B. continued in the possession of the premises, and enlarged the window; but, as the plaintiff contended, did not erect a shop-front. It appeared also, that, after a quarter's rent had become due, and after the expiration of three months from the date of the agreement, A.'s son, the father being too ill to attend to business, made a demand of a quarter's rent, which B. offered to pay, if he would indemnify him for a sum which he had paid as a penalty to A.'s lessor for carrying on a trade in the premises, which was refused. At the trial, B., the defendant, contended that he had made a shop-front which answered the purposes



of his trade; and he offered to show that A. held the premises under a lease from C., which contained a clause imposing a penalty upon the lessee, if he allowed a trade to be carried on upon the premises; from which it was to be inferred that the words "shop-front," in the agreement were used in a peculiar sense; but this evidence was rejected;—Held, that such evidence was clearly inadmissible to explain the meaning of the words "shop-front" in the agreement:—Held also, it not having been proved that A. himself had had notice of the nature of the alterations, that the son had not sufficient authority to waive the forfeiture. *Doe d. Nash v. Birch*, 1 Mees. & Wels. 402. 1083

Where an expression used in a written instrument has a technical meaning, parol evidence is admissible to show that it had been used in that sense, and not in its ordinary meaning in common parlance, although that may be perfectly clear and unambiguous in itself; therefore, where the lessee of a coal-mine covenanted to get the whole of the mines "not deeper than or below the level of the bottom of the mine at a particular point:"—Held, that parol evidence of the understanding amongst miners was admissible to show that the word "level" had a particular technical meaning, different from its ordinary signification of "horizontal line." *Clayton v. Greyson*, 4 Nev. & M. 602; 1 Har. & Woll. 159. 1089

Quere, whether a previous agreement between the parties for a lease of the same mine, and for which the lease was substituted, was also admissible in evidence for the same purpose? 1d.

On an application to a creditor to enter into a composition, he was requested to write down what he was willing to do; he afterwards wrote—"I hereby agree, on payment of 10s. in the pound, to give a full discharge:"—Held, that evidence of the conversation with the creditor was admissible to show the purpose for which the writing was given. *Reay v. Richardson*, 2 C. M. & R. 422; 1 Gale, 219. 1088

Where a plaintiff relies upon a mercantile custom to support his claim for commission to a certain amount, the defendant may, without any special plea, produce evidence to show that under certain circumstances the custom is to pay but half that amount. The evidence being offered to show that the contingent reduction was part of the original contract, and not that it was a subsequent alteration, so as to create a new contract. *Broad v. M'Aylmer*, 5 Nev. & M. 413; 1 Har. & Woll. 532. 1088

Assumpsit by the drawer against the acceptor of two bills of exchange, payable respectively six and twelve months after date. The plea set forth an agreement (not stated to be in writing) between the plaintiff and defendant, by which, before the making of the bills, it was agreed that the defendant should be discharged from all liability in an action commenced against him by the plaintiff on a promissory note, on his paying the plaintiff the costs of such action, and a certain sum of money, and accepting the bills of exchange in question, in case the plaintiff should recover in another action brought by him against another

party, on a promissory note given under similar circumstances to the defendants; and that until he should so recover, or if he should not so recover, he should not call for payment of the bills of exchange; and the plea averred that the defendant accordingly paid the costs and money agreed for, and accepted the bills of exchange in question; and that the action against such third party was still undetermined:—Held, on demurrer, that the plea was bad, inasmuch as the defendant could not vary the absolute contract entered into by the bills of exchange by a contemporaneous oral contract inconsistent with it. *Adams v. Wardley*, 1 Mees. & Wels. 374. 1088

A. sent to B.'s agent a list of prices at which he would do work. B. wrote a letter to his agent, stating that he would agree to the prices, if A. would consent to be paid at stated periods, the first payment to be "in November." The agent showed this letter to A., and said to him that he might consider the 100*l.* to be payable on the "1st of November." A. afterwards did the work for B. It was left to the jury to say whether that which the agent said to A. formed a part of the actual contract between the parties, or whether it was a mere observation by the agent himself. *Knapp v. Harden*, 6 C. & P. 745—Gurney. 1088

A broker gave the following bought and sold notes:—1. "We have this day bought for your use, from J. O. B., 100 tons dry palm oil, at 31*l.* 10*s.* per ton to be taken from the quay at landing weights with customary allowances, &c., in cash, at fourteen days from delivery, less 2*½* per cent. discount: the above oil to be delivered from the Speedy or Charlotte, expected to arrive about November or December next." 2. "We have this day sold for your use, payment in fourteen days by cash, less 2*½* per cent. discount from delivery, 100 tons of dry palm oil, at 31*l.* 10*s.* per ton, ex Speedy and Charlotte, to arrive:"—Held, that evidence of merchantile usage was admissible to explain all the variances between these notes; and that, being so explained, the variances were not material, and did not avoid the contract. *Bold v. Rayner*, 1 Mees. & Wels. 343. 1088

#### XXVIII. PROOF BY SUBSCRIBING WITNESS.

Evidence must be given of identity of the obligor of a bond with the party sued thereon, where the subscribing witness proves that he never saw the defendant before or after he saw it executed. *Whitelock v. Musgrave*, 3 Tyr. 557; 1 C. & M. 511. 1090

Where a title deed under which both parties in ejectment claim, comes out of the possession of the defendant upon notice to produce, it may be read against him on behalf of the plaintiff, without calling the attesting witnesses. *Doe d. Williams v. Williams*, 5 Nev. & M. 434; 1 Har. & Woll. 574. 1089

In an action against A. upon a promissory note more than six years old, and which purported to be the joint and several note of A. & B., and the signature of B. to which purported to be



attested by C., evidence of payments of interest within six years by B. is not sufficient to take the case out of the statute of limitations, unless C. is called, although it appears that A. signed the note as surety for B., whose name was already subscribed to the note. *Wylde v. Porter*, 3 Nev. & M. 565; 1 Adol. & Ellis, 742. 1099

Where the defendants claimed title to certain goods under an assignment, and in pursuance of notice produced it at the trial when called for by the plaintiffs:—Held, that the plaintiffs were entitled to read it in evidence without calling the attesting witness to prove the execution, although they impugned the validity of the assignment on the ground of fraud. *Carr v. Burdiss*, 1 C. M. & R. 782; 5 Tyr. 309. 1099

In assumpsit by indorsee against acceptor of an English bill of exchange, to show that the plaintiff had received the bill when it was overdue; a protest, which had been made of it by the plaintiff's immediate indorser, being in the hands of the plaintiff, was called for by the defendant at the trial on notice to produce. On its production it appeared to be attested by a subscribing witness:—Held, that the mere circumstances that the protest came out of the hands of the plaintiff, as he did not claim title under it, was not sufficient to dispense with the necessity of calling the subscribing witness; but it being proved that on two occasions the paper had been produced by the plaintiff's attorney to the defendant's attorney, as the protest applying to the bill in question, it was admitted in evidence without proof of the attestation. *Marin v. Palmer*, 6 C. & P. 466—Tindal. 1099

#### XXIX. PROOF BY SECONDARY EVIDENCE.

The muniment chest of the lessor and his assigns is the proper custody for an expired lease. *Plaxton v. Dare*, 5 M. & R. 1. 1095

Where, on the second trial of the cause, a witness stated that he had, on the argument for the new trial, handed a document to one of the learned judges, and had not since seen it, or had been able to find it, secondary evidence was received of its contents without any search for it having been made at the chambers of the learned judge; the presumption being that his lordship had returned it to the party who produced it. *Deacon v. Fuller*, 6 C. & P. 74—Lyndhurst. 1095

There are no degrees in secondary evidence; therefore, where a defendant has given notice to the plaintiff to produce a letter, of which he kept a copy, he may, if the letter is not produced, give parol evidence of its contents, and is not bound to put in the copy; but, if there had been a duplicate original, it might be otherwise. *Brown v. Woodman*, 6 C. & P. 206—Parke. 1096

The mere refusal of a witness to produce a document where he is not justified in withholding it, is not a ground for going into secondary evidence of that document. *Jesus College v. Gibbs*, 1 Y. & Col. 145. 1094

In replevin the defendants avowed for a distress for poor's rates:—Held, that one of the defend-

dants having acted as overseer of the poor was *prima facie* evidence that he was so:—Held, also, that to let in secondary evidence of his appointment, it was sufficient proof of loss that a witness stated that he, at the desire of the attorney, had applied to the defendant for his appointment, and that he said that he had lost it, without proving any search made. *Bristol (Governor, &c. of poor) v. Wait*, 6 C. & P. 591—Alderson. 1094

Appellants against an order of removal relied upon the settlement of a deceased party by apprenticeship; and, to let in parol evidence of the indenture, they called the widow of the deceased, who stated that her husband, in his last illness, told her that he received his indentures from his master at the end of his apprenticeship, and wore them out in his pocket. The sessions confirmed the order, subject to the opinion of the court as to the admissibility of the evidence. The court held, that without further proof of inquiry after the indenture, evidence of this conversation was not admissible; and they refused to send the case back to be re-stated. *Rex v. Rawden*, 2 Adol. & Ellis, 156; 4 Nev. & M. 97. 1094

In assumpsit for money had and received, where it is shown that the defendant admitted that he had received a bill drawn on a third party, to which the plaintiff was entitled, and that he had paid it into his banker's on his own account, the banker's clerk cannot be called to prove that the defendant received benefit from a bill of similar description, the bill itself not being produced, nor its absence accounted for. *Atkins v. Owen*, 4 Nev. & M. 123; 2 Adol. & Ellis, 35. 1094

The production of an entry of the minutes of a contract made by a third party, in the presence of and by the direction of two contracting parties, but not signed by either of them, is not the only medium of proving the contract, unless there is evidence that the writing in fact constituted the agreement, and was taken to be so, and assented to as such by the parties: parol evidence of the terms of the contract is, therefore, admissible without accounting for the non-production of the written minutes. *Rex v. Wrangle*, 4 Nev. & M. 375; 2 Adol. & Ellis, 314; 1 Har. & Woll. 41. 1096

What is a sufficient search for witnesses to prove handwriting to allow secondary evidence to be given, must depend on the circumstances of each case. *Miller dem., Miller ten.*, 2 Scott, 123; 2 Bing. N. R. 76; 1 Hodges, 187. 1094

In order to dispense with the production of an attesting witness to a will, bearing date the 15th May, 1806, it was proved that applications had been made by letter to the attorney in whose office the witness was at the time a clerk; in the first place, for general information respecting the will, and afterwards for information respecting the witnesses by whom it was attested, and that advertisements for their discovery had a week before the trial been inserted in three daily and one weekly newspapers, but without success:—Held, that sufficient had been done to entitle the party to have the will read on proof of the handwriting of the witnesses, although the attorney of



whom the inquiries had been made stated that one of the witnesses was examined in a cause touching the property in 1815, a fact which he had forgotten to communicate at the time he was asked for information, but which (it was suggested) he could not fail to have remembered had any strict inquiry been instituted. *Id.*

The architect gave an order to the parties by whom he was employed to pay a particular sum out of his commission to a creditor:—Held, on the trial of an issue, directed under the Interpleader Act, between the creditor and the architect, to try the right to the money, that a copy of an affidavit sworn by the architect in another action against the parties by whom he was employed, in which the order was set out, and which copy his attorney had admitted to be correct, was good secondary evidence for the plaintiff of the order which was lost:—Held also, that in the absence of any evidence to the contrary, the order must in such an issue be presumed to have been duly stamped. *Pooley v. Goodwin*, 5 Nev. & M. 466; 1 Har. & Woll. 567. 1096

A. had purchased at an auction an under-leasee's interest in a house, and refused to pay a check which he had given for the deposit, because the ground rent payable to the superior landlord was greater than it was stated to be at the sale:—Held, that the superior landlord's solicitor was not compellable to produce the counterpart of the original lease; and that a person who had advanced money on that lease, and held it as equitable mortgage, could also not be compelled to produce the lease itself; but that, if both these, on being called as witnesses, refused to produce the lease and counterpart, secondary evidence might be given of the contents of the lease, by calling a person who had seen it, and who neither claimed under it as one of his own title deeds, nor was privileged as an attorney or solicitor. *Mills v. Oddy*, 6 C. & P. 728—Parke. 1096

### XXX. PROOF AFTER NOTICE TO PRODUCE.

In an action on an attorney's bill, it is not necessary to give notice to produce the original bill delivered the party, but the production of a duplicate thereof is sufficient. *Fyson v. Kemp*, 6 C. & P. 71—Gurney. 1097

Nor is it necessary that the parties examining should read the two bills alternately. *Id.*

Where notice of the dishonor of a bill of exchange has been given in writing, it is not necessary to give a notice to produce that writing to let in parol evidence of its contents. *Swain v. Lewis*, 2 C. M. & R. 261; 4 Dowl. P. C. 261; 1 Gale, 182. 1097

In ejectment by the heir of A., the defendant sets up a will of A., whereby he devises all his property in fee to B., through whom the defendant claims. One of the attesting witnesses stated that he had prepared this; that a fortnight afterwards he prepared another will for A., which A. executed and delivered to him, and which the witness upon A.'s death delivered to B. No notice to produce the last-mentioned instrument

had been given:—Held, that the plaintiff's counsel could not ask the witness, "whether, at the time of executing the instrument, A. declared it to be his last will; and if so, whether it was attested by three witnesses." *Doe d. Philips v. Morris*, 4 Nev. & M. 598; 3 Adol. & Ellis, 46; 1 Har. & Woll. 226. 1097

Quære, whether, if the second instrument in this case could have been shown to have been duly executed, published, and attested, as the last will of A., the plaintiff would have been entitled to recover as heir at law, without showing its contents or application? *Id.*

Semble, that an instrument which has been traced to the hands of an opposite party can in no case be presumed to have been lost or destroyed, unless such party has had notice to produce it. *Id.*

Notice to produce an agreement, served upon the defendant's attorney at 5 o'clock on the commission day of the assizes, held too late, the attorney having then left home for the assize town, which was nine miles distant from his office, and the opposite party refusing to furnish him with a conveyance. *George v. Thompson*, 4 Dowl. P. C. 656. 1098

A notice to produce a tradesman's books, served upon the plaintiff's attorney at 7 o'clock of the evening previous to the trial, is too late. *Atkins v. Meredith*, 4 Dowl. P. C. 658. 1098

The plaintiff had been employed as secretary to a charitable institution; his appointment was made in pursuance of a resolution of the committee for managing the affairs of the society which was entered in a book remaining in the plaintiff's hands as secretary, but to which entry the plaintiff was no party, nor did it appear to have been expressly brought to his notice; the society dissolving, the plaintiff quitted the employ, leaving this book in the office; in an action against three of the committee for arrears of salary:—Held, that the plaintiff was bound to produce the book, inasmuch as it would show the terms on which he had been engaged; and that a notice to the defendants to produce it was not sufficient to entitle him to give secondary evidence under the quantum meruit; the book appearing not to be in the possession of the defendants, but in that of another member of the committee, without the knowledge or control of the defendants. *Whitford v. Tutin*, 4 M. & Scott, 166; 10 Bing. 386; 6 C. & P. 228. 1099

Proof of the possession of books by a member of a committee which he has in his custody, not as such member but as tenant of the premises previously occupied by such committee, is not sufficient, in an action against other members of the committee, to let in parol evidence of the contents on notice and non-production. *Id.*

In debt for rent by the assignee of the reversion against the assignee of the term, the plaintiff's attorney was called by his client to prove the execution of a deed; on cross-examination he admitted that there had been another deed between the same parties, relating to the demised premises, executed after the former, and that he



had that deed in court; but he refused to produce it, relying on his privilege; the defendant then offered to produce parol evidence of the contents of the deed, (without stating what evidence); no notice to produce had been given:—Held, that the parol evidence was rightly rejected. *Bate v. Kinsey*, 1 C. M. & R. 38; 4 Tyr. 662. 1099

Secondary evidence of a document, to produce which notice has been given, is not admissible where the document is held by a stakeholder, between the party in the cause and a third person. *Parry v. May*, 1 M. & Rob. 279—Little-dale. 1099

In an action against A. & B., as executors, A. had suffered judgment by default. The probate of the will was produced, and notice had been given to both the defendants to produce a receipt which had been given to A. as one of the executors:—Held, that if it was not produced, secondary evidence might be given of its contents, and that A.'s having suffered judgment by default made no difference. *Beckwith v. Benner*, 6 C. & P. 681—Gurney. 1099

If the opposite party be called on to produce a paper (under a notice to produce), he must either produce it when called for, or not at all; and he cannot, after having refused to produce it, put it into a witness's hand at a later period of the cause, to ask him at what time an interlineation was made in it. *Doe d. Higgs v. Cockell*, 6 C. & P. 525—Alderson. 1099

### XXXI. PROOF UNDER SUBPŒNA DUCES TECUM.

A witness who appears to produce a document, under a subpoena duces tecum, may be compelled to produce it without being sworn. *Perry v. Gibson*, 3 Nev. & M. 462; 1 Adol. & Ellis, 48. 1100

Where a person called only to produce a document is sworn as a witness by mistake, and a question is put to him which he does not answer, the opposite party is not entitled to cross-examine him. *Rush v. Smith*, 1 C. M. & R. 94; 2 Dowl. P. C. 687; 4 Tyr. 675. 1100

In an action on a promissory note, the defendant wished to give in evidence a composition deed executed by him and the plaintiff, and also by various of the defendant's creditors, but not by the defendant himself; it was in the hands of a trustee, who was willing to produce it, but the plaintiff's counsel objected:—Held, that the trustee ought not to produce it, but that the defendant might give in evidence an extract which had been furnished by the trustee, and which he, the trustee, proved to be a correct extract. *Cocks v. Nash*, 6 C. & P. 154—Gurney. 1100

A party served with a subpoena duces tecum is bound to produce the required document in court, and need not be sworn; thus, in an action against a sheriff, upon 32 Geo. 2, c. 28, for a penalty incurred by the act of his officer in taking a party arrested under meane process to a tavern without his free and voluntary consent; it was held that the officer, after being served with a

subpœna duces tecum on the part of the plaintiff, must produce his warrant in court without its being necessary to swear him as a witness. *Summers v. Moseley*, 2 C. & M. 477; 4 Tyr. 158. 1100

An attorney and steward of a lord of a borough is bound to produce under a subpoena duces tecum public documents relating to the borough, but he is not bound to produce documents relating to the lord's interest in the borough. *Rex v. Woodley*, 1 M. & Rob. 390—Denman. 1100

It is not competent for a person served with a subpoena duces tecum to show that the instrument he was required to produce was immaterial in the cause, in answer to a rule for an attachment. *Doe d. Butt, v. Kelly*, 4 Dowl. P. C. 273. 1100

Where there are several actions against the same party, grounded on the same document, and the document is in the custody of an officer of a court of equity, in a suit instituted by the defendant at law to restrain proceedings in one of the actions, the court, upon the application of the defendant at law, will order the production of that document at the trial of another of the actions, though the plaintiff in the latter action is not a party to the suit in equity. *Taylor v. Sheppard*, 1 Y. & Col. 284. 1100

Subpœna duces tecum granted to enforce attendance of an officer of the customs with entries and warrants. *Anon.* 1 Alcock & Napier, 112. (*Irish.*) 1100

The court of Review will not order the registrar to attend with the proceedings, at the trial of an action, on behalf of a party who is a stranger to the commission. *Ex parte Munk*, 3 Deac. & Chit. 233. 1100

The court of Review in bankruptcy has no jurisdiction to order a commissioner to compel a witness to produce a document which the commissioner thinks he ought not to produce. *Ex parte Groom*, 2 Mont. & Ayr. 143. 1100

### XXXII. INSPECTION OF PRIVATE DOCUMENTS.

Where there is an agreement between the plaintiff and defendant, of which there is only one part, the party who has the agreement in his possession ought, when applied to, to give the other party a copy; and he has no right to impose terms as a condition for so doing. *Reid or Read v. Coleman*, 2 C. & M. 456; 2 Dowl. P. C. 354; 4 Tyr. 274. 1101

An application for a copy of an agreement ought to be made to a judge at chambers, and not to the full court. *Id.*

The plaintiff, assignee of A., who had become bankrupt, sued B. in respect of certain contracts alleged to have been entered into by A. with the plaintiff on the joint account of A. and B.; the court allowed B. to inspect the books of A., in the hands of the plaintiff, as his assignee, in order that he might discover what the alleged contracts were. *Whitbourne v. Pettifer*, 4 M. & Scott, 182. 1102



On an application for liberty to inspect a private instrument in the hands of the opposite party, it must appear to the court that the instrument is held in the possession of the latter, upon an implied or expressed trust for the benefit of the party making the application. *Alexander v. Alexander*, 1 Alcock & Napier, 109. (*Irish*). 1102

On an application by the defendant, who was sued as the acceptor of a bill of exchange, the court will order the bill to be lodged with the officer, for the personal inspection of the defendant, when it appears upon his affidavit that the cause of his refusal to pay is a reasonable suspicion of the acceptance having been forged. *Richey v. Ellis*, 1 Alcock & Napier, 111. (*Irish*). 1102

In an action by an attorney for his work and labor as such against a corporation of which he was a burgess, the court refused to grant him inspection of the books of the corporation. *Stevens v. Berwick* (Mayor), 4 Dowl. P. C. 227; 1 Har. & Woll. 517. 1100

Where an agreement for a lease was in the hands of an attorney, and it was doubtful whether he acted as attorney for both the parties to the agreement, in drawing it up; the court allowed one of the parties to inspect and take a copy of it. *Ex parte Bretter*, 1 Har. & Woll. 212. 1100

Certain books of the plaintiff had come into the defendant's possession as his agent. It became necessary for the plaintiff to inspect them. The court ordered the defendant to allow an inspection, but would not order him to deliver them up. *Jones v. Palmer*, 4 Dowl. P. C. 447. 1102

Rule calling on the directors of an insurance office to deliver up a policy refused, where they had refused to make good a loss, and the party insured could not declare without it, there being no action pending. *Ex parte Partridge*, 1 Har. & Woll. 350. 1102

Where a lease is executed by both the lessor and lessee, and the lessee assigns it by way of mortgage, the lessor, having no counterpart, is entitled, on an ejectment brought for a forfeiture, to compel the mortgagee to allow an inspection, and give a copy of the lease. *Doe d. Morris v. Roe*, 1 Mees. & Wels. 207. 1102

### XXXIII. PROOF OF PRIVATE DOCUMENTS.

Entries signed by a deceased agent, but not in his handwriting, but by which such agent charges himself, are receivable in evidence. *Doe d. Litchfield* (Earl) *v. Stacey*, 6 C. & P. 139—*Tindal*. 1105

Declarations respecting the subject-matter of a cause by a person who, at the time of making them, had the same interest in such matter as one of the parties now has, are admissible in evidence against that party, though the maker of them is alive, and might be called as a witness. *Woolway v. Rowe*, 3 Nev. & M. 849; 1 Adol. & Ellis, 114. 1105

The plaintiff below deduced title, under the

Clanricarde family, by proper averments, from Richard, fourth Earl of Clanricarde; to prove possession under this title, the plaintiff below gave in evidence two documents found at the family mansion of the descendants of Anthony Dopping, bishop of Meath, in 1681; these documents were found amongst the family papers; it appeared by the evidence of the registrar of the diocese, that no diocesan records (with the exception of one roll) anterior to 1717 were to be found in the diocesan registry; one of the two documents was a parchment deed, purporting to be a grant from Ulick, fifth Earl of Clanricarde, to E. D., of the next avoidance of the rectory and vicarage of Rathweir; it bore date 28th March, 1637.—Held, that as this deed related to the patronage of the diocese, and there were not any such documents in the registry anterior to 1717, a proper place to search for such documents was amongst the Dopping family papers, and being found there it was properly admitted as evidence for the plaintiff below: the other document purported to be a case for the opinion of counsel, prepared on the part of the bishop, but not proved to be in his handwriting, and bore date on the 28th February, 1695; in this it was stated, that, in 1637, Ulick, fifth Earl of Clanricarde, granted to E. D., incumbent of Rathweir, his executors and administrators, the next presentation to the rectory and vicarage of Rathweir, dated 28th March, 1637; that, in 1642, both rectory and vicarage being void by the death of E. D., his widow and executrix presented pro hac vice tantum William Barry to both, who was thereupon instituted and afterwards inducted:—Held, that as this was the statement of a fact, the knowledge of which might have been acquired by the bishop from documents within his reach, and was made against his own interest, it was admissible in evidence against his successor. *Meath* (Bishop) *v. Winchester* (Marquis), 1 Alcock & Napier, 508. (*Irish*). 1105

Accounts of the receipts of tolls of a market, signed by a person since deceased, styling himself managing clerk of a deceased steward of the claimant's ancestor, are not evidence of title, although such accounts are found among the family muniments. *De Rutzen v. Farr*, 5 Nev. & M. 617. 1105

A private book kept by a deceased collector of taxes, not as a matter of duty, but for his own convenience, containing entries by him, acknowledging the receipt of sums of money in his character of collector, is admissible in evidence in an action against his surety; although the parties who had made the payments were alive, and might have been called as witnesses. *Midleton v. Melton*, 5 M. & R. 264. 1105

An entry of the dishonor of a bill of exchange, made in the usual course of business, at the time of the dishonor, in the book of a notary, by his clerk, who presented the bill, may be given in evidence in an action on the bill, upon proof of the death of the clerk who made the entry. *Poole v. Dicus*, 1 Scott, 600; 1 Bing. N. R. 649; 7 C. & P. 79; 1 Hodges, 162. 1105

In ejectment, it appeared that the lessor of the



plaintiff, to entitle himself to the property as heir at law, must deduce title through E. The title relied upon by the defendants was that of a party to whom E. had devised his remainder in the property, which remainder had been devised by J. to E. Among other evidence to identify the property in question with that devised by J., a book was offered in evidence, containing entries of receipts of rent of the property in question by a deceased steward of E.:—Held, that the defendants were entitled to produce these entries in evidence against the plaintiffs, each party claiming under or through E. The defendants claimed by purchase from the heir of a devisee under E.'s will. The estate purchased was only a part of the property devised, and to which the steward's entries related:—Held, that the defendants, although not entitled to the possession of the book, might insist upon having it produced in evidence as to that part of the property which had come to their hands. *Doe d. Strode v. Seaton*, 2 Adol. & Ellis, 171; 4 Nev. & M. 81. 1105

A written memorandum of an arrest, and the place where it occurred, made by a sheriff's officer contemporaneously with effecting the arrest, sent immediately to the sheriff's office, and there filed in the course of business, is not admissible evidence of the place at which the arrest took place, after the death of the officer, in an action between third persons. *Chambers v. Bernasconi*, 1 C. M. & R. 347; 4 Tyr. 531. 1105

In ejectment by an heir against devisee, evidence may be given on the part of the heir, of declarations made by the testator, that he had attempted to destroy his will. *Doe d. Reed v. Harris*, 7 C. & P. 330—Coleridge. 1105

In an action on a covenant, in a colliery lease, the lessee covenanted to keep true accounts of all coal daily raised, and to make and deliver true copies thereof to the lessor. D. J., who was the account-keeper appointed by the persons who worked the colliery, but who was since dead, rendered to the lessor (the plaintiff) accounts of coals sold by him:—Held, that these accounts were receivable in evidence against the lessee; first, as being entries made by D. J., charging himself; and, secondly, as being admissions made by the lessee's agent. *Edwards v. Rees*, 7 C. & P. 340—Coleridge. 1105

A letter is to be presumed to be written on the day on which it is dated, until the contrary is shown to be the fact. *Hunt v. Massey*, 3 Nev. & M. 109. 1107

Upon a question as to the general sanity of a deviser, letters addressed to him in his life-time, by persons since dead, who were well acquainted with him, and found amongst his papers after his death, with the seals unbroken, and in which he is addressed as a person of sound mind, are not evidence, unless it be shown that the deviser answered such letters, or did some other act in relation to them. *Doe d. Tatham v. Wright*, 6 Nev. & M. 132; S. C. nom. *Wright v. Doe d. Tatham*, 3 Nev. & M. 260; 1 Adol. & Ellis, 3. 1107

The last act done by the deviser in relation to such letters would have rendered them admissible. *Id.*

On a question whether certain land be part of the plaintiff's estate or waste of the manor, a perambulation of such manor by the lord, including the land in question, is evidence, as showing an assertion of ownership by the lord, though it be not proved that any person on behalf of the plaintiff was present at the perambulation, or knew of it. *Woolway v. Rowe*, 1 Adol. & Ellis, 114; 3 Nev. & M. 649. 1108

A counterpart of a feoffment by the corporation to an individual of land, &c., in the town of N., produced from among the corporation muniments, was held inadmissible in an action of debt by the lessee of the corporation, for tolls; it appearing that no rent was received in respect of the property. *Lancum v. Lovell*, 6 C. & P. 441—Tindal. 1103

It was proved that it had been the practice, as long as the witness, who was conversant with the subject, could remember, for the town treasurer to furnish the town clerk with information, from which he made out his (the treasurer's) accounts, and also for the treasurer to attend before the auditors, unless prevented by illness or accident, and produce vouchers verifying the town clerk's statement. Entries in books of that description, commencing with the year 1766, were tendered in evidence. Some of them were signed by the auditors as allowed, and to some of them appeared only an unsigned entry of their having been examined:—Held, that those which were signed by the auditors were admissible without proof of any attendance by the particular treasurer before the auditors, or of any entry in his writing, charging himself, partly on the ground that there was reasonable evidence of his having made the town clerk his agent for the making out of the accounts. *Id.*

#### XXXIV. PROOF OF HANDWRITING.

Assumpsit against the drawer and indorser of a bill of exchange. Plea denying the drawing and indorsement. At the trial, a witness for the plaintiff stated that he had received letters from the defendant's place of business in the same handwriting as that in which the bill was drawn and indorsed. An offer to the defendant to compromise after action brought was also proved. For the defence, three witnesses swore positively that the writing was not the defendant's:—Held, that though the three witnesses for the defence rebutted the inference that the writing upon the bill was the defendant's, yet the offer to compromise was evidence recognizing the handwriting upon the bill, whether that of the defendant or of some other person, sufficient to go to a jury. *Harding v. Jones*, 1 Tyr. & G. 135. 1106

A question arising at N. P. from the obscurity of the handwriting, what the words of a written instrument produced in evidence really were, the Lord Chief Justice decided it, and refused to



have it put to the jury. *Remon v. Hayward*, 2 Adol. & Ellis, 666. 1108

### XXXV. HEARSAY EVIDENCE.

In ejectment, where the question is *devisavit vel non*, evidence of the examination and cross-examination of one of the attesting witnesses to the will, who, upon the trial of an issue out of Chancery between the same parties, and upon the same question, proved the execution of the will, and is since dead, is admissible; and, being admitted, is entitled to the same degree of weight as the *viva voce* evidence of an attesting witness. *Wright v. Doe d. Tatham*, 3 Nev. & M. 268; 1 Adol. & Ellis, 3. 1110

Therefore, a will was held to be sufficiently proved by evidence of such examinations, where it appeared at the second trial that another attesting witness was alive, and within the jurisdiction of the court. *Id.*

In order to let in evidence of the examination of a deceased witness, upon a former trial upon the same question, it is sufficient if the parties be substantially the same. *Id.*

Therefore it is sufficient, if, in the former action, a party is plaintiff or defendant, and, in the other, lessor of the plaintiff in ejectment. *Id.*

Nor is it material that one of the parties to the second action was in the former action joined with several others who are not parties to the second action. *Id.*

Nor that the former evidence was given upon the trial of an issue arising out of a bill in Chancery, which has been dismissed upon the motion of the plaintiff in equity himself. *Id.*

Where, by a rule of court, made by consent of parties previously to the trial of an ejectment, it is ordered that the short-hand writer's notes of the evidence on the trial of an issue out of Chancery shall be read in evidence as to such witnesses as might be dead or beyond sea, evidence given by the short-hand writer of the examination at the former trial of an attesting witness since dead, who proved the execution of a will, the due execution of which was in controversy on both occasions, is not only admissible in evidence on the ground of the agreement in the rule, but, being admitted, is not secondary evidence, but is evidence of as high a nature as that of a living attesting witness. *Id.*

A., being possessed of Blackacre and Whiteacre by the same title, conveys Blackacre to B. Evidence given by witnesses since dead, in an action between C. and A. respecting the title to W., brought subsequently to the conveyance from A. to B., is not admissible in an action between C. and B., as to the title to Blackacre. *Doe d. Foster v. Derby (Earl)*, 3 Nev. & M. 782; 1 Adol. & Ellis, 783. 1110

Where two ejectments depending upon the same title are brought by A. against B. and C. respectively, at the same time, and come on for

trial on the same day; and that of Doe d. A. v. B. having been decided against B., C.'s counsel consents that a verdict shall pass against him in Doe d. A. v. C., on the ground that the evidence is the same in both cases; the evidence given in Doe d. A. v. B. cannot be admitted on behalf of A. in an action subsequently brought respecting the same title by C. against A., unless A. proves clearly that it was agreed between himself and C., on the former occasion, that the evidence given in Doe d. A. v. B. should be considered as repeated in the action of Doe d. A. v. C. *Id.*

The proper course for a party who wants a transcript of the evidence adduced at the former trial, appears to be to apply to the clerk of the judge who presided, for a copy of such judge's notes; and the expense of obtaining such copy would, it seems, be allowed in costs. *Crease v. Barrett*, 1 Tyr. & G. 112. 1110

An entry by a deceased person, charging himself, is admissible against strangers, even though it appears that the facts stated in that entry were not known to him of his own knowledge. *Crease v. Barrett*, 1 C. M. & R. 919; 5 Tyr. 458. 1110

Ancient answers of conventionary tenants of a manor, stating the rights of the lord of the manor, are admissible in evidence, even against the freeholders of the manor; but, if they state facts only, e. g. that "the commons of the said manor do belong to the tenants of the said manor unstinted, who have always enjoyed the same under the yearly rent of 33*l.* 4*s.*, as by the records thereof remaining with the auditor of the duchy appeareth; unto which, for the more certainty, we refer ourselves;" they are not admissible in evidence. *Id.*

Declarations of a deceased lord of a manor, as to the extent of his rights over the wastes of a manor, are not admissible in evidence. *Aliter*, if spoken of the extent of wastes only. *Id.*

Reputation is admissible in evidence, though unsupported by usage. *Id.*

A lease of tin mines and toll tin was surrendered in 1810, and another lease taken, on payment of a fine, part of which was a compensation for the surrender of a former lease. A statement in a lease of the surface made by the same lessor, during the existence of the former lease, is admissible in evidence against the lessee in that second lease of the mines and toll. *Id.*

A., in the year 1798, died possessed of property, which, many years afterwards, B. commenced a suit to recover. In the year 1799, a relation of B. made a declaration, the effect of which was to show that B. was the heir and next of kin of A.:—Held, that this declaration was not receivable in evidence: as the *lis mota*, or commencement of controversy, must be taken to be the arising of that state of facts on which the claim is founded, without any thing more. *Walker v. Beauchamp*, 6 C. & P. 552—Alderson. 1110

Statements of a deceased occupier touching his title, are admissible in evidence generally,



without reference to the particular effect they may produce in the cause. *Carne dem.*, Nicoll ten., 1 Bing. N. R. 430; 1 Scott, 466. 1110

On an issue to try whether a farm modus of 21l. 19s. 8d. was payable for a certain farm, a former occupier of the farm cannot be asked what he has heard his deceased father say respecting this modus, although his father had also occupied the farm, because this would be evidence of reputation of a fact. *Wells v. Jesus College, Oxford*, 7 C. & P. 284—Alderson. 1110

On an issue joined, whether a certain place situate on the bank of a river is a public landing-place for all the king's subjects, evidence may be given of reputation that it is not a public landing-place. *Drinkwater v. Porter*, 7 C. & P. 181—Coleridge. 1112

Evidence of reputation is not admissible upon a question whether, by custom, the sheriff of a county or of a city is bound to do execution upon criminals condemned to death by a judge of gaol delivery, at the assizes for the county. *Rex v. Antrobus*, 4 Nev. & M. 565; 2 Adol. & Ellis, 798; 6 C. & P. 784; 1 Har. & Woll. 96. 1112

Upon an information against a sheriff for refusing to execute prisoners upon whom sentence of death has been passed by justices of gaol delivery sitting in his county, evidence was received for the crown of an order of the Court of Gaol Delivery, requiring a former sheriff to hang a criminal in chains, and an examined copy of the cravings of that sheriff filed in the Exchequer, wherein he craves to be allowed his expenses of gibbeting such criminal, which expenses were allowed by the then Chancellor of the Exchequer. *Id.*

Whether, upon a question as to the liability of the mayor and citizens of an incorporated city to perform a certain public duty, declarations of deceased citizens, in favor of the existence of such liability, are admissible in evidence, *quære?* *Id.*

#### XXXVII. PRODUCTION OF EVIDENCE.

If, in an action for goods sold, the question be whether the credit was given to the defendant's wife or to her father, evidence that other persons had given credit to the father is not receivable. *Smith v. Wilkins*, 6 C. & P. 180—Tindal. 1114

Where issue is taken on a plea which would be bad on demurrer, because inconsistent with the admission of the party on the record, evidence in support of it cannot be rejected at *nisi prius*. *Bowman v. Rostrow*, 4 Nev. & M. 551; 1 Har. & Woll. 221. 1114

If, during the cross-examination of one of the plaintiff's witnesses, the defendant's counsel, under a notice to produce, call for a book which the plaintiff's counsel produces—the defendant's counsel, if he looks over the book, so as to see the contents of several pages of it, will be bound to put it in as his evidence. *Calvert v. Flower*, 7 C. & P. 386—Denman. 1114

Upon a trial under the writ of trial act, in an action on a promissory note, *semble* that the note should be produced: but if the objection was not taken at the time, the non-production of the note is ground afterwards for a new trial. *Henn v. Neck*, 3 Dowl. P. C. 163. 1114

In an action to recover the amount of a check, where the defendant does not deny giving the check, but pleads that it was given for a gambling transaction, the plaintiff is not bound to make it part of his case, nor to produce it for the purpose of the defendant giving it in evidence, unless he has received notice to produce it. *Reeves v. Gambell*, 5 Nev. & M. 433; 1 Har. & Woll. 567. 1114

On the trial of an issue directed under the Interpleader Act to be in the form of an action for money had and received, evidence may be received, which in an ordinary case would only strictly be admissible under a special count. *Pooley v. Goodwin*, 5 Nev. & M. 466; 1 Har. & Woll. 567. 1114

In an action for work and labor, the defendant, on a judgment by default, is at liberty to cross-examine the plaintiff's witnesses, who are called to prove the work done, as to whether the work was done on the defendant's retainer or not. *Williams v. Cooper*, 3 Dowl. P. C. 204. 1114

In an action by A. against B., B. cannot object to the production of the title deeds of C. *Marston v. Downes*, 3 Nev. & M. 861. 1114

Nor, if C. refuses to produce them, can B. object to the reception of parol evidence of their contents. *Id.*

Where in an action it is required to be proved that L. had committed a felony by hiring a piano forte, and selling it immediately:—Held, that evidence could not be given respecting optical instruments which were alleged to have been obtained by L. from another tradesman. *Wilton v. Edwards*, 6 C. & P. 677—Lyndhurst. 1114

In trespass for taking a piano forte, which the plaintiff had bought of L., the defendant pleaded that it belonged to him, and had been feloniously stolen from him by L., and that he retook it:—Held, that whatever would be evidence against L. if he were on his trial for the felony, is evidence to prove the felony to have been committed by L. *Id.*

If A. and B. rent a ready furnished bed-room jointly, and both are taken into custody in the bed-room, charged with jointly stealing feathers from the bed, and, on a search, pawnbrokers' duplicates are found on one of them:—Held, that these duplicates are receivable in evidence against the other, on a plea of justification to any action for false imprisonment brought by that other. *Atkinson v. Warne*, 6 C. & P. 687—Gurney. 1114

Where special damage is alleged, that C. declined to deal with the plaintiff, because his bill was dishonored, the letter C. received, announcing to him the dishonor of the bill, may be read in evidence to show that he received such a letter, but is no proof of the statements contained in it:—Held, also, that C. might be asked questions, to show that other causes in addition to the letter



induced him to cease from dealing with the plaintiff, and that other witnesses might be asked whether other bills of the plaintiff's had not been dishonored, but that they could not be asked as to any particular bill without its being produced. *Whitaker v. England (Bank of)*, 6 C. & P. 700—Parke. 1114

### XXXVIII. DEMURRER TO EVIDENCE.

Quære whether the defendant can demur to evidence after money has been paid into court? *Jenkins v. Tucker*, 1 H. Black. 90. 1116

### XXXIX. BILLS OF EXCEPTIONS.

Where a bill of exceptions is taken at the trial of a cause, it must be set down for argument within the first four days of the ensuing term. *Hill v. Watts*, 1 Alcock & Napier, 130. (*Irish*). 1116

Where exceptions are not properly taken, (as where they appear upon the record after the finding of the jury), the court of error cannot give judgment thereon. *Armstrong v. Lewis* (in error), 4 M. & Scott, 1; 2 C. & M. 274. 1116

### EXECUTION.

*Practice on issuing Execution*—After postea has been left with the clerk of the judgments, conformably with the rule of court made in Trinity term, 13 Geo. 2, it will be lawful for the clerk of the judgments to permit the same to be taken out of the office for the purpose of being produced to the sealer of the writs, in order to obtain a writ of execution. And the attorney, or agent, who procures such postea or inquisitions from the office of the clerk of the judgments, must cause the same to be returned again to the same office during the office hours of that day. *Reg. Gen. C. P. E. T.* 2 Will. 4. 1119

A suggestion of the reason for directing a writ of execution to the coroner, instead of the sheriff, need not be made upon the roll previously to the writ being issued. *Bastard or Barston v. Gutch or Trutch*, 5 Nev. & M. 109; 4 Dowl. P. C. 6; 3 Adol. & Ellis, 451; 1 Har. & Woll. 321. 1119

The 3 & 4 Will. 4, c. 67, s. 2, as to making writs of execution returnable immediately, applies to executions issued on judgments obtained both before and since it passed. *Rex v. Sheriff of Surrey*, 3 Dowl. P. C. 82. 1119

Where judgment was entered up by consent, and a written agreement made to pay a certain sum, and refer the balance in dispute to arbitration, the court refused to allow the execution to be taken out for the balance, on affidavit of a different arrangement having been subsequently come to in conversation. *Batsey v. Day*, 1 Har. & Woll. 114. 1119

The plaintiff obtained a verdict at the Spring assizes; the defendant died on the 18th of April; costs were taxed on the 21st, final judgment signed

on the 22nd, and a fi. fa. issued on the same day, tested on the first day of the term. The court refused to set aside the fi. fa. for the irregularity. *Watson v. Maskell or Marshall*, 2 Dowl. P. C. 810; 4 M. & Scott, 461. 1119

Upon a trial under the 3 & 4 Will. 4, c. 42, the plaintiff having obtained a verdict, got his costs taxed, and signed judgment on the same day:—Held, upon the construction of section 18, that the judgment was regular. *Nicolls v. Chambers*, 2 Dowl. P. C. 693. 1119

*Judgment in Inferior Courts*.—Under stat. 4 & 5 Will. 4, c. 62, s. 31, where a judgment has been obtained in the court of C. P. Lancaster, and it is sworn that the defendant has removed his person out of the jurisdiction, but nothing is said as to his goods, the court of K. B. will grant execution against the person only. *Lord v. Cross*, 2 Adol. & Ellis, 81; 4 Nev. & M. 30; 3 Dowl. P. C. 4. 1119

In order to obtain execution on a judgment from the court of C. P. at Lancaster, under the 4 & 5 Will. 4, c. 62, s. 31, it is necessary not only to have the certificate of the prothonotary, but also an affidavit that the defendant has removed his person or goods, or both, out of the jurisdiction. *Duckworth v. Fogg*, 4 Dowl. P. C. 396; 2 C. M. & R. 736. 1119

The court will remove a judgment from an inferior court, in order to issue execution thereon, pursuant to 19 Geo. 3, c. 70, s. 4, though part of the debt has been levied by process from the inferior court. *Knowles v. Lynch*, 4 Tyr. 477. 1119

Seemle, that the 19 Geo. 3, c. 70, s. 4, empowering the removal of judgments from the inferior courts of record, does not apply to judgments obtained by defendants. *Batten v. Squires*, 4 Dowl. P. C. 53. 1119

*Several Writs of Execution*.—Where a plaintiff from mistake, has taken out a fi. fa. for less than the sum for which he has obtained judgment, the court will, on conditions, allow him to take out a fi. fa. for the residue. *Hunt v. Passmore*, 2 Dowl. P. C. 414. 1119

A fi. fa. having been delivered at the sheriff's office on the 23rd of April, on the following day the officer wrote a letter, stating that the defendant was only a lodger, and had no effects; in consequence of which letter the plaintiff, on the succeeding day, lodged a ca. sa. with the sheriff's deputy in London. On the 29th, the plaintiff having heard that the defendant had goods, and that the letter of the officer was false, wrote to the officer, directing him not to arrest the defendant, but to take his goods; and, on the 1st of May, obtained a side bar rule for the return of the writ of fi. fa. The sheriff applied to discharge that rule, on the ground that the fi. fa. was superseded by the ca. sa. subsequently issued:—Held, that, whether it was so or not, the plaintiff had a right under the circumstances to have a return to the fi. fa. *Smith v. Johnson*, 4 Dowl. P. C. 208. 1119



Two writs of ca. sa. were issued at one time into Anglesea and Carnarvonshire. The debtor was arrested in Anglesea on 1st November, and having paid debt and costs to the sheriff, was discharged. The next day he was arrested in Carnarvonshire on the other ca. sa., and was detained in custody till the 15th, when the debt and costs were paid over to the creditor's attorney several days after he had been acquainted with the previous fact. The debtor then sued the creditor and her attorney in case for malicious non-feazance, in not giving notice to the sheriff of Carnarvonshire that the writ issued into Anglesea had been executed, or the judgment satisfied, and that the writ directed to him was not to be executed:—Held, in the absence of proof that before the second arrest any notice had reached the creditor or her attorney of the first arrest, or of the payment of the debt and costs, or that at any time before his discharge the plaintiff had applied to either for a countermand of his imprisonment, which had been thereupon maliciously withheld, he could not maintain the action. *Lewis v. Morris*, 2 C. & M. 712; 4 Tyr. 907. 1119

Semble, the discharge by the sheriff of Anglesea without consent of the plaintiff was illegal. *Id.*

Semble, also, that the second arrest might have been set aside on application to a judge. *Id.*

[*Capias ad satisfaciendum*.]—A fi. fa. sued out by the plaintiff proving ineffectual, by reason of defendant's goods being already in custodia legis, and assigned under a bill of sale:—Held, that plaintiff might issue a ca. sa. before the return of the fi. fa. *Dicas v. Warne*, 10 Bing. 341; 3 M. & Scott, 814; 2 Dowl. P. C. 762. 1121

As soon as a writ of fi. fa. is returned, a writ of ca. sa. may be issued for the sum remaining unsatisfied. *Gardner v. Cover*, 1 Gale, 45. 1121

Semble, that the court will not receive affidavits to negative the truth of the sheriff's return of the execution of the fi. fa. *Id.*

The court of C. P. will not discharge a defendant from custody under a ca. sa., on the ground that he has been before irregularly taken and discharged under a criminal process at the instance of the plaintiff. *Mackie v. Warren*, 5 Bing. 176; 2 M. & P. 279. 1121

After the lapse of two terms, the court will not discharge a defendant out of custody on the ground that his addition and place of abode are not indorsed upon the writ of ca. sa. *Constable v. Fothergill*, 2 Dowl. P. C. 591. 1121

A ca. sa. is irregular, if it is tested before the time of signing judgment. *Peacock v. Day*, 3 Dowl. P. C. 291. 1121

The court will not discharge a defendant out of custody on a testatum ca. sa., on the ground of the want of an indorsement on the ca. sa. pursuant to the rule of Hil., 2 & 3 Geo. 4. *Davidson v. Dunne*, 4 Dowl. P. C. 119. 1121

A writ of ca. sa. directed to the coroner, on

the ground of the sheriff being interested, need not recite that fact, nor need any suggestion to that effect be entered on record previous to suing out such a writ. *Bastard or Barston v. Frutch or Gutch*, 5 Nev. & M. 109; 4 Dowl. P. C. 6; 1 Har. & Woll. 321. 1121

Plaintiff having recovered 33*l.*, arrested the defendant on a ca. sa. for 34*l.* The court refused to discharge the defendant out of custody, and allowed the process to be amended by inserting the true sum, it not being shown that the variance was intentional, or that the defendant was damnified. *M'Cormack v. Melton*, 1 Adol. & Ellis, 331; 3 Nev. & M. 881. 1121

A *capias ad satisfaciendum* in the body of it stated the sum recovered to be 100*l.*, but was indorsed for 58*l.* only, that being the real amount of the damages and costs; and the defendant was actually taken in execution for the smaller sum. After rule obtained to set aside the ca. sa. and discharge the defendant out of custody, a rule was obtained to amend the ca. sa. The court set aside the first rule with costs, and made the second absolute on payment of costs. *Arnall v. Weatherby*, 5 Tyr. 485. 1121

Where a defendant was charged in execution upon a writ indorsed to satisfy 18*l.* 9*s.*, and interest of 15*l.* until paid:—Held, that it was not such a misindorsement as to entitle the defendant to his discharge; but the proper course was for the defendant to have moved to have the indorsement set right. *Williams v. Waring*, 2 C. M. & R. 354; 4 Dowl. P. C. 200; 1 Gale, 268. 1121

A plaintiff taking a bill of exchange in payment of the debt and costs of an action, may, upon the bill being dishonored, arrest the defendant on a ca. sa. without delivering up the bill. *Kemp v. Gadderer*, 4 Dowl. P. C. 676. 1121

A writ of ca. sa. set aside for irregularity is a nullity, and the taking of the defendant under it is no satisfaction of the judgment. *M'Cormick or M'Cornish v. Melton*, 1 C. M. & R. 525; 3 Dowl. P. C. 215; 5 Tyr. 147. 1121

A variance between a sheriff's warrant and a ca. sa. lodged in his office is immaterial. *Rose v. Tomblinson*, 3 Dowl. P. C. 49. 1121

Where a party is in execution, and a third person engages that if he is discharged, he will have him forthcoming at any future period, in case it should appear necessary to the plaintiff to issue another execution, and an action is afterwards brought for the non-performance of such an agreement, the defendant cannot set up the illegality of the first execution as an answer to the action. *Atkinson v. Baynton*, 1 Scott, 404; 1 Hodges, 7. 1121

In such an action, if the plaintiff avers generally that the defendant had notice of the issuing of the second execution, the defendant cannot object on general demurrer, that the time and place when and where he was required to render the party, is not set out in the declaration. *Id.*

Plaintiffs having obtained a verdict against



defendant under an award in a cause in K. B., the Court of Chancery, upon bill filed, and matter appearing on the award itself, granted an injunction to stay further proceedings. Plaintiffs, nevertheless, signed judgment and took defendant in execution. On application to this court for a rule nisi to discharge defendant out of custody, (it being stated, among other things, that the plaintiffs could not be met with for the purpose of attaching them by process out of Chancery), this court refused to interfere. *Foreman v. Jeyes*, 5 B. & Adol. 835. 1121

*Fieri facias*.—A fi. fa. on a judgment signed after a defendant's death, in vacation, may be tested on the last day of the preceding term, notwithstanding the 3 & 4 Will. 4, c. 67, s. 2. *Brocher v. Pond*, 2 Dowl. P. C. 472. 1122

If a defendant dies in execution, a fi. fa. tested and returnable while he was alive and in execution, and returned by the plaintiff's attorney, will support a testatum issued under the 21 Jac. 1, c. 24, s. 2, into a foreign county. *Farncombe v. Kent*, 2 Dowl. P. C. 464. 1122

In an action of trespass, where the defendants justify under a fi. fa., and the plaintiff replies de injuria absque residuo cause, and new assigns that the defendants committed the trespasses on another occasion, and for other purposes than those in the plea mentioned, the judge may leave it to the jury to say whether the execution was bona fide or colorable. *Lucas v. Nockels*, 1 Clark & Fin. 438. 1122

If judgment is obtained against a defendant in custody on mesne process, the plaintiff in the action may issue execution against the goods without discharging him. *Jones v. Tye*, 1 Dowl. P. C. 181. 1122

Where a testatum fi. fa. appeared on a judgment-roll to be founded on an irregular writ of fi. fa., that after the testatum writ had been executed without any application made to set it aside, no objection could be raised upon an action being brought on the judgment. *Leonard v. Simpson*, 2 Scott, 335; 2 Bing. N. R. 176; 1 Hodges, 251. 1122

Quære, whether the delivery of a writ to the deputy, under the 3 & 4 Will. 4, c. 42, binds the goods as if the writ had been delivered to the sheriff himself. *Brackenbury v. Laurie*, 3 Dowl. P. C. 180. 1122

In an action by a landlord against the sheriff, the court refused to allow the proceeds of the sale to be paid into court with the costs of the action, though it was sworn that the sale was regularly conducted. *Groombridge v. Fletcher*, 2 Dowl. P. C. 353. 1128

*Elegit*.—By inquisition taken under an elegit, it was stated that G., the defendant, was possessed of a term in lands as mortgagee. The term had been bequeathed by words, upon which a question arose, whether such term was vested in G. or in the executrix. The court refused to decide on motion at the instance of the mortga-

gor or of the executrix whether G. had an interest in the inquisition and liable to be extended. *Cooper v. Gardner*, 3 Adol. & Ellis, 211. 1129

*Sequestrari facias*.—Quære whether the bishop must of necessity be made a party to a rule calling upon a plaintiff, to whom the bishop has granted a sequestration, to show cause why such sequestration should not be set aside? *Bishop v. Hatch*, and *Chuter v. Same*, 3 Nev. & M. 498; 1 Adol. & Ellis, 171. 1131

A judgment on a warrant of attorney was for 1800l.; the defeazance provided, that on the death of the defendant, and full payment of arrears of the annuity, satisfaction should be entered on the record. A second judgment having been signed by a different creditor, who sued out a sequestrari facias thereupon, it appeared that, at that time, the former creditor had, by sequestrations, levied more than 1800l. for arrears of his annuity, and there were arrears still due. The court ordered that satisfaction should be entered on the roll of the former judgment, as of the date when judgment was signed by the second creditor; and that the sums levied since should be paid over to him. But they refused to order payment to this creditor of the surplus over 1800l., levied before the signing of his judgment. *Cottle v. Warrington*, 2 Nev. & M. 227; 5 B. & Adol. 447. 1131

A sequestration obtained by the assignees of an insolvent incumbent, operates only from the time of publication, and does not entitle the assignees to the arrears of composition for tithes due before publication. *Waite v. Bishop*, 1 C. M. & R. 505; 3 Dowl. P. C. 234; 5 Tyr. 90. 1131

Lodging a writ of *levari facias* with the registrar of the bishop of the diocese, does not bind the property of the incumbent from the time of such lodging. *Id.*

Where a sheriff returned to a writ of *capias utlagatum* that the defendant had no goods, nor any lay fee in his bailiwick, but that he was possessed of a rectory, the court awarded the writ of sequestration, although the sheriff did not return that he had seized the rectory into his hands. *Rex v. Armstrong*, 2 C. M. & R. 205; 3 Dowl. P. C. 760. 1131

To a writ of *capias utlagatum*, the sheriff returned that the defendant had no goods, nor any lay fee within his bailiwick, but that he was a beneficed clergyman; not stating the name or situation of the benefice. The court refused a writ of sequestration, but suggested a motion for a rule calling upon the sheriff to amend his return. *Rex v. Powell*, 1 Mees. & Wels. 321. 1131

## EXECUTORS AND ADMINISTRATORS.

*Grant of Administration*.—Where a canal is situate in the provinces of Canterbury and York, but the office for transacting the business of the canal is in the former province, it is sufficient if the will of a shareholder be proved in the Prerogative Court of Canterbury. *Smith v. Stafford*, 2 Wils. C. C. 164. 1133



attested by C., evidence of payments of interest within six years by B. is not sufficient to take the case out of the statute of limitations, unless C. is called, although it appears that A. signed the note as surety for B., whose name was already subscribed to the note. *Wyld v. Porter*, 3 Nev. & M. 585; 1 Adol. & Ellis, 742. 1089

Where the defendants claimed title to certain goods under an assignment, and in pursuance of notice produced it at the trial when called for by the plaintiffs:—Held, that the plaintiffs were entitled to read it in evidence without calling the attesting witness to prove the execution, although they impugned the validity of the assignment on the ground of fraud. *Carr v. Burdiss*, 1 C. M. & R. 782; 5 Tyr. 309. 1089

In assumpsit by indorsee against acceptor of an English bill of exchange, to show that the plaintiff had received the bill when it was overdue; a protest, which had been made of it by the plaintiff's immediate indorser, being in the hands of the plaintiff, was called for by the defendant at the trial on notice to produce. On its production it appeared to be attested by a subscribing witness:—Held, that the mere circumstances that the protest came out of the hands of the plaintiff, as he did not claim title under it, was not sufficient to dispense with the necessity of calling the subscribing witness; but it being proved that on two occasions the paper had been produced by the plaintiff's attorney to the defendant's attorney, as the protest applying to the bill in question, it was admitted in evidence without proof of the attestation. *Marin v. Palmer*, 6 C. & P. 466—Tindal. 1089

#### XXIX. PROOF BY SECONDARY EVIDENCE.

The muniment chest of the lessor and his assigns is the proper custody for an expired lease. *Plaxton v. Dare*, 5 M. & R. 1. 1095

Where, on the second trial of the cause, a witness stated that he had, on the argument for the new trial, handed a document to one of the learned judges, and had not since seen it, or had been able to find it, secondary evidence was received of its contents without any search for it having been made at the chambers of the learned judge; the presumption being that his lordship had returned it to the party who produced it. *Deacon v. Fuller*, 6 C. & P. 74—Lyndhurst. 1095

There are no degrees in secondary evidence; therefore, where a defendant has given notice to the plaintiff to produce a letter, of which he kept a copy, he may, if the letter is not produced, give parol evidence of its contents, and is not bound to put in the copy; but, if there had been a duplicate original, it might be otherwise. *Brown v. Woodman*, 6 C. & P. 206—Parke. 1096

The mere refusal of a witness to produce a document where he is not justified in withholding it, is not a ground for going into secondary evidence of that document. *Jesus College v. Gibbs*, 1 Y. & Col. 145. 1094

In replevin the defendants avowed for a distress for poor's rates:—Held, that one of the defend-

dants having acted as overseer of the poor was prima facie evidence that he was so:—Held, also, that to let in secondary evidence of his appointment, it was sufficient proof of loss that a witness stated that he, at the desire of the attorney, had applied to the defendant for his appointment, and that he said that he had lost it, without proving any search made. *Bristol (Governor, &c. of poor) v. Wait*, 6 C. & P. 591—Alderson. 1094

Appellants against an order of removal relied upon the settlement of a deceased party by apprenticeship; and, to let in parol evidence of the indenture, they called the widow of the deceased, who stated that her husband, in his last illness, told her that he received his indentures from his master at the end of his apprenticeship, and wore them out in his pocket. The sessions confirmed the order, subject to the opinion of the court as to the admissibility of the evidence. The court held, that without further proof of inquiry after the indenture, evidence of this conversation was not admissible; and they refused to send the case back to be re-stated. *Rex v. Rawden*, 2 Adol. & Ellis, 156; 4 Nev. & M. 97. 1094

In assumpsit for money had and received, where it is shown that the defendant admitted that he had received a bill drawn on a third party, to which the plaintiff was entitled, and that he had paid it into his banker's on his own account, the banker's clerk cannot be called to prove that the defendant received benefit from a bill of similar description, the bill itself not being produced, nor its absence accounted for. *Atkins v. Owen*, 4 Nev. & M. 123; 2 Adol. & Ellis, 35. 1094

The production of an entry of the minutes of a contract made by a third party, in the presence of and by the direction of two contracting parties, but not signed by either of them, is not the only medium of proving the contract, unless there is evidence that the writing in fact constituted the agreement, and was taken to be so, and assented to as such by the parties: parol evidence of the terms of the contract is, therefore, admissible without accounting for the non-production of the written minutes. *Rex v. Wrangle*, 4 Nev. & M. 375; 2 Adol. & Ellis, 314; 1 Har. & Woll. 41. 1096

What is a sufficient search for witnesses to prove handwriting to allow secondary evidence to be given, must depend on the circumstances of each case. *Miller dem., Miller ten.*, 2 Scott, 123; 2 Bing. N. R. 76; 1 Hodges, 187. 1094

In order to dispense with the production of an attesting witness to a will, bearing date the 15th May, 1806, it was proved that applications had been made by letter to the attorney in whose office the witness was at the time a clerk; in the first place, for general information respecting the will, and afterwards for information respecting the witnesses by whom it was attested, and that advertisements for their discovery had a week before the trial been inserted in three daily and one weekly newspapers, but without success:—Held, that sufficient had been done to entitle the party to have the will read on proof of the handwriting of the witnesses, although the attorney of



whom the inquiries had been made stated that one of the witnesses was examined in a cause touching the property in 1815, a fact which he had forgotten to communicate at the time he was asked for information, but which (it was suggested) he could not fail to have remembered had any strict inquiry been instituted. *Id.*

The architect gave an order to the parties by whom he was employed to pay a particular sum out of his commission to a creditor:—Held, on the trial of an issue, directed under the Interpleader Act, between the creditor and the architect, to try the right to the money, that a copy of an affidavit sworn by the architect in another action against the parties by whom he was employed, in which the order was set out, and which copy his attorney had admitted to be correct, was good secondary evidence for the plaintiff of the order which was lost:—Held also, that in the absence of any evidence to the contrary, the order must in such an issue be presumed to have been duly stamped. *Pooley v. Goodwin*, 5 Nev. & M. 466; 1 Har. & Woll. 567. 1096

A. had purchased at an auction an under-lessee's interest in a house, and refused to pay a check which he had given for the deposit, because the ground rent payable to the superior landlord was greater than it was stated to be at the sale:—Held, that the superior landlord's solicitor was not compellable to produce the counterpart of the original lease; and that a person who had advanced money on that lease, and held it as an equitable mortgage, could also not be compelled to produce the lease itself; but that, if both these, on being called as witnesses, refused to produce the lease and counterpart, secondary evidence might be given of the contents of the lease, by calling a person who had seen it, and who neither claimed under it as one of his own title deeds, nor was privileged as an attorney or solicitor. *Mills v. Oddy*, 6 C. & P. 728—Parke. 1096

### XXX. PROOF AFTER NOTICE TO PRODUCE.

In an action on an attorney's bill, it is not necessary to give notice to produce the original bill delivered the party, but the production of a duplicate thereof is sufficient. *Fyson v. Kemp*, 6 C. & P. 71—Gurney. 1097

Nor is it necessary that the parties examining should read the two bills alternately. *Id.*

Where notice of the dishonor of a bill of exchange has been given in writing, it is not necessary to give a notice to produce that writing to let in parol evidence of its contents. *Swain v. Lewis*, 2 C. M. & R. 261; 4 Dowl. P. C. 261; 1 Gale, 182. 1097

In ejectment by the heir of A., the defendant sets up a will of A., whereby he devises all his property in fee to B., through whom the defendant claims. One of the attesting witnesses stated that he had prepared this; that a fortnight afterwards he prepared another will for A., which A. executed and delivered to him, and which the witness upon A.'s death delivered to B. No notice to produce the last-mentioned instrument

had been given:—Held, that the plaintiff's counsel could not ask the witness, "whether, at the time of executing the instrument, A. declared it to be his last will; and if so, whether it was attested by three witnesses." *Doe d. Phillips v. Morris*, 4 Nev. & M. 598; 3 Adol. & Ellis, 46; 1 Har. & Woll. 226. 1097

Quære, whether, if the second instrument in this case could have been shown to have been duly executed, published, and attested, as the last will of A., the plaintiff would have been entitled to recover as heir at law, without showing its contents or application? *Id.*

Semble, that an instrument which has been traced to the hands of an opposite party can in no case be presumed to have been lost or destroyed, unless such party has had notice to produce it. *Id.*

Notice to produce an agreement, served upon the defendant's attorney at 5 o'clock on the commission day of the assizes, held too late, the attorney having then left home for the assize town, which was nine miles distant from his office, and the opposite party refusing to furnish him with a conveyance. *George v. Thompson*, 4 Dowl. P. C. 656. 1098

A notice to produce a tradesman's books, served upon the plaintiff's attorney at 7 o'clock of the evening previous to the trial, is too late. *Atkins v. Meredith*, 4 Dowl. P. C. 658. 1098

The plaintiff had been employed as secretary to a charitable institution; his appointment was made in pursuance of a resolution of the committee for managing the affairs of the society which was entered in a book remaining in the plaintiff's hands as secretary, but to which entry the plaintiff was no party, nor did it appear to have been expressly brought to his notice; the society dissolving, the plaintiff quitted the employ, leaving this book in the office; in an action against three of the committee for arrears of salary:—Held, that the plaintiff was bound to produce the book, inasmuch as it would show the terms on which he had been engaged; and that a notice to the defendants to produce it was not sufficient to entitle him to give secondary evidence under the quantum meruit; the book appearing not to be in the possession of the defendants, but in that of another member of the committee, without the knowledge or control of the defendants. *Whitford v. Tutin*, 4 M. & Scott, 166; 10 Bing. 395; 6 C. & P. 228. 1099

Proof of the possession of books by a member of a committee which he has in his custody, not as such member but as tenant of the premises previously occupied by such committee, is not sufficient, in an action against other members of the committee, to let in parol evidence of the contents on notice and non-production. *Id.*

In debt for rent by the assignee of the reversion against the assignee of the term, the plaintiff's attorney was called by his client to prove the execution of a deed; on cross-examination he admitted that there had been another deed between the same parties, relating to the demised premises, executed after the former, and that he



*Held*, per Patterson, J., and Colridge, J., that the lapse of a long period of years would not make it such evidence. *Id.*

*Secus*, per Lord Deane, C. J. *Id.*

Where an annuity is secured by a covenant and warrant of attorney, and all the arrears have been paid, the court will not restrain the executor of the grantor from paying his simple contract debts, until they have set apart a fund to answer the future payments, unless a case of past or probable misapplication of assets is made out. *Read v. Blunt*, 5 Simon, 567. 1144

Quære whether the service of a writ of summons under 2 Will. 4, c. 39, in which an executor is not described in his representative character, is notice to him of the commencement of an action against him in that character, so as to render him liable to a devastavit, if he pay debts of an equal degree with that sued for, between the service of the writ of summons and the filing the declaration? *Rees v. Morgan*, 3 Nev. & M. 305; 5 B. & Adol. 1035. 1144

If an executor or administrator pay into court, under an order in a cause, money which he had received from the deceased's estate, his right to detain a debt due to him from the deceased is not prejudiced. *Langton v. Higgs*, 5 Sim. 222. 1145

Assumpsit against executrixes, for work and labor done for the testator. Plea, that a judgment had been obtained against the testator in his lifetime, and that the defendants had fully administered, &c., except as to chattels of small value, not sufficient to satisfy the judgment. Replication, that the testator paid a large sum, to wit, 200*l.*, in full satisfaction and discharge of the debt recovered, and of the judgment; and that the defendants, deceitfully and with intention to defraud the plaintiff of his damages, have deferred and still do defer procuring acknowledgment or satisfaction to be entered up of the said debt, or to be released therefrom, and still permit the said judgment thereon to remain in full force. Rejoinder, traversing the payment of the said sum in full satisfaction and discharge of the debt recovered, and of the judgment, was held bad on demurrer; for the material fact to be traversed was the keeping on foot the judgment by fraud: whereas the payment in satisfaction was immaterial and not traversable, being mere inducement. *Jones v. Roberts*, 4 Tyr. 48; 2 C. & M. 219. 1145

*Executor de son tort.*—An executor de son tort, to whom administration is subsequently granted, may repudiate an agreement made by him to surrender a term for years vested in the intestate. *Doe d. Hornby v. Glenn*, 3 Nev. & M. 837; 1 Adol. & Ellis, 49. 1146

Lessee of premises, under a covenant of re-entry if the rent should be in arrear twenty-eight days, died in bad circumstances, and his brother administered de son tort. B., the brother, agreed with the landlord to give him possession, and suffer the lease to be cancelled, on his abandoning the rent, which was twenty-eight days in arrear. B. afterwards took out letters of administration:

—*Held*, that the agreement of B., as administrator de son tort, did not conclude him as rightful administrator, nor give a right of possession to the landlord who had entered under the agreement, but who had not made any formal claim in respect of the forfeiture, nor taken a regular surrender of the lease. *Id.*

A., having proved the will of B., in which she supposed herself to be appointed executrix, employs C., an auctioneer, to sell the goods of B. They are sold to D., who, as an inducement to C. to let him remove them without payment, expressly promises to pay C. as soon as the bill shall be made out. Probate is afterwards granted to E., the real executrix, who gives D. notice not to pay the price to C. Notwithstanding the express promise, C. cannot sue D. for the price. *Dickenson v. Naule*, 1 Nev. & M. 721. 1146

To make a man liable as executor de son tort, it is not essential that the dealing with the chattels of the deceased should be in the character of executor; therefore, where a party had received possession of goods from the widow of a deceased person, being aware at the time that they were the property of the deceased:—*Held*, that it was sufficiently an intermeddling to make him liable as an executor de son tort. *Seally v. Powis*, 1 Har. & Woll. 2. 1146

A possession of goods which the defendant had received from the deceased in his lifetime under a colorable sale, may be sufficient to charge him as an executor de son tort. *Id.*

A. had pledged goods to B. for a debt. B. died, and the parish officers took the goods, and gave them to J., the carpenter who made the coffin of B., on condition of his paying B.'s rent and the funeral expenses:—*Held*, that by taking these goods, the parish officers became executors de son tort; and that, if they sold the goods to J., they would be liable to A. in trover, because such a sale was so inconsistent with the bailment as to re-vest the right of possession in A. But, if the parish officers merely relinquished their possession, and let J. take possession, this would not make the parish officers liable in trover, as, in this case, a mere seizure of the goods by a stranger, who afterwards relinquished them, would not be a conversion. *Samuel v. Morris*, 6 C. & P. 620—*Alderson*. 1146

*Actions by and against.*—Where the vendor of an estate (the vendee having made a deposit in part payment of the purchase money) fails to make out a good title by the time stipulated, and the vendee dies, the personal representative of the vendee, and not his heir, is entitled to maintain an action to recover damages for loss of interest on the deposit, and for expenses incurred by the vendee in endeavoring to procure a title, the injury accruing to the personal estate. *Orme v. Broughton*, 4 M. & Scott, 417. 1147

In ejectment by an administrator, the demise may be laid on the day after the intestate's death, but before the grant of the letters of administration. *Patten v. Patten*, 1 Alcock & Napier, 493. (*Irish*). 1148



In the general indebitatus count it was stated, that the defendant was indebted to the plaintiff as executrix for money let by the plaintiff to the defendant. The other considerations in the same count were alleged to move from the plaintiff as executrix; the promise was alleged as made "to the plaintiff executrix as aforesaid."—Held, on special demurrer, that the declaration was vitiated by this misjoinder of different considerations in different rights, but that if they had all appeared to have been in the same right, it would be sufficient if any one consideration were properly averred, as the remaining considerations might be rejected. *McClelland v. M'Adam*, 1 Alcock & Napier, 488. (*Irish*). 1149

Parties in actions. *Pearson v. Pearson*, 5 B. & Adol. 559; 2 Nev. & M. 471. 1149

A demurrer to a declaration by executors commencing in the debt and detinet, was overruled. *Collett v. Collett*, 3 Dowl. P. C. 211. 1149

An executrix pleaded in assumpsit, that she had not, nor at the commencement of the action nor since, had any goods, which were of the testator at the time of his decease, in her hands to be administered; and the plaintiff replied that the defendant before and at the time of the commencement of the action, had divers goods of the testator to be administered; upon which issue was joined. At the trial, the plaintiff having shown that the defendant received certain assets, the defendant proved payment to a greater amount, and a verdict was found in her favor:—Held, first, that the evidence of payment was properly received; and, secondly, that the plaintiff was not entitled to judgment non obstante veredicto, upon the ground that the introductory part of the plea did not state that the executrix had fully administered the testator's goods. *Reeves v. Ward*, 2 Scott, 390; 2 Bing. N. R. 235; 1 Hodges, 300. 1149

Whether such an omission is ground for special demurrer, *quære*? *Id.*

Plene administravit and no assets at the time of the exhibiting of the bill, pleaded after the Uniformity of Process Act, 2 Will. 4, c. 39, was held after verdict to refer to the commencement of the suit. *Rees v. Morgan*, 3 Nev. & M. 205; 5 B. & Adol. 1035. 1151

On a plea of plene administravit præter, the plaintiff is entitled to judgment of assets in futuro for debt and costs. *Cox v. Peacock*, 2 Scott, 125; 4 Dowl. P. C. 134; 1 Hodges, 272. 1151

On such a plea he is entitled to judgment both for debt and costs. *Id.*

In debt upon a judgment by default against the defendant as executor, suggesting a devastation, the plaintiff gave in evidence the record in the original action, and a testatum fi. fa. with the sheriff's return that he had caused to be levied the costs de bonis propriis of the defendant, and that the defendant had no goods or chattels of the testator in his hands to be administered:—Held, that this was prima facie evidence of a devastation. *Leonard v. Simpson*, 2 Scott, 335; 3 Bing. N. R. 176; 1 Hodges, 251. 1151

Reg. Gen. H. T. 4 Will. 4, does not apply to judgments in other cases pleaded by an executor. *Power v. Fry*, 3 Dowl. P. C. 140. 1151

A rule nisi to revive a judgment against the executors of a deceased defendant must be served on all the executors who have proved the will. *Panter v. Seaman*, 5 Nev. & M. 679 1151

### EXTENT.

The court refused to allowed a writ of immediate extent to be antedated. *Rex v. Maberly*, 2 Dowl. P. C. 383; 2 C. & M. 536; 4 Tyr. 345. 1157

Right to extent in aid. *Rex v. Bingham*, 3 Tyr. 938; 2 Dowl. P. C. 128; 2 C. & J. 131; 1 C. & M. 862. 1159

Proceedings on extents in aid. *Pennell v. Thompson*, 1 C. & M. 857; 3 Tyr. 823; 1 Dowl. P. C. 137. 1160

Semble, that the court of Exchequer has power to refer it to the Master to take an account of the rents and profits of land extended to the plaintiff, and to order him to refund the overplus, if it shall appear that he has been over paid. *Brookbank v. Miers*, 4 Dowl. P. C. 179. 1161

An extent having issued against the defendant, certain freehold property was seized and sold under the 25 Geo. 3, c. 35. The purchaser having paid the purchase money into the bank, afterwards, and before any conveyance was executed, sold the property to another person for a less sum, and, in order to avoid the necessity of paying the ad valorem duty on two conveyances, applied to the court that the sub-purchaser's name might be substituted in the conveyance for that of the original purchaser. The court declined to grant the application unless with the consent of all parties, which was afterwards obtained, and an order made. *Rex v. Rawlings*, 4 Dowl. P. C. 407; 2 C. M. & R. 471. 1161

### FENCES.

Where, upon the diversion of a turnpike road after the new road had been completed, but before the old road was stopped up, the trustees by permission of B. broke down his fence to make a passage from the new road to the close of A., but did not put up a gate or fence to protect the latter close:—Held, that the trustees were wrongdoers, and that B. was responsible for their acts. *Winter v. Charter*, 3 Y. & J. 308. 1163

### FINE AND RECOVERY.

A husband alone may make a tenant to the præcipe, in a recovery to be suffered of the wife's lands; and such recovery will bind the wife and her heirs, unless reversed within twenty years after coverture determined. *Doe d. Smith v. Bird*, 2 Nev. & M. 679; 5 B. & Adol. 695. 1167

Devise of lands to A. for life, remainder to the children of B. living at the time of A.'s death. B. left one daughter, who, with her husband, in the lifetime of A., levied a fine to the use of C. The fine operates by estoppel only during the life of A., but after A.'s death it



operates upon the estate, vesting the right of possession in C. Doe d. Christmas v. Oliver, 5 M. & R. 202. 1166

A fine can be levied only by a person having the freehold either by right or by money. Doe d. Parker v. Gregory, 4 Nev. & M. 308; 2 Adol. & Ellis, 14. 1164

A widow, tenant for life of lands settled upon her for jointure, (such settlement being made in execution of a power granted to the deceased husband), married, and levied a fine of the lands jointly with her second husband. She died, and the second husband held for more than twenty years after her death:—Held, that the fine was void, but that the possession of the second husband, after the wife's death, was a bar to ejectment brought by the party on whom the reversion in fee had descended during the estate for life. *Id.*

If a tenant in tail suffers a recovery and declares uses which are void, he does not take back an estate tail, but an estate in fee. Tanner v. Radford, 6 Simon, 21. 1165

Where the acknowledgment of a party to a fine was taken before commissioners who were aware of the fact of her being a married woman, and of the non-concurrence of her husband, but the parties were living separate under a deed by which the husband covenanted not to interfere with his wife's property, the court refused to reverse the fine at the instance of the husband, but left him to his common law remedy. Check v. Bootle, 4 M. & Scott, 460. 1168

Where such parts of the affidavit, verifying the certificate of acknowledgment, taken in pursuance of the late act of parliament respecting fines and recoveries, as state "the deponent's knowledge of the party making the acknowledgment, and her being of full age," cannot be deposed to by a commissioner, or by an attorney or solicitor, the same may be deposed to by some other person, whom the person before whom the affidavit shall be made shall consider competent so to do. Reg. Gen. T. T. 4 Will. 4, C. P. 1171

Where more than one married woman shall at the same time acknowledge the same deed, respecting the same property, the fees directed by the said rules to be taken shall be taken for the first acknowledgment only. And the fees to be taken for the other acknowledgment, or acknowledgments, how many soever the same may be, shall be one half of the original fees; and so also, where the same married woman shall at the same time acknowledge more than one deed respecting the same property. And where, in either of the above cases, there shall be more than one acknowledgment, all such acknowledgments may be included in one certificate and affidavit. In every case the acknowledgment of a lease and release shall be considered and paid for as one acknowledgment only. Reg. Gen. T. T. 4 Will. 4, C. P. 1171

Where the form of certificate to be made by commissioners for taking the acknowledgments of married women to deeds prescribed by the 84th section of the 3 & 4 Will. 4, c. 74, did not

suit the peculiar circumstances of the case, the court of C. P. will make a special order for the alteration of the form in that case. In re Luke, 3 Dowl. P. C. 112; 1 Scott, 80; 1 Bing. N. R. 256. 1171

To meet the special circumstances of the case, the court directed the commissioners for taking the acknowledgment of a married woman (an infant) in their certificate, made in pursuance of 3 & 4 Will. 4, c. 79, s. 84, to omit "of full age." In re Luke, 1 Scott, 80. 1171

The affidavit verifying the certificate of the acknowledgment of a fine must be sworn before a judge or commissioner of the C. P. in England; therefore, where the affidavit was sworn before a commissioner of the C. P. in Ireland, the court refused to receive the acknowledgment. Rogers v. Fry, 4 Dowl. P. C. 641. 1171

The affidavit verifying the certificate of a married woman's acknowledgment, must, even in Ireland, be made before a commissioner of the court. In re Anderson, 2 Bing. N. R. 435; 2 Scott, 626. 1172

The affidavit verifying the certificate of the acknowledgment of a married woman taken by commission under the 3 & 4 Will. 4, c. 74, s. 83, may be filed subsequently to the filing the certificate. Anon. 1 Scott, 52. 1171

Under 6 Geo. 4, c. 87, s. 20, a British consul has the same power as a notary public to certify that the affidavit in support of the certificate of a married woman's acknowledgment was sworn before a commissioner duly appointed. In re Barber, 2 Bing. N. R. 268; 2 Scott, 436; 4 Dowl. P. C. 640; 1 Hodges, 318. 1172

The consuance of two consors to a fine was taken in India, and the consuance of a third consor was afterwards taken in this country; the consuee died a few days before the last consuance was taken; and under the circumstances of the case the fine was allowed to pass as to the two consors in India. Griffith's fine, 1 Scott, 711; 1 Bing. N. R. 724; 1 Hodges, 161. 1172

The date of the chirograph of a fine was two days later than the day of the first proclamation, both days being in the same term; three other proclamations were duly made in the three following terms:—Held to be a good fine with proclamations. Doe d. Fleming v. Ford, 1 Adol. & Ellis, 758; 3 Nev. & M. 813. 1177

### FISH.

The prohibition contained in the 10 Car. 1, (Irish), c. 14, extend to Scotch weirs erected in rivers between high and low water mark, and also to places in rivers where the water is perfectly salt. M'Adam q. t. v. Halliday, 1 Alcock & Napier, 459, n. (Irish): S. P. Devonshire (Duke) v. Smith, 1 Alcock & Napier, 442. (Irish). 1177

### FIXTURES.

A tenant for years of a garden has no right to remove a border of a box planted by himself.



*Empson v. Soden*, 1 Nev. & M. 720; 4 B. & Adol. 655. 1180

In January, 1797, several persons carried on business in partnership as calico printers; and in the same month certain premises on which their works were principally carried on were conveyed to one of the partners in fee. The conveyance mentioned the premises to consist, besides land, of dwelling-houses, machine-house, and other buildings and erections, and stated them to be then in the possession of the partner to whom they were conveyed, and another partner. Various buildings and machines were afterwards, from time to time, erected on the premises by the firm, for the purpose of extending the works. The whole was firmly fixed to the freehold, and stood on that part of the land which was conveyed to one of the partners in 1797, but the part in question could be removed without material injury to the buildings. In the different stock takings of the firm, the land and buildings were always valued and classed separately from the machinery and fixtures. In the part of the country where the premises were situated, machinery of this description was constantly bought and sold distinctly from the freehold. The freehold in the premises having been subsequently conveyed to two of the partners, they, in 1828, mortgaged them to the plaintiff's wife, under the description of all the messuages, dwelling-houses, lands and buildings therein mentioned; "and also all that and those the steam-engine, mill-gearing, heavy gear to millwright work, fixed machinery, and other matters and things, &c., then standing and being in and upon the thereby demised buildings, works and premises, which in any manner constituted fixtures and appendages to the freehold of the same, or any part thereof." All the machinery, fixtures, &c., appeared to have been in the reputed ownership of the partners who carried on the works until 1831, when they became bankrupt, and the defendants were appointed their assignees. The plaintiff, who was the husband of the mortgagee, had inspected statements of the affairs of the partners, which treated the machinery as not included in the mortgage, and had made no objections to such statements. In the month of April, 1831, the assignees sold all the machinery and fixtures, with the exception of two steam-engines, two water-wheels, an iron flooring and other small articles, and the greater part of them were removed by the purchasers. The articles claimed by the mortgagee were all firmly fixed to the freehold, in such a manner, however, that they might easily be removed without material injury to themselves or to the buildings:—Held, that the machinery did not belong to the inheritance, but was part of the personal estate of the bankrupts; and that it passed to the assignees, and that the machinery in question was not intended to pass, and did not pass to the mortgagee, under the mortgage deed. *Trappes v. Harter*, 2 C. & M. 153; 3 Tyr. 604. 1181

A plea to an action of trespass by a landlord against his tenant for removing a cornice, stated, that it was the property of the defendant, that it was fixed up by him with screws only, for the purpose of ornament; that he carefully removed

it during the term, doing no unnecessary damage; and that he repaired all the damage done. The replication stated that it was affixed to the freehold of the house, and was not removable by law. Issue on that question:—Held, that it was not a misdirection to leave it to the jury to say whether they were of opinion that the cornice was ornamental, and was so affixed to the freehold that it could be removed without substantial injury; and that if they thought so, and that it had been so removed, the tenant had a right to remove it. *Avery v. Cheslyn*, 5 Nev. & M. 372; 3 Adol. & Ellis, 75; 1 Har. & Woll. 283. 1181

The question whether removable by law or not, is a mixed question of law and fact. Id.

The question whether a fixture can be removed by a tenant without substantial injury to the premises, is a question proper for the jury, upon an issue whether the fixture is removable or not by law. Id.

An outgoing tenant may remove an ornamental chimney-piece put up by himself during his tenancy, but not a chimney-piece which is not ornamental. An outgoing tenant has no right to remove pillars of brick and mortar built on a dairy floor to hold pans, although such pillars are not let into the ground. *Leach v. Thomas*, 7 C. & P. 328—*Patteson*. 1181

Under bequests of fixtures and fixed furniture to A., and of household goods, furniture, plate, &c., to B., A. is entitled to chimney-glasses and book-cases fastened by screws and brackets to the walls of the house as fixed furniture. *Birch v. Dawson*, 4 Nev. & M. 22; 2 Adol. & Ellis, 37; 6 C. & P. 658. 1181

Under a bequest of a leasehold house, "with the grates, stoves, coppers, locks, bolts, keys, bells, and other fixtures and fixed furniture therein," chimney-glasses and book-cases fastened to the wall by means of brackets and screws do not pass. Id.

Quære, whether a carpet tacked to the floor is fixed furniture? *Birch v. Dawson*, 6 C. & P. 653. 1181

The lessee of a house containing fixtures executed an assignment of the premises by way of mortgage, not mentioning the fixtures. He afterwards assigned the premises, and all his estate and effects to trustees. The trustees being in treaty for a sale of the fixtures, the mortgagee, whose principal and interest were due, took forcible possession of the house, and refused, on demand, to deliver the fixtures up. The trustees brought trover:—Held, that they could not recover for the fixtures. *Longstaff v. Meagoe*, 2 Adol. & Ellis, 167. 1181

A. having occupied a house as tenant to B., in which there were certain fixtures which A. had purchased on entering the house, and which he had a right to remove during his tenancy, agreed at B.'s request, a few days before the expiration of his tenancy, to forbear to remove his fixtures, B. agreeing to take them at a valuation of two brokers. A., at the expiration of his tenancy, delivered up possession of the house to B., leav-



ing the fixtures on the premises. On the following day the fixtures were valued by two brokers at the sum of 40*l.* 10*s.*, and the valuation was signed by them accordingly. A. having brought *indebitatus assumpsit* for the price and value of fixtures, &c., bargained and sold, and for fixtures sold and delivered:—Held, that the action was maintainable, and that this was not a sale of an interest in land within the 4th section of the Statute of Frauds.

And *semble*, that a note or memorandum in writing was not necessary within the 17th section of that statute, relating to the "sale of goods" above the value of 10*l.* *Hallen v. Runder*, 1 C. M. & B. 266. 1181

### FOREIGNER.

Ireland is still a place beyond the seas, within 4 Anne, c. 16, s. 19, notwithstanding the Act of Union, and the 3 & 4 Will. 4, c. 42, s. 7. *Lane v. Bennett*, 1 Mees. & Wels. 71.

Under the 48 Geo. 3, c. 12, (the Bristol Dock Act), Ireland is in parts beyond the seas, with respect to the duties imposed by that act on goods imported. *Battersby v. Kirk*, 2 Bing. N. R. 584. 1182

A party cannot be held to bail for arrears of a fee-farm rent issuing out of premises situate in Scotland. *M'Kenzie v. Johnson*, 1 Scott, 694. 1182

A defendant may be held to bail in this country, notwithstanding proceedings had for the same cause of action in Scotland, such proceedings not enuring to deprive the party of liberty there, and the debt being unfinished. *Sharpe v. Johnston*, 2 Scott, 407. 1182

Where a contract is made between persons domiciled in a foreign country, and in a form known to the law of that country, the court, in administering the rights of parties under it, will give it the same construction and effect as the foreign law would have given to it. *Anstruther v. Adair*, 2 Mylne & K. 513. 1182

If, therefore, a domiciled Scotchman would be held entitled in Scotland, by virtue of a marriage contract executed there, in the Scotch form, to receive whatever property accrued during coverture to his wife, this court will enforce his right, as against any such property coming within its jurisdiction, and will not raise an equity for a settlement in favor of the wife, in opposition to the provisions of the contract. *Id.*

The rule applicable to contracts made in one country, and put in suit in the courts of law of another, is this:—The interpretation of the contract must be governed by the law of the country where the contract was made, and the mode of suing, and the time within which the action must be brought, by the law of the country in which it is sought to be enforced. *Trimby v. Vignier*, 4 M. & Scott, 695; 1 Bing. N. R. 151; 6 C. & P. 25. 1182

Therefore, where a promissory note was made

by the defendant in France, and indorsed in blank by the payee in that country, the maker and payee both at the times of making and indorsing the note being domiciled there:—Held, that, as no action could have been maintained upon the French courts of law, in the name of the indorsee, the indorsement according to the law of France operating as a procuration only, and not as a transfer, so no action could be maintained by him in our courts. *Id.*

By the French law of prescription relating to bills of exchange, the debt is not extinguished, but the remedy only is taken away. *Huber v. Steiner*, 2 Scott, 304; 2 Bing. N. R. 202; 2 Dowl. P. C. 781; 1 Hodges, 206. 1182

Where a personal contract made in a foreign country is sought to be enforced, so much of the law as affects the rights and merits of the contract is adopted from the foreign country, and all which affects the remedy is taken from the *lex fori* of the country where the action is brought. *Id.*

The distinction between that part of the law of the foreign country where a personal contract is made which is adopted, and that which is not adopted by our courts, is, that so much of the law as affects the rights and merits of the contract, all that relates ad *decisionem litis*, is adopted from the foreign country—so much of the law as affects the remedy only, all that relates ad *litis ordinationem*, is taken from the *lex fori* of that country where the action is brought. In the interpretation of this rule, the time of limitation of the action is governed by the law of the country where the action is brought, and not by the *lex loci contractus*.

By the 19th article of the Code de Commerce, it is declared, that "all actions relative to matters of exchange and to bills to order, subscribed by merchants, tradesmen, or bankers, or for matters of commerce, are prescribed (see *prescript*) by five years, if the debt has not been acknowledged by an 'acte séparé': nevertheless, the supposed debtors shall be held, if required, to affirm upon oath that they are no longer indebted; and their widows, heirs, or representatives, that they bona fide believe that there is nothing more due:"—Held, first, that this prescription merely operates in bar of the remedy, and not as an extinguishing of the right or contract itself—secondly, that a special plea setting up this prescription as an absolute bar, without qualification, was bad, the article containing an exception that the debt is not acknowledged by an *acte séparé*. *Id.*

The court will, on terms, on an action on a foreign promissory note, even after issue joined, allow a defendant to put in a plea, showing that by the foreign law, the plaintiff's right of action is tolled by lapse of time. *Id.*

On A. and B. entering into an agreement in France, a copy of it was deposited by A. with a notary at Paris. In an action against B. on the agreement, evidence was given that, by the usage of France, a document deposited with a notary cannot be moved:—Held, that the agreement was sufficiently proved by production of a copy



of the document so deposited; there being no satisfactory evidence of the fact, that two duplicate originals had been made. *Alivon v. Furnival*, 1 C. M. & R. 277; 4 Tyr. 751; 3 Dowl. P. C. 202. 1182

By agreement between A. and B. made in France, any disputes which might arise between them, was to be submitted by them to two arbitrators, merchants, (negotiants), respectively named by them, who, in case of disagreement, were to have power to name an umpire. The two or the three referees might also be named by a particular court, at the request of either party:—Held, that the court might appoint an arbitrator who was not a merchant; and also that an act by which it annulled B.'s nomination of an arbitrator, on the ground that he was a foreigner, and appointed not two other arbitrators, but one a Frenchman, and not a merchant, to act as referee with the nominee of A., must he taken to be legal according to the French law, till the contrary was distinctly proved. *Id.*

Where on breach of an agreement entered into in France, and to be performed there, French arbitrators awarded a sum, including the profits which the plaintiff would have made had the agreement been fulfilled:—Held, that the sum might be recovered in an action here on the award, as not being shown to be contrary to French law. *Id.*

It was deposed that two out of three provisional syndics may, by the law of France, sue to recover debts due to a bankrupt, and without the previous authority of the Judge Commissaire:—Held, that they may so sue in this country unless the French law be shown to be contrary:—Held, also, that the act of the two syndics sufficiently implied the absence or want of consent of the third, without showing his absence or want of consent. *Id.*

Evidence was given that, by French law, two out of three provisional syndics may sue for the debts due to the bankrupt, and no contradiction being offered:—Held, that they may sue so in this country. *Id.*

The declaration averred, that a party, a Frenchman, was a bankrupt. The evidence was, that he was only "en état de faillite," or insolvent:—Held, no variance, as the English "bankrupt" does not appear identical with the French "banqueroute." *Id.*

By 5 & 6 Will. 4, c. 41, so much of the 45 Geo. 3, c. 72, as enacts that any note, bill, or mortgage shall be void by reason of being given for the ransom of ship or goods, is repealed; and it is enacted instead, that such securities shall be deemed and taken to have been made, drawn, accepted, given, or executed, for an illegal consideration only. 1186

#### FRIENDLY SOCIETY.

Where deposits are made in a savings bank by a benefit society, of whom a part have since been expelled by an order of a magistrate who had no authority to interpose, the managers of

the bank are not compellable, upon the application of the members so illegally expelled, to appoint an arbitrator to settle disputes as between such managers and the depositors. *Rex v. Witham Savings Bank (Trustees)*, 3 Nev. & M. 416. 1195

Nor, in any case where deposits have been made on behalf of the society, are the managers compellable to appoint an arbitrator upon the application of individual members, not being the representatives of the whole or of a majority of such society. *Id.*

Magistrates have no authority, under 49 Geo. 3, c. 125, to make orders enforcing rules of a benefit society, which have not been duly enrolled. *Id.*

#### GAME.

Free warren cannot be parcel of a manor, and therefore will not pass by a grant of the manor, with the appurtenances, though it be held with the manor. *Morris v. Dimes*, 3 Nev. & M. 671; 1 Adol. & Ellis, 654. 1196

A warren can be appertaining to a manor only by prescription. *Id.*

Free warren in gross, of which a grantor is seised, will not pass by a grant of a manor and the appurtenances. *Id.*

Nor by a grant of a manor and all free warren (or other term comprehending free warren) "belonging to or in anywise appertaining to the manor, or therewith or at any time theretofore usually held, and occupied or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof." *Id.*

Trespass against two for assaulting plaintiff, and tearing his clothes. The fourth plea stated, that, before the committing those trespasses, plaintiff was found by defendant on the land of W. S. in search of game, without the license and against the will of W. S., and that plaintiff had in his possession a hare, which appeared to have been recently killed. Whereupon one defendant, as servant of and by command of W. S., demanded the hare, which plaintiff refused to deliver. That afterwards, and just before committing the trespasses, the said defendant demanded the hare from the plaintiff, and because he refused to deliver it, and kept it in his possession, both defendants, as such servants, and by such command, in order to take the same for the use of W. S., seized the plaintiff, and took it from him according to the form of the statute (viz. 1 & 2 Will. 4, c. 32, s. 36.) The fifth plea stated, that, just before the trespasses, the plaintiff had in his possession a dead hare belonging to W. S. without his leave or license, wherefore defendants did, as his servants, and by his command, demand the same from the plaintiff, which he refused to deliver, and which he detained, whereupon the defendants, as such servants, &c., seized the plaintiff (concluding as in the former plea.) The replication to the fourth plea stated, that, at the several times of the demands of the defendant and refusal by the plaintiff, the plaintiff was



lawfully on the highway. A similar replication to the demand and refusal in the fifth plea. On demurrer to the replication it was held, that the fourth plea was bad for not sufficiently showing when the second demand was made, or that it was made on the land of W. S.; and that the fifth plea was also bad, for not stating that the defendants gently laid their hands on the plaintiff in order to take the game, and that because he resisted, they necessarily committed the trespasses complained of, doing as little damage, and using as little violence to the plaintiff, as they could on that occasion. *Wisdom v. Hodson*, 3 Tyr. 811. 1199

Where there was an agreement in writing, but not under seal, to let a message, together with full and free and exclusive license and leave to hunt, hawk, course, shoot, and sport over a manor, and the tenant entered and was possessed during the term granted:—Held, in assumpsit on the agreement for the rent, on demurrer to a plea, that not being by deed, the agreement was void, because an incorporeal hereditament was agreed to be let, that the plaintiff was not entitled to recover in respect of the actual enjoyment of the premises let by the defendant, of which he had taken possession. *Bird v. Higginson*, 2 Adol. & Ellis, 686; 4 Nev. & M. 505; 1 Har. & Woll. 61. 1197

To justify the apprehension of a person under 31st sect. of the Game Act, 1 & 2 Will. 4, c. 32, he must have been required to quit the land, and to tell his name; and the "wilfully continuing or returning upon the land," to justify an apprehension, must be upon the same land, and for the purpose of pursuing game there. *Rex v. Long*, 7 C. & P. 314—*Williams*. 1199

### GAMING.

Legality of cricket. *Hodson v. Terrill*, 3 Tyr. 929; 1 C. & M. 797. 1204

A game at cricket for above 10*l*. is illegal, though the game was not finished in one day. *Id*.

By 5 & 6 Will. 4, c. 41, *so much of the 16 Car. 2, c. 7, and the 9 Anne, c. 14, as enacts that any note, bill, or mortgage shall be void by reason of gaming, is repealed; and it is enacted instead, that such securities shall be deemed and taken to have been made, drawn, accepted, given or executed, for an illegal consideration only*. 1204

To an action on a promissory note for 100*l*. made by the defendant on the 12th September, 1833, payable six months after date to the order of K., and by K. indorsed to the plaintiff, the defendant pleaded that on the 23rd July, 1833, he lost money at play to one A., and that the note was given to secure the money so lost. The evidence was, that, in July 1833, the defendant gave A. a bill of exchange for 87*l*. payable six months after date, for money won by him from the latter at hazard, which bill the defendant indorsed to K., and that in December, 1833, the promissory note declared upon was substituted for the bill:—Held, that the evidence did not support the plea. *Boulton v. Coghlan*, 1 Scott, 588; 1 Bing. N. R. 640; 1 Hodges, 145. 1204

*Semble*, that the infirmity of the bill would also avoid the substituted note, upon a plea properly framed. *Id*.

A declaration in assumpsit stated, that by the usage of racing it was regulated that in all races to be run for, all stakes for sweepstakes should be made before the hour of starting for the first race of the day, in cash, bank bills, or bankers' notes, payable on demand, and be placed in the hands of the person appointed by the stewards to receive the same; and in default thereof by any person, he should pay the whole stake as a loser. The declaration then stated, that, it being so regulated, certain races were appointed to be run, and were run at L., of which one R. B. was steward, and one J. J. clerk of the races; and that there were at the races certain produce stakes to be run for, &c., and that a certain filly of the plaintiff, and a certain colt of the defendant had been nominated for the stakes; that, by a regulation of the races at L., it was provided that all stakes, &c., should be paid to the clerk of the races before 11 o'clock on the day of running, or the owner should not be entitled, though a winner. The declaration then alleged that the plaintiff had, before the hour of starting, and before the hour of 11 o'clock on the day of running, made and paid his stake into the hands of the clerk of the races; that the defendant's colt ran, and came in first, and, but for the defendant's fault, according to the usage of racing, would have been entitled to the sweepstakes; but that the defendant did not, before the hour of starting for the first race of the day, or before 11 o'clock on that day, being the day of running, make his stake, or pay the same into the hands of the clerk of the races. It then averred that the plaintiff's filly did run, and came in second only to the defendant's colt, whereby the defendant became liable to pay the whole of the stake, &c. Plea, that before the defendant had notice of the regulation of the races at L., and before the hour of starting for the first race of the day, and before the running for the race for the said sweepstakes, the defendant was ready and willing, and offered to make his stake for his said colt, for the said sweepstakes, in bankers' notes, payable on demand, and then tendered and offered to pay the said stakes in such bankers' notes, into the hands of the said J. J., but that the said R. B. then refused to allow the said J. J. to accept or receive the said stake, or to allow the defendant's colt to run for the sweepstakes, on the ground that the defendant's colt was disqualified to run for the said sweepstakes: and that the said J. J. did in pursuance of such refusal of the said R. B., refuse to accept or receive from the defendant his stake, and to allow his colt to run for the said sweepstakes, on the ground and for the reason aforesaid, and on no other ground whatsoever.—Replication, that the defendant did not tender or offer to make his stakes for his said colt for the said sweepstakes, or to pay the same into the hands of the said J. J., until long after 11 o'clock on the day of running for the said sweepstakes, (although before and at that hour he had notice of the regulation of the said races at L.):—Held, on special



demurrer, that the replication was ill, and that if it was not a departure from the declaration, at all events that the replication did not show any cause of action. *Lacey v. Umbers*, 2 C. M. & R. 112. 1206

### GRANT.

King Edward 4th, before his accession to the throne of England, and in right of the earldom of March, was seised in fee of the manor of Rathweir, with the advowson of the church of Rathwier, otherwise Killucan, appendant thereto. King Edward afterwards, in the ninth year of his reign, granted the said advowson by name to Sherwood, bishop of Meath, and his successors. By an act passed in the 10th year of the reign of Henry 7th, all advowsons of churches in Ireland, whereof the said king or any of his noble progenitors, kings of England, was or were at any time seised in fee simple or fee tail, from the last day of the reign of King Edward 2nd to the passing of that act, were resumed into the king's hands. And also, all grants, &c., made by letters patent under the great seal of England or Ireland to any person or persons jointly or severally from the said day, were revoked or avoided:—Held, that this act reappended the advowson of Rathweir to the manor, and revested the said advowson in the crown, as the words in the act included property of which Edward 4th was seised, either by private or regal right, and which descended to Edward 5th. And also, that the word "progenitors," was tantamount to "predecessors," and, therefore, extended to Edward 4th; and the general words in the first branch of the enactment, "all advowsons of churches," included advowsons howsoever granted; and, therefore, that it was immaterial under what seal the grant was made. *Meath (Bishop) v. Winchester (Marquis)*, 1 Alcock & Napier, 508. (*Irish*). 1208

Although the King can never be put out of possession in point of law by the wrongful entry of a subject; yet there may be an adverse possession in fact against the crown. Therefore, after such an adverse possession by a subject for twenty years, the crown could only recover the land by an information of intrusion; consequently ejectment would not lie at the suit of the grantee of the crown, notwithstanding the rights of the crown are not barred by the Statute of Limitations. *Doe d. Wall or Watt v. Morris*, 2 Scott, 276; 1 Hodges, 215. 1206

### GUARANTIE.

A. introduced B. to C, an upholsterer, and A., in B.'s premises, asked C. if he had any objection to supply B. with some furniture, and that if he would, he would be answerable. C. asked A. how long credit he wanted, and A. replied, "he would see it paid at the end of six months." C. agreed to it, and A. gave him the order, and the goods were supplied accordingly. At the end of six months, B. not having paid the amount, C. applied to A. for payment, and he paid

the money. The entry in C.'s books was, "Mr. B per Mr. A.:"—Held, that the jury were warranted in finding that the undertaking on the part of A. was not a collateral undertaking. *Simpson v. Penton*, 2 C. & M. 430; 4 Tyr. 315. 1210

The defendant, in consideration of the plaintiff's withdrawing a distress for rent, undertook to pay the sum due for rent out of the sale of the produce of the effects:—Held, that it was a positive engagement to pay, if the goods were sufficient; and therefore, in an action on the guarantee, proof that the goods produced the amount of rent, entitled the plaintiff to recover, although these were prior claims. *Stephens v. Pell*, 2 C. & M. 710; 4 Tyr. 6. 1210

The declaration stated, that H. was employed to do work on certain houses, and that the defendant was employed as surveyor over him, and to receive monies to be paid to H. for such work; that, in consideration that the plaintiff would provide and deliver to H. such materials as should be required to enable him to do the work, the defendant promised the plaintiff to pay him for them, out of such monies received by him as should become due to H. for that purpose. The declaration then averred that H. gave the defendant such order, and that he required certain materials which the plaintiff delivered to him, to the value of 1000*l.*, and that the sum became due to H. for the work; of all which the defendant had notice, and was requested by the plaintiff to pay him for the materials out of such monies received by him as were due to H. for the work.—Breach, that though the defendant had received the 1000*l.* to be paid and then due to H., and though the said order had not been revoked, the defendant refused to pay the plaintiff. Plea, that the promise in the declaration mentioned was a special promise to answer for the debt of H., and that there was no memorandum or note thereof in writing:—Held, on demurrer, that the plea was bad, for that the defendant's promise was an original and not a collateral one. *Andrews v. Smith*, 2 C. M. & R. 627. 1210

To constitute a valid agreement to answer for the debt or default of a third person, within the 4th section of the Statute of Frauds, it is not necessary that the consideration should appear in express terms; it is enough if the memorandum be so framed, that a person of ordinary capacity must infer from the perusal of it, that such and no other was the consideration upon which the undertaking was given. *Hawes v. Armstrong*, 1 Scott, 661; 1 Bing. N. R. 761; 1 Hodges, 179. 1212

No consideration is to be implied from an undertaking as follows:—"Inclosed, I forward you the bills drawn per J. T. A. upon and accepted by L. D., which, I doubt not, will meet due honor, but in default thereof, I will see the same paid." 1*l.*

No consideration is to be implied from an undertaking as follows:—"Mr. R. H. C. of Barbadoes, about to proceed thither in the Mary, having incurred an account with you amounting to 49*l.* 5*s.*, with the understanding that he is to



transmit the amount to you, three months after he shall have arrived at Barbadoes, we guarantee his performance of the said engagement, and in failure thereof we will be responsible to you." Id.

Plaintiffs, owners of a ship hired on charter-party by H. S., refused to let her sail till certain disputes about the freight between them and H. S. were settled, by H. S. giving security; whereupon defendant, in consideration that plaintiffs would let H. S. sail without giving security, undertook to get T. M. to sign the guarantie hereunder set forth, and deliver it to plaintiffs within a week:—Held, that this was not an undertaking for the debt, default, or miscarriage of another, within the Statute of Frauds. *Bushell v. Bevan*, 4 M. & Scott, 622; 1 Bing. N. R. 103. 1212

The guarantie to be signed by T. M. was as follows:—"Whereas H. S. has hired a ship for six months from the 12th July, 1830, and such longer time as his intended voyage may require, and has paid or secured the freight for six months from the 20th August, 1830, and is about to leave E.; I guarantee the payment of freight which shall accrue for any portion of the voyage after the said six months."—Held, an undertaking within the Statute of Frauds, and insufficient for want of consideration apparent on the face of it; and, consequently, that only nominal damages could be recovered against defendant for failing to procure T. M.'s signature, according to his promise. Id.

Assumpsit on the following guarantie:—"You will be so good as to withdraw the promissory note, and I will see you at Christmas, when you shall receive from me the amount of it, together with the memorandum of my son's, making in the whole 45l." A promissory note for 35l. made by the defendant's son, and payable to the plaintiff, was proved at the trial, but not the memorandum. The guarantie was proved, and a subsequent admission by the defendant, that he had to pay the plaintiff 45l. due from his son:—Held, first that the plaintiff was not bound to produce the memorandum; secondly, that the consideration, viz. the withdrawing of the promissory note, was sufficient to satisfy the Statute of Frauds, though the amount and maker's name were not specified, there being no evidence of any other note to which the agreement could apply. *Shortrede v. Cheek*, 1 Adol. & Ellis, 57; 3 Nev. & M. 366. 1212

Held also, that the plaintiff was entitled to recover for the whole 45l. upon producing a promissory note, made by the defendant's son, for the payment of 35l., and proving that he had withdrawn it, there being no evidence of any other note, drawn by either the defendant or his son, having been at the time of the writing the letter in the possession of the plaintiff. Id.

Where the defendant addressed to the plaintiff the following letter, which he dated and signed, "I hereby agree to see you paid within three months from date hereof, the amount of 5l. due to you on account of Mr. G. M., jun.:"—Held, not sufficient to bind the defendant under the Statute of Frauds, the consideration for the promise not being sufficiently expressed. *Clancey*

*v. Piggott*, 4 Nev. & M. 496; 2 Adol. & Ellis, 473; 1 Har. & Woll. 20. 1212

Assumpsit on the following agreement:—"I undertake, on behalf of Mr. Peate, (in consideration of Mr. Dicken having this day given me an undertaking to procure Mr. Ward's check or note in favor of Mr. Peate for 150l., on account of a debt due from Mr. Chambers to Mr. Peate), that Mr. Chambers shall have credit for that sum in his accounts with Mr. Peate, and that Mr. Ward shall stand in the place of Mr. Peate to that amount; and I further undertake, that Mr. Peate shall not personally dispute Mr. Ward's right to deduct that sum from the accounts owing by the colliers of the Black Park Colliery to Mr. Chambers:"—Held, that this agreement showed a sufficient consideration moving from the plaintiff. *Peate v. Dicken*, 1 C. M. & R. 422; 3 Dowl. P. C. 177; 5 Tyr. 116. 1212

"As you have a claim on my brother for 5l. 17s. 9d. for boots and shoes, I hereby undertake to pay the amount within six weeks from this date—January 14, 1833:"—Held, that no action lies on this undertaking, inasmuch as no consideration appears on the face of the instrument. *James v. Williams*, 3 Nev. & M. 196; 2 Dowl. P. C. 481; 5 B. & Adol. 1109. 1213

The plaintiff, previous to delivering bricks to a certain government contractor, received from the defendants a guarantie in the following terms:—"Please to deliver to Mr. S. for the completion of his contracts at D. and W. yards, 500,000 best bricks, to be delivered at the dock-yards, at 32s. per thousand, and we, as his sureties, consent that the proper officer, Navy-office, Somerset House, who shall or may have the payment of the contract when finished, shall and may stop the amount of such account for bricks delivered; and we do hereby agree to become guaranties for the payment of the same to you when the amount of the contract is paid." The bricks were delivered, and S. received, with the consent of the plaintiff, a part payment. S. having performed part only of his contract, and failed in the performance of it, other persons were employed by government to finish the contract without the assent of S. or the defendants, and to these persons payment of the remainder of the contract price was paid; after which a balanced account was made out with S., in which he was debited for the sums paid to the parties who finished the contract, and with the sum paid for work partly performed, and received credit for the whole contract work done:—Held, that by the guarantie the defendants undertook only that the money should be paid to the plaintiff when paid in pursuance of the contract, and that the money paid to the parties who finished the contract was not money paid to him. *Hemming v. Malin or Trenery*, 2 C. M. & R. 385; 1 Gale, 206. 1215

In the aforesaid account S. had credit given for extra work for 284l., and received in payment the balance of the whole account, viz., 241:—Held, that this must be considered as paid in respect of the extras, and not in pursuance of the contract:—Held also, that the first part pay-



ment to S. being by the consent of the plaintiff, he had no right to recover in respect of such payments. *Id.*

Guarantie in the following form:—"F. informs me that you are about publishing an arithmetic for him. I have no objection to being answerable as far as 50*l.*; for my reference apply to B." Signed "G. T." B. wrote this memorandum, and added "witness to G. T., J. B." It was forwarded by B. to the plaintiffs, who never communicated their acceptance of it to G. T. In an action against the latter on the guarantie:—Held, that the plaintiffs not proving any notice of acceptance to the defendant, were not entitled to recover. *Mozley v. Tinkler*, 1 C. M. & R. 692; 5 Tyr. 416; 1 Gale, 11. 1215

C. & Co., before their bankruptcy, guaranteed to A. the payment of 300*l.* for the erection of a sugar mill for D., on the production of a certificate from the engineer that the mill was erected according to the terms of a certain specification; A. produces a certificate of the erection of the mill, stating, however, a deviation from the original plan, with the consent of D.; upon which C. & Co., without making any objection to such deviation, informed A. that it was not in their power to pay the money:—Held, that A. might prove the 300*l.* under the fiat issued against C. & Co. *Ex parte Ashwell*, 2 Deac. & Chit. 281. 1216

The following guarantie was given by the defendant in January, 1825, to certain bankers:—"Please to open an account with and honor the checks of H. B., on mill account, for whom I will be responsible." The account having been opened, the bankers made advances to H. B. from time to time till February, 1827, when they ceased; a large balance was then due to them from H. B., who, in October of that year, paid a sum into the bank on account of it; in February, 1828, the bankers took an acceptance from H. B., at three months, for the balance of his account, with interest, without the defendant's knowledge; in several previous instances the bankers had taken similar acceptances from customers who had overdrawn their accounts; but though the defendant had been consulted by them as their attorney on the dishonor of several of them, it was not shown that he was aware of the practice of the bank in that particular:—Held, that the taking the acceptance from the principal debtor by the parties guaranteed, without the knowledge or assent of the surety, was a giving time to the principal, which altered the situation of the surety, and therefore discharged him from liability on the guarantie. *Howell v. Jones*, 4 Tyr. 548. 1217

An agreement between A., and B. the wife of A., and C., of the one part, and of D., of the other, recited that A., B., and C. had sued L. and obtained a cognovit from him; that W. was bail to the sheriff, and that the bail-bond was forfeited; that W. had requested A., B., and C. to let L. be at large, and to forbear entering up judgment, or proceeding against the bail or the sheriff till a certain day, on W.'s guaranteeing the security of L.'s person if the money were not

paid before that day, and the agreement further set forth that it was understood and agreed, and W. undertook and promised, that he, W., would render L. on the day or pay the money, in consideration that A., B., and C. would so forbear: W., having broken the agreement, A., B., and C. declared jointly against W., reciting the agreement, and averring performance on the part of A., B., and C.:—Held, that B. was entitled to join. *Wills v. Nurse* (in error), 1 Adol. & Ellis, 65. 1218

A. guarantees to B. the debt of C. upon condition "that no application shall be made to A., on B.'s part, for the amount guaranteed, or any portion thereof; but on the failure of B.'s utmost efforts and legal proceedings to obtain the same from C." C. remains in England two years, then goes abroad insolvent, not having paid the debt to B. No proceedings are taken against him until four years after the guarantie given, when process is issued, and continued on the roll, C. remaining abroad until more than six years after the guarantie given: the guarantie is discharged by the laches of B. *Holl v. Hadley*, 4 Nev. & M. 505; 2 Adol. & Ellis, 758. 1218

Where defendant, in assumpsit, pleads that the contract declared upon was a guarantee for the debt of another, and that no memorandum thereof, stating the consideration, was or is in writing signed by defendant, or any person authorized by him; plaintiff may reply, that a memorandum of agreement in writing, stating the consideration, was signed by defendant, without setting out such memorandum in the replication. *Wakeman v. Sutton*, 2 Adol. & Ellis, 78; 4 Nev. & M. 114. 1218

In an action on a contract of guarantie, it is a good bar, that before breach a new contract has been made to pay absolutely. *Taylor v. Hillary*, 1 C. M. & R. 741; 3 Dowl. P. C. 461; 1 Gale, 22; 5 Tyr. 373. 1218

The declaration stated, that the defendant guaranteed the payment of goods furnished by plaintiff to H., at the defendant's request. Plea, that, before breach of that undertaking, it was agreed between plaintiff and defendant that plaintiff should supply goods to H., and that they should be paid for at the end of three months by a joint bill at four months, to be accepted by the defendant, which agreement of defendant, plaintiff, before breach of the former declared on, accepted in full discharge of such former agreement, and released the defendant from performing it:—Held, on demurrer, that the second agreement did not require to be in writing, pursuant to 29 Car. 2, c. 3, being an agreement by which the defendant became absolutely bound as an original debtor, and not being an accord and satisfaction, but a substituted contract, afforded a good defence to the action, without alleging performance. *Id.*

If in an action on a guarantie for payment for goods to be supplied to A. the plaintiff aver that goods were supplied to A., and the defendant plead non-assumpsit, this admits the supply of the goods to A., and no proof is required in support of the averment, and the plaintiff need not



give any evidence that the goods were supplied, except with the view of showing the amount of damages. *Taylor v. Hillary*, 7 C. & P. 30—Gurney.

### HABEAS.

A. is charged with a felony before three magistrates, who, upon hearing evidence, admit him to bail, and afterwards, upon additional evidence, commit him to gaol: A. is not entitled to a habeas corpus to be discharged out of custody. *Ex parte Allen*, 3 Nev. & M. 35. 1220

A hab. corp. will not lie to bring up a prisoner, in a county gaol, for the purpose of voting at the election of a member of parliament. *Ex parte Jones*, 4 Nev. & M. 340; 2 Adol. & Ellis, 436; 1 Har. & Woll. 7. 1220

Where a defendant, charged with selling unstamped papers, was in custody, the court granted a hab. corp. for the purpose of enabling him to defend in person. *Att. Gen. v. Cleave*, 2 Dowl. P. C. 668. 1220

On an application in bankruptcy for a bankrupt's discharge by hab. corp., an affidavit may be read, stating circumstances which are not set forth in the warrant of the commissioners. *Ex parte Lampon*, 3 Deac. & Chit. 751; 1 Mont. & Ayr. 245. 1220

On a rule for discharging a prisoner who was arrested under process from an inferior court, and brought up into this court by habeas corpus cum causa, it is no objection that the affidavits on which the rule is obtained are intitled in a cause in this court—*Per Littledale, J., and Patteson, J. Perrin v. West*, 5 Nev. & M. 291; 3 Adol. & Ellis, 405; 1 Har. & Woll. 401. 1220

In support of a motion to set aside a judge's order for a procedendo, after a hab. corp. removing from an inferior court into K. B., it was sworn that the judge made the order in consequence of its being proved before him, by the affidavit of J. N., that the habeas was issued by an uncertificated attorney:—Held, that this statement of the ground of the order was sufficient for the court to act upon, without production of the affidavit of J. N., there being no statement on the other side that any different ground had existed. *Glyn v. Hutchinson*, 3 Dowl. P. C. 529; 2 Adol. & Ellis, 660. 1220

The hab. corp. was sued out in the cause in the inferior court by the defendant in that court. The application to set aside the order and the procedendo was made by parties who were bail for the defendant in a cause in K. B., (and not in the suit below), for the purpose of bringing up the defendant to be rendered in the cause in K. B., upon their motion, though it was objected that they were not proper parties to apply. *Id.*

The court set aside the judge's order, and directed that the hab. corp. should stand revived; reserving it, however, for consideration, how the defendant should be dealt with as to future custody on his being brought up. *Id.*

Held, no objection to the making of the last mentioned rule that, since the procedendo issued,

a writ of inquiry had been executed in the cause in the inferior court, and it did not appear that final judgment had yet been signed. *Id.*

An attachment may be granted for making an insufficient return to the first writ of habeas corpus, without issuing an alias and a pluries writ. *Rex v. Winton*, 5 T. R. 89. 1221

### HOLIDAY.

Whereas by the act of the 3 & 4 Will. 4, c. 42, s. 43, it is enacted, that none of the several days mentioned in the statute, passed in the sessions of parliament holden in the 5th and 6th years of the reign of King Edward 6, intitled, "An act for keeping holidays and fasting days," shall be observed or kept in the courts of common law, or in the several offices belonging thereto, except Sundays, the day of the Nativity of our Lord, and the three following days, and Monday and Tuesday in Easter week: It is hereby ordered, that, henceforth, in addition to the said days, the following, and none other, shall be observed or kept as holidays in the several offices belonging to the said courts; viz. Good Friday and Easter eve, and such of the five days following as may not fall in the time of term, but not otherwise; the birthday of our lord the king, the birthday of our lady the queen, the day of the accession of our lord the king, Whit-Monday and Whit-Tuesday. *Reg. Gen. K. B., C. P., and Excheq., H. T. 6 Will. 4.*

### HORSE.

A declaration in assumpsit stated, that, in consideration that the plaintiff would at the request of the defendant lend him a horse, the latter promised to take proper care of him, and return him to the plaintiff in as good a condition as he was in at the time of the promise, or pay fifteen guineas; the contract proved was, in addition to these terms, that the defendant should find the horse meat for his work:—Held, that the contract was sufficiently stated in the declaration, and according to its legal effect. *Handford v. Palmer*, 5 Moore, 74; 2 B. & B. 359. 1224

A person to whom a horse is delivered to be stabled, taken care of, fed, and kept, has no lien on him for the expense incurred in so doing. *Judson v. Etheridge*, 1 C. & M. 743; 3 Tyr. 954. 1225

To an action for not delivering a horse, under an agreement to sell him for 1s. if he did not trot 18 miles within the hour, within one month, to the satisfaction of J. N., with an averment that he had been tried in the presence of J. N. and had failed, defendant pleaded, that after that trial, and within the month, defendant gave notice of another trial, but J. N. did not attend:—Held, ill. *Brogden v. Marriott*, 2 Scott, 712; 2 Bing. N. R. 473. 1224

Defendant also pleaded that the first trial was interrupted by one acting as the plaintiff's servant:—Replication traversing the whole of that plea, held single. *Id.*

By 6 Geo. 4, c. 62, postmasters are to pay for



horses, let out for a distance not exceeding eight miles, a duty of 1s. 9d. a horse, or one-fifth of the sum charged to the hirer; and are to make a return to the Stamp Office of the number of horses let, the number of miles, the amount charged to the hirer; the fifth part of that amount, or 1s. 9d. for each horse; for a false return the postmaster is liable to a penalty, and the farmer of the duty may compel him to verify his return on oath. Defendant returned, as the amount of duty for two horses let out for five miles, 2s. 6d., and omitted to state the sum charged to the hirer:—Held, that, notwithstanding such omission, he had sufficiently indicated his election to pay the duty of one-fifth, and that the farmer could not claim 1s. 9d. for each horse. *Hammond v. Hooley*, 4 M. & Scott, 664; 1 Bing. N. R. 131. 1225

### HUNDRED.

By 2 Will. 4, c. 39, s. 13, *every writ of summons issued against the inhabitants of a hundred or other like district, may be served on the high constable thereof, or any one of the high constables thereof; and every such writ issued against the inhabitants of any county of any city or town, or the inhabitants of any franchise, liberty, city, town, or place, not being part of a hundred or other like district, on some peace officer thereof.* 1227

If an action be brought by a termor upon 7 & 8 Geo. 4, c. 31, for an injury done to his house within three calendar months from the offence committed, and that action abates by the death of the termor, after the three months have expired, his executor cannot bring a fresh action. *Till Adam v. Bristol (Inhabitants)*, 4 Nev. & M. 144; 2 Adol. & Ellis, 389. 1229

Whether an executor of a termor can in any case bring an action upon 7 & 8 Geo. 4, c. 31, for an injury sustained in the lifetime of his testator, *quære?* Id.

To entitle a party who has sustained damages under 30l. by the felonious act of rioters, to require, under 7 & 8 Geo. 4, c. 31, s. 8, the holding of a petty sessions for hearing and determining his claim for compensation, it must appear that within seven days after the commission of the offence he went before a justice of the peace, and that he has complied with all the other requisites of the section. *Rex v. Bateman*, 1 Nev. & M. 718. 1231

In the absence of an affidavit verifying these facts, (in general terms,) the court will not grant a mandamus for the holding of a petty sessions for such purpose. Id.

### HUSBAND AND WIFE.

*Marriage.*—A marriage by banns, published in false names, is not void under 4 Geo. 4, c. 76, s. 22, unless both parties were privy to such mispublication. *Rex v. Wroxtton*, 1 Nev. & M. 712; 4 B. & Adol. 641. 1233

By 5 & 6 Will. 4, c. 54, *all marriages before the passing of the act, between persons being within*

*the prohibited degrees of affinity, are not to be annulled for that cause by any sentence of the Ecclesiastical Court, unless pronounced in a suit depending at the time of the passing of the act.* 1233

By s. 2, *all such marriages hereafter celebrated between persons within the prohibited degrees of consanguinity and affinity are to be absolutely void.* Id.

The registry of a marriage is evidence between strangers of the time of the marriage. *Doe d. Wollaston v. Barnes*, 1 M. & Bob. 386—Denman. 1236

Where, upon a question as to the validity of a marriage between A. and C., it appears that A.'s first wife, B., was alive in a distant colony 26 days before the second marriage, the sessions or a jury are justified in finding the second marriage to be void. *Rex v. Harborne*, 4 Nev. & M. 341; 2 Adol. & Ellis, 540; 1 Har. & Woll. 36. 1236

Neither the sessions, nor a jury trying an issue as to the validity of such a marriage, are bound to presume the death of B., in favor of the innocence of A., in contracting a second marriage; but may look to the evidence in each particular case. Id.

*Marriage settlement.*—On articles under seal, after a recital of an intended marriage between B. and C., A., (the father of B.), "for the support and settlement in the world of the young couple, freely and clearly giveth and settlth upon B. his lands from Michaelmas next" for life, remainder to the first son of the marriage, "and so on successively," with remainders over: this is a covenant to stand seised, and not an executory contract. *Doe d. Jones v. Williams*, 2 Nev. & M. 602; 5 B. & Adol. 783. 1238

B. and C. have issue, E. their eldest and F. their second son; B. dies, then E. dies: F. may enter, as in his remainder, and thereby avoid a fine with proclamations levied by E. and B. Id.

By a marriage settlement, stock was assigned to trustees, upon trust to pay the interest and dividends to the husband for life, and in case he should survive the wife, upon trust to transfer the said stock to the husband, "his executors, administrators, or assigns, to and for his and their own use and benefit;" but in case the wife should survive the husband, upon trust during her life to pay the interest and dividends as she should appoint, and after her decease, upon trust to transfer the stock "unto the executors or administrators of the said G. M. (the husband) to and for their own use and benefit." The wife survived the husband, and took out administration of his effects, and claimed an absolute interest in the whole corpus of the stock:—Held, that she was not entitled. *Marshall v. Collett*, 1 Y. & Col. 232. 1238

*Husband's Liabilities.*—An officer in the army, being required to join his regiment in the East Indies, left his wife in England, and settled a certain sum upon her, which was regularly paid:—Held, in an action by a tradesman for goods delivered at the house in which the wife was



living, that it was not to be treated as a case of separation, but that the questions for the jury were, 1st, whether the goods supplied were necessities, considering the condition in life of the husband; 2ndly, whether the sum of money settled was sufficient; and 3dly, whether it was or was not notorious in the neighborhood that the wife was living in a style not justified by the rank of her husband; and the jury having found the first question in the negative, and the others in the affirmative, it was held that their verdict must be for the defendant. *Dennys v. Sergeant*, 6 C. & P. 419—Bosanquet. 1242

Where a wife had in one single instance bought goods, which were delivered at the lodgings of her mother, without her husband's knowledge, but for which he subsequently paid:—Held, in an action for other goods, also bought by the wife from the same tradesman, and delivered at the lodgings of the mother, but at a different place, that evidence of the facts was proper to be left to the jury, to show an agency in the wife, and a sanction of her dealings by her husband; and the jury having found for the plaintiff, the Court refused to disturb the verdict. *Filmer v. Lynn*, 4 Nev. & M. 559; 1 Har. & Woll. 59. 1242

Quere, if in an action against a husband for goods supplied to his wife, it is necessary to plead specially the adultery of the wife. *Symes v. Goodfellow*, 4 Dowl. P. C. 642; 2 Bing. N. R. 532; 2 Scott, 769. 1240

Defendant pleaded non assumpsit to an action for the board and lodging of his wife; an arbitrator, to whom the cause was referred, admitted evidence of the wife's adultery, and decided against the plaintiff. The court refused to set aside the award. *Id.*

It is competent to a jury to infer agency in a wife to accept a notice with respect to a particular transaction in her husband's trade, from the circumstance of her being seen twice in his counting-house, appearing to conduct his business with reference to the transaction in question, and on one of these occasions giving directions to the foreman. *Plummer v. Sells*, 3 Nev. & M. 422. 1243

A., who kept a fruiterer's shop, in the year 1824, became bankrupt, but did not surrender to his commission, and from that time to the year 1833, the business was carried on by A.'s wife. Fruit was supplied to her between the years 1828 and 1832, to an amount exceeding 266l., and evidence was given that A. was seen in London a few times between 1824 and 1833, and was arrested at the shop in 1833, and that he attended the marriage of two of his daughters at Mary-le-bone church:—Held, that proof of these facts was evidence to go to the jury, to show that A.'s wife acted as the agent of A., so as to charge him with the price of the fruit, although it might not be sufficient to charge him with necessities supplied to his wife. *Smallpiece v. Dawes*, 7 C. & P. 40—Parke. 1243

*Wife's Property.*—A husband is entitled to the personal property of his wife, which she has

acquired by living apart from him in adultery. *Agar v. Blethyn*, 2 C. M. & R. 699; 1 Tyr. & G. 160. 1244

A woman living apart from her husband acquired a sum of money, which she deposited in a bank. She married another man, and on that account the money was vested in trustees for the benefit of herself and her illegitimate children. She was afterwards tried, convicted, and executed for murder. The trustees expended a considerable sum in her defence, and made an application to the bankers for the money so deposited, but it appeared that such an application was not made bona fide in execution of the trusts of the settlement. The first husband claimed the money, and the parties having all been brought into court by an interpleader rule, an issue was directed to try whether he was entitled to it, in which he recovered. The court refused to allow the trustees their costs out of the fund, and directed that the costs of the bankers should be paid by the plaintiff (the husband) to be repaid to him by the trustees. *Id.*

Where a married woman having separate estate, and living apart from her husband, employed a solicitor in various transactions, and promised by letters to pay him, but without referring to her separate estate, it was held that her separate estate was liable to the payment of the solicitor's bill of costs. *Murray v. Barlee*, 3 Mylne & Keen, 209. 1244

Semble, that the separate estate of a feme covert is liable in equity to her general engagements, as well upon an implied undertaking as by a written obligation. *Id.*

Under 3 & 4 Will. 4, c. 74, ss. 77, 91, a [feme covert, when her husband has absconded, and has not been heard of for some time, may pass a contingent life interest in freehold property. *Ex parte Gill*, 1 Bing. N. R. 168. 1244

Motion under the 3 & 4 Will. 4, c. 74, s. 91, to dispense with the concurrence of the husband to a disposition by the wife of lands, &c., to which the latter is entitled in her own right. *Ex parte Thomas*, 4 M. & Scott, 331. 1245

Rents devised to a female durante viduitate do not pass over to the remainder-man upon her cohabiting with one who, under an illegal marriage, holds himself out as her husband. *Allen v. Wood*, 4 M. & Scott, 510; 1 Bing. N. R. 8. 1245

And the party who thus holds himself out is not, by so doing, estopped to show the invalidity of the marriage. *Id.*

A married woman being entitled under a will to stock and cash, forming part of a residue, her husband wrote to one of the executors requesting that the stock should be transferred into the names of certain trustees, for the wife's separate use, and that the cash should be paid to himself. These requests were complied with. The husband employed part of the cash in increasing the amount of the stock. He afterwards became bankrupt and died:—Held, that the stock transferred by the executors was not reduced into possession by the husband, and, therefore, belonged to the wife by survivorship,



but that the assignees under the bankruptcy were entitled to the increase made by the husband. *Ryland v. Smith*, 1 Mylne & Craig, 53. 1245

**Privileges of Wife.]**—A married woman who has put her name to a bill of exchange as drawer, and is arrested upon it, will not be discharged on motion. *Walsh v. Gibbs*, 4 Dowl. P. C. 683. 1246

Costs of an application to discharge defendant out of custody on the ground of coverture are not costs in the cause. *Mummery v. Campbell*, 4 M. & Scott, 379; 10 Bing. 511; 2 Dowl. P. C. 798. 1247

**Separation.]**—By a deed dated in 1817, after reciting that disputes had existed between W., and E. his wife, and that they had been on the point of separation, it was witnessed, that, in consideration that the wife had consented to cohabit with the husband, he had covenanted with S. (a trustee) to convey estates to his use, &c. for ninety-nine years, &c. The trusts of this term were, that in case the wife should find herself compelled, by a renewal of the disputes, to cease to cohabit with her husband, or live apart from him, that a sufficient annuity for her separate maintenance should be raised out of the rents, or by sale or mortgage of the term; and in that event the husband agreed to execute articles of separation. The deed contained no covenant by the trustee indemnifying the husband against the debts of the wife. After the execution of this deed, the husband and wife continued to live together. By an indenture in 1818, made between the husband and wife, and trustees, after reciting that the husband at the desire of the wife had agreed to live separate and apart from her, and to allow her a separate maintenance, the husband demised the estate to trustees for a term to raise provisions for the wife and an infant daughter; and the husband covenanted that the wife might live separate and apart from him, and free from his authority and control, &c. This deed contained no indemnity against debts. The parties continued to live in the same house, although they slept in separate rooms, and met at board, and appeared in the world as man and wife, until June, 1819, when they finally separated. In 1822, the trustees in the deed of 1818 distrained upon the tenants of the land charged with the annuity to the wife. Upon bill filed in equity, and appeal, held, that the deeds were void; the first, as providing for a prospective separation; and the second, because there was a reconciliation. *Westmeath (Marquis) v. Salisbury (Marquis)*, 5 Bligh, N. S. 339. 1249

Where a husband and wife lived separate, and an action was brought by the wife for a debt due to herself in the name of the husband and wife, without the husband's authority, the court, on application, ordered proceedings to be stayed until an indemnity was given to the husband. *Morgan v. Thomas*, 2 C. & M. 388; 2 Dowl. P. C. 332. 1250

On giving such indemnity, the wife is at liberty to go on in the husband's name. *Id.*

**Actions.]**—Action by husband and wife, jointer of wife. *Nurse v. Wills*, 1 Nev. & M. 765; 4 B. & Adol. 739. 1251

In 1810 the defendant's wife died seized of certain freehold, with which was intermixed certain copyhold, to which she had been admitted in 1804. She left surviving her the defendant and an only daughter, who was shortly after admitted to the copyhold and married in 1815. The defendant remained in possession of the freehold ever since, as tenant by curtesy, and also of the copyhold ever since, letting them both from time to time together at an entire rent, and never recognising any right in his daughter or her husband to either copyhold or rent. No title was proved, except from the court rolls of the manor. It was insisted that the defendant's possession must be taken to have continued for the protection of his daughter's rights, and that he was therefore her agent for receipt of the rent of the copyhold, liable to an action by her husband to recover it as money had and received to his use:—Held, that the husband could not maintain an action against the defendant without proving such an agency, or some recognition by him of his daughter's right, so as to establish a privity between the plaintiff and defendant, and avoid the question of title, which would otherwise have arisen. *Clarence v. Marshall*, 4 Tyr. 147; 2 C. & M. 495. 1251

Semble, the husband might sue alone. *Id.*

To a plea of coverture, replication that the husband was an alien, not a subject of this country by naturalization or otherwise, and at the time of the contract residing in France; that the defendant lived in this kingdom separate from her husband, that the plaintiff gave no credit to her husband, but contracted with her as a feme sole:—Held, ill. *Stretton v. Busnach*, 4 M. & Scott, 678; 1 Bing. N. R. 139. 1252

To a declaration against husband and wife for a debt due from the wife before coverture, the husband's discharge under the Insolvent Act is a good plea. *Lockwood v. Salter*, 5 B. & Adol. 303. 1253

Quære whether it can be replied that the wife had separate property? *Id.*

Where an action is brought (without the authority of the husband) in the name of husband and wife, for an assault upon the latter, the husband will be entitled to stay the proceedings until he receives an indemnity against costs. *Harrison v. Almond*, 4 Dowl. P. C. 321; 1 Har. & Woll. 519. 1255

**Crim. Con.]**—In an action for crim. con., evidence may be given in reduction of damages that the wife, before the criminal intercourse, had complained of her husband's treatment of her. *Winter v. Wroot*, 1 M. & Rob. 404—*Lyndhurst*. 1254

In an action for crim. con., evidence on the part of the plaintiff to show the amount of the defendant's property is not admissible; but, in an action for a breach of promise



of marriage, it is otherwise. *James v. Bridington*, 6 C. & P. 589—Alderson. 1254

If, in an action for adultery, it appear that the wife has died since the commencement of the action, the jury should give damages for the loss of the society of the wife from the time of the discovery of the adultery to the time of the wife's death; and also for the shock to the feelings of the husband; and this is so, although it appear there was no suspicion of the wife's infidelity till she was on her death-bed, and though the husband continued to treat her kindly up to the time of her death. *Wilton v. Webster*, 7 C. & P. 198—Coleridge. 1254

Letters written by the wife to her husband, are not receivable in evidence in an action for crim. con., if written at a time when at least an attempt at adultery had been made by the defendant; but a draft, in the defendant's handwriting, of a letter written by the wife, in answer to a letter of Mrs. B. to the wife, is receivable in evidence, as is the letter of Mrs. B. *Id.*

In an action for criminal conversation, where the adultery was committed on board a ship during a voyage, a witness may be asked, on the part of the plaintiff, whether the wife did not keep a journal, and whether she stated for what purpose she kept it. *Jones v. Thompson*, 6 C. & P. 415. —Tindal. 1254

*Dower.*—Dower of copyhold lands. *Riddell v. Jenner*, 3 M. & Scott, 673; 10 Bing. 29. 1255

In a writ of dower, in support of a plea of election by the widow to take an annuity secured to her by deed in lieu of dower, the tenant proved a receipt by the demandant, after issue joined and before trial, of certain dividends mentioned in the deed:—Held, that this, standing alone, was not sufficient evidence to warrant the court in holding (after verdict for the demandant) that the demandant had elected to take the annuity in satisfaction of her dower:—Held, also, that an order made in a suit in equity to which the tenant was no party, and which contained a proviso that the receipt of the money by the demandant should be without prejudice to her right to dower, was admissible in evidence to show *quoniam* she received it. *Slatter v. Slatter*, 1 Scott, 82. 1255

Quære whether a court of law can properly take cognizance of an election of the widow to take something in lieu of dower. *Id.*

A rent-charge expressed to be for a jointure and in lieu of dower and thirds, at common law does not bar the jointress of her share in her husband's undisposed of personal estate. *Colleton v. Garth*, 6 Simon, 19. 1255

#### IDENTITY.

What is sufficient proof of identity. *Corfield v. Parsons*, 1 C. & M. 730; 3 Tyr. 806. 1257

If a carman take goods to the house of L., not knowing him, and ask for Mr. L. of a person whom he finds in the house, and that person says,

"I am Mr. L.," this is *prima facie* evidence that he was L. *Wilton v. Edwards*, 6 C. & P. 677—Lyndhurst. 1257

#### IMPROVEMENT.

A public company is by statute empowered to hold lands and to purchase certain scheduled messuages, and is required to make compensation by a particular process to persons "damaged or injured by or in the taking down of any of the messuages or buildings to be taken down for the purposes or otherwise in the execution of the act." The company purchased a house not mentioned in the schedule, and in pulling it down injured the adjoining house:—Held, that the tenant of the adjoining house was not entitled to compensation by the process provided by the act. *Rex v. Hungerford Market Company*, 3 Nev. & M. 622; 1 Adol. & Ellis, 668. 1258

A company for effecting improvements in a town is empowered by statute to take certain lands, &c., upon giving notice and making compensation, the amount of which compensation, if not agreed upon, is to be ascertained by a jury; and it is provided that in case the jury shall assess the damages at more than was offered, the company shall pay "the costs of the notices and precepts, and costs of summoning the jury and witnesses, and also of the inquest."—Held, that a party whose property was assessed at more than the sum offered was entitled to his general costs attending the trial, but not to the expenses of surveying. *Rex v. York (Justices)*, 3 Nev. & M. 685; 1 Adol. & Ellis, 828. 1258

Where an assessment of compensation had been made to a claimant under the 3 & 4 Will. 4, c. 46, (Greenwich Railway Act), in one entire sum, and he was possessed of a leasehold interest as well as other subjects of compensation, the court refused an application on behalf of the company for another assessment to be made, on the ground that as the value of the leasehold property was not assessed separately according to the act, it could not be known what would be the proper *ad valorem* stamp duty to be affixed to the deed of assignment: the court saying that the difficulty would be obviated by putting on the deed a stamp applicable to the whole sum assessed, and reciting all the circumstances of the case. In re London & Greenwich Railway Company, 2 Adol. & Ellis, 678; 4 Nev. & M. 458; 1 Har. & Will. 81. 1258

By a local act, a company are empowered to take lands—with an exception of mines—for a railway, paying the value of the lands and making compensation for damages sustained by reason of the execution of the works, and for damage, loss, or inconvenience sustained by reason of the execution of any of the powers of the act; such value and compensation to be fixed by agreement or assessed by a jury:—mines to be worked by the owner, so that no damage be thereby done to the railway—and in case of damage the owner to repair it at his own expense, or the company to repair in case of neglect or refusal, and recover the expenses from the owner. The owner of



land taken by the company, and for which compensation is paid, cannot, upon afterwards discovering that a mine, to which he is entitled, cannot be worked without doing damage to the railway, claim further compensation in respect of the loss sustained thereby. Compensation in respect of such contingent loss should have been claimed at the time of the original agreement or assessment. *Rex v. Leeds & Selby Railway Company*, 5 Nev. & M. 246. 1258

Whether, where an act for making canals, &c., authorizes the summoning a jury, "to ascertain what sum and sums shall be paid by way of recompense either for the damages before that time sustained, or for the future temporary or perpetual continuance of any recurring damages occasioned, and the time or occasion of which shall have been only in part obviated, repaired or remedied, and which can or will be no further remedied or repaired," the jury can assess compensation in respect of prospective damages, were, no previous damage has been sustained, *quere*. *Rex v. Yorkshire W. R. (Justices)*, 3 Nev. & M. 802: 1 Adol. & Ellis, 563. 1258

Where a statute provides that a water-works company shall make compensation for damages done in executing the works, and these works are restricted to a particular line, damage occasioned by executing the prescribed works is within the proviso, although the property injured be not within the line. *Rex v. Nottingham Old Water Works Company*, 5 Nev. & M. 498. 1258

And *semble*, that the act would protect the company from any action at law for the injury. *Id.*

Where an act of parliament establishing a railway company directs that the money to be paid for lands purchased by the company shall be paid into the bank, until the same shall, upon petition, be applied in the purchase of other lands; and in the meantime, until such purchase can be made, shall, upon application to the court, be invested in the funds; and that the expenses and costs attending such purchase shall be paid by the company:—Held, that, under the latter clause, a party applying to have the money invested in the funds is not entitled to the costs of the application. *Ex parte Taylor*, 1 Y. & Col. 229. 1258

Where by a railway act, it was enacted that the monies paid into court by the company for lands purchased by them should, by order made upon the petition of the party interested, be invested in the purchase of other lands to be settled to the like uses, and in the meantime should, by an order similarly obtained, be invested in the funds; and it was further enacted, that the court might order the expenses of such purchases, and of the investment of the purchase money in land "or other disposition of the same," to be paid by the company:—Held, that the company were liable to pay the expenses of the interim investment of the money in the funds. *Ex parte Onslow*, 1 Y. & Col. 553. 1258

## INFANT.

The office of clerk of the peace being merely ministerial may be held by an infant. *Crosbie v. Hurley*, 1 Alcock & Napier, 431. (*Irish*). 1259

Contract to enter into partnership. *Corpe v. Overton*, 3 M. & Scott, 738; 10 Bing. 252. 1259

If a father make to a son under age an absolute gift of an article of dress or ornament, e. g. a watch, he cannot afterwards, without that son's consent, reclaim the gift. Declarations made by a testator are evidence against a person claiming in the character of his administrator. *Smith v. Smith*, 7 C. & P. 401—Vaughan. 1259

Where an infant rented a house, and exercised his calling therein as a barber:—Held, that it was properly left to the jury to decide whether it came within the term of necessities. *Semble*, that there is no distinction between a trade carried on by a minor, and his occupation in a manual employment, and that he is not liable for the rent of a house taken for either purpose. *Lowe v. Griffiths*, 1 Scott, 458; 1 Hodges, 30. 1259

If a person of full age orders clothes, however extravagantly and absurdly, and they are delivered to him, he is bound to pay for them; but with a minor it is otherwise. A minor is only liable for necessities suitable to his state and degree, and the jury must consider not only whether the clothes were suitable in point of quality, but also in point of quantity. *Burghart v. Angerstein*, 6 C. & P. 690—Alderson. 1260

If a minor has been supplied with ten coats by another tradesman, and immediately after that, the plaintiff supplies him with another, the plaintiff will not be entitled to be paid for that other coat, as it was unnecessary. *Id.*

If a minor is supplied with necessities suitable to his estate and degree, no matter from what quarter, a tradesman cannot recover for any further supply made to the minor just after. *Id.*

In an action for the price of clothes, brought by a tailor against a minor, the defendant may go into evidence to show that he had all the clothes which were suitable to his estate and degree from other tailors; and if he in fact had such clothes from them, it makes no difference that he has not paid for them, or even that he has successfully defended an action brought by one of them to recover the price of the clothes supplied by him. *Id.*

Where an infant has an allowance made to him by his guardians for his support, a tradesman is not entitled to be paid for articles supplied to the infant on credit, unless he can make out, that, having regard to the infant's circumstance and station, (which he is bound to inquire into), the articles were necessities. *Mortara v. Hall*, 6 Simon, 465. 1260

A., a minor, had held a commission in the army, but sold it by reason of not having sufficient fortune to hold it. His father was a beneficed clergyman, who paid various sums for him during his minority, and gave him a further sum of 1500*l.* when he attained the age of twenty-one years:—Held, that a stanhope was not ne-



cessary for him while a minor, as being suitable to his state and degree. *Charters v. Baynton*, 7 C. & P. 52—Gurney. 1260

In an action for seduction of the plaintiff's daughter, the defendant may examine witnesses to prove particular acts of sexual intercourse between the plaintiff's daughter and those witnesses, who may each be asked as to the fact and the time and place of its occurrence; but if the jury are of opinion that the defendant had such intercourse with the plaintiff's daughter as caused him to be the father of the child, the plaintiff is entitled to the verdict; and the evidence of her unchastity with others is only to be considered in mitigation of damages. *Verry v. Watkins*, 7 C. & P. 308—Alderson. 1262

To charge a father with the amount of clothes supplied to his son, it is essential that the clothes should have been supplied with the assent or by the authority of his father; and the father is the person to judge what is proper for his son. *Rolfe v. Abbott*, 6 C. & P. 286—Gurney. 1264

The mother of an illegitimate child has no power to appoint a guardian for it under stat. 12 Car. 2, c. 24, s. 8; therefore the Court of K. B. will not on habeas corpus order an illegitimate child to be delivered up by a person to whose care it had been committed by the mother, into the custody of a person who was appointed guardian and devisee in trust for its benefit by the will of the mother. *Ex parte Glover*, 4 Dowl. P. C. 291; 1 Har. & Woll. 508. 1264

The Court of K. B. will grant a rule absolute in the first instance to bring up the body of an infant, if it is probable that it may be concealed. *Id.*

Where a person is appointed guardian under a will not duly executed for that purpose, the Court will appoint him without a reference. *Hall v. Storer*, 1 Y. & Col. 556. 1264

The Court will not discharge an infant, in an action of slander, from execution for damages and costs, although the Insolvent Court has refused to relieve him, because, on account of his infancy, he was unable to make the assignment of property required by the 7 Geo. 4, c. 57. *Defries v. Davies*, 3 Dowl. P. C. 629; 1 Scott, 594; 1 Bing. N. R. 692; 1 Hodges, 103. 1264

Quere, whether an infant plaintiff, being non-suited, is liable to be taken in execution for the costs of the nonsuit? *Dow v. Clark*, 2 Dowl. P. C. 302; 1 C. & M. 860. 1264

If an infant appear in person, not by guardian or prochein ami, it is error in fact. *Castledine v. Mundy*, 1 Nev. & M. 635; 4 B. & Adol. 90. 1264

Such error may be assigned in the court by which the judgment is pronounced. *Id.*

So it may be assigned in a court of error, except Dom. Proc., and (before 1 Will. 4, c. 70) the court of error constituted by 27 Eliz. c. 8. *Id.*

If an infant assigns, by attorney, for error coram vobis, that he has improperly appeared in the action by attorney instead of guardian, it is

not a mere irregularity, but a ground of error: still the Court will, on application, set the assignment aside, and allow the plaintiff in error to assign by guardian. *Beven v. Cheshire*, 3 Dowl. P. C. 70. 1264

An appearance entered by a plaintiff for an infant defendant by an attorney, is irregular, and the subsequent proceedings may be set aside without costs, even after a writ of inquiry executed. *Nunn v. Curtis*, 4 Dowl. P. C. 729. 1264

A motion, on behalf of an infant defendant, to set aside irregular proceedings, may be made by his father or an attorney; but it must appear to be made with the consent of the defendant. *Id.*

## INFERIOR COURT.

*Courts of Requests.*—A barrister is not exempted from liability to be sued in the London Court of Requests, under the 39 & 40 Geo. 3, c. 104. Therefore, where the defendant, a barrister, having chambers in the Temple, was sued, in the Court of C. P. for a claim of 6*l.* 6*s.*, which was reduced by the verdict to 4*l.* 4*s.*, the Court of C. P. permitted him to enter a suggestion on the roll to deprive the plaintiff of costs. *Wettenhall v. Wakefield*, 3 M. & Scott, 805; 10 Bing. 335; 2 Dowl. P. C. 759. 1265

An action for not using a farm in a tenant-like manner is not within the meaning of the 46 Geo. 3, c. 66, (the Isle of Wight Court of Requests Act). *Wittam v. Urry*, 2 Dowl. P. C. 543. 1268

The jurisdiction of the Westminster Court of Requests is confined to cases of debt, and it has no power to inquire into a matter which is the subject of an action on the case for unliquidated damages. *Soames v. Rawlings*, 2 C. M. & R. 744; 4 Dowl. P. C. 501; 1 Tyr. & G. 46; 1 Gale, 299. 1268

But in actions for ascertained debts, not exceeding the fixed amount, they may proceed as well by the rules of equity as law. *Id.*

The London Court of Requests' acts confer jurisdiction over liquidated demands, though there are special counts, but not in cases where unliquidated damages are sought to be recovered, as e. g., on a count for not returning goods unsold. *Poetan v. Masser* or *Massaer*, 4 Tyr. 999; 2 C. M. & R. 683. And see *Mansfield v. Brearey*, 1 Adol. & Ellis, 347; 3 Nev. & M. 471. 1268

An action for the use and occupation of "furnished" lodgings is within sec. 13 of the 39 & 40 Geo. 3, c. 104, (the London Court of Requests' Act), and therefore it may be brought in the superior courts without the plaintiff's incurring the penalties provided in sec. 12. *Kidd v. Mason*, 3 Dowl. P. C. 96. 1268

A court of requests' act provided, that a defendant, sued elsewhere for a cause of action within the cognizance of that court, might plead the act; and if it should appear by the verdict that the cause was within the cognizance of that



court, then the plaintiff should be nonsuit, if the judge or judges who should try the cause should not, in open court, certify, as by the act was directed. In an action brought in a local court of record, the defendant pleaded the Court of Requests' Act, and the cause appeared to be within the cognizance of that court. The judges of the court of record were the mayor and bailiffs of the town, and they were assisted, at the trial, by the recorder, who was not a judge of the court of record. A certificate was given, pursuant to the act, but by the recorder alone:—Held, that this did not satisfy the act. *France v. Parry*, 1 Adol. & Ellis, 615. 1265

On error brought, the entry on the proceedings sent up to the court was, simply, that it appeared by the certificate of the Court of Record, that, &c., (without stating that the certificate was made in open court, or by whom it was made, except as above); but it was suggested on affidavit, that the certificate had really been made in open court by the recorder; that the proceedings sent up were merely a transcript of the record which remained below; and that the record of the court below had been amended there by entering the certificate, as having been made by the judges who tried the cause, in open court; and it was moved that this court should amend the proceedings in conformity with the alterations said to have been made below. This court refused the amendment, first, because they could not take notice that they had only a transcript before them, so as to be at liberty to amend, in conformity with the record below; secondly, because, if the document before them were to be considered as a record, they had no power to make the amendment, it being contrary to the facts as to the person certifying. *Id.*

*Ecclesiastical Courts.*—A defendant cited in the Ecclesiastical Court must appear before he can apply for a prohibition. *Ex parte Law*, 2 Dowl. P. C. 558; 2 Adol. & Ellis, 45; S. C. nom. *Rex v. Mills*, 4 Nev. & M. 7. 1273

A testator died indebted to an attorney for law expenses, including the preparation of his will, which was left in the custody of the attorney; the Prerogative Court having cited the attorney (at the instance of the personal representatives) to bring in the will, and leave in the registry of that court, the Court of K. B. refused, in this stage of the proceedings, to interfere by prohibition, on the ground of the attorney's lien on the will. *Id.*

A prohibition to an ecclesiastical court, in a cause which is clearly of ecclesiastical cognizance, does not lie where there has been an irregularity in the practice. *Ex parte Smyth*, 5 Nev. & M. 145; 1 Har. & Woll. 417. 1273

The only instances in which the temporal courts can interfere to prohibit any particular proceeding in an ecclesiastical suit, are those in which something is done contrary to the general law of the land, or manifestly out of the jurisdiction of the court. *Id.*

Semble, that the court of Exchequer has power to issue a writ of prohibition to the judicial committee of the privy council, if they exceed their jurisdiction; but it cannot issue for that which is a subject of appeal. *Ex parte Smyth*, 2 C. M. & R. 748; 1 Gale, 274. 1273

The privy council, on an appeal from the Arches Court to the king in council, may decide the matter of appeal, and retain the principal cause, and make an original order therein. *Id.*

In a suit for a divorce, in the Consistory court in London, the defendant put in an answer under protest, which protest was afterwards over-ruled; but the Court refused to compel the defendant to appear absolutely, or to admit the plaintiff's libel. The plaintiff appealed to the court of Arches from that decision, but not in due time; and the appeal was dismissed. The plaintiff afterwards applied to the Consistory court, to be allowed to correct her libel; but the Court refused the application. The plaintiff appealed from the decision to the court of Arches, who pronounced in favor of the appeal. From that decree the defendant appealed to the king in council, praying that it might be reversed, and the cause retained, and he be dismissed from all observance of justice therein. The plaintiff also prayed that the cause might be retained. The appeal was referred to the judicial committee of the privy council, who reported in favor of the appeal, that the decree ought to be reversed, and the principal cause retained, but the defendant should appear absolutely. The report was confirmed, and the order for the appearance was made and served upon the defendant. On a motion for a prohibition to the judicial committee:—Held, that, as the judicial committee had jurisdiction over the cause, and they have retained the cause, this must be taken to be a step taken in the cause; and, if wrong, that it was a matter of practice, over which this Court had no jurisdiction. *Id.*

Semble, pleas may now be pleaded in an action of prohibition. *Hall v. Maule*, 5 Nev. & M. 455; 1 Har. & Woll. 583. 1273

It is competent to the court of Chancery to issue several concurrent writs de contumacè capiendo. *Rex v. Blake*, 2 Nev. & M. 312; 4 B. & Adol. 355. 1274

A contumacè capiendo may be returnable on or after the essoign day of the term. *Id.*

Semble, that it ought to appear upon the warrant granted upon a writ of contumacè capiendo, that the suit was for a subject matter which was exclusively within the jurisdiction of the Spiritual Court; therefore, where a warrant merely stated that the suit was for slander, without showing that it was a slander of which the Spiritual Court alone had cognizance, the Court granted a rule to show cause why the party should not be discharged out of custody. *In re Gale*, 1 Har. & Woll. 59. 1274

Where a party in custody under writs of contumacè capiendo applied for a rule to show cause why they should not be set aside for irregularity, with costs; and after the rule obtained, also ap-



plied to the Chancellor, who decided that one of them was bad, and ordered the others to stand over for argument, the court, on showing cause, enlarged the rule, with a stay of proceedings. *Rex v. Ricketts*, 1 Har. & Woll. 64. 1274

**County Courts.**—Plea, in bar to an action of debt for 20*l.*, that the debt did not amount to 40*s.*, and that the defendant, before and at the commencement of the suit, resided and still resides in Middlesex, and, from the time of the accruing of the debt, was, and still is, liable to be summoned in the county court of Middlesex:—Held, that this plea was bad under the County Court Act, (23 Geo. 2, c. 33, s. 19), for not negativing that the freehold or title to land, or an act of bankruptcy, principally came in question. *Sandall v. Bennett*, 4 Nev. & M. 89; 2 Adol. & Ellis, 204; 3 Dowl. P. C. 294. 1274

Seemle, that a plea in bar, containing such negative averments, would not be good under 23 Geo. 2, c. 33. *Id.*

Seemle also, that generally a plea in bar, that the debt is under 40*s.*, and recoverable in a county court, could not be pleaded under the Statute of Gloucester (6 Edw. 1, c. 8). *Id.*

After a judgment in the county court has been set aside, though not at the instance of the parties, the court will not compel the sheriff to issue execution on it. *Eldridge v. Fletcher*, 3 Dowl. P. C. 588. 1274

**Removal of Causes.**—Where a defendant suffered judgment to go by default in the Palace Court:—Held, that it was too late, after the jury were sworn on the writ of inquiry, to remove the cause by habeas corpus. *Smith v. Stocking*, 1 Har. & Woll. 194. 1276

Since 21 Jac. 1, c. 23, s. 3, the Court of Exchequer has no power to remove a cause out of the Palace Court, after interlocutory judgment there, except by writ of error. *Lawes v. Hutchinson*, 5 Tyr. 236. 1276

If a writ of habeas corpus, to remove a cause from the Palace court, wherein judgment has been suffered by default, is not delivered until after the jury have assessed the damages on the writ of inquiry, the court will issue a procedendo. *Smith v. Stirling*, 3 Dowl. P. C. 609. 1276

### INJUNCTION.

A foreign judgment being equally conclusive against the debtor as an English judgment, may be set aside in equity for fraud. *Bowes v. Orr*, 1 Y. & Col. 464. 1279

A court of equity has no jurisdiction to relieve a plaintiff against a judgment at law, where the case in equity proceeds upon a ground equally available at law and in equity: but the plaintiff must establish some special equitable ground for relief. *Harrison v. Nettleship*, 2 Mylne & K. 423. 1279

A bill in equity to set aside a verdict is not sustainable, where the facts on which the bill is

founded, though discovered since the trial, might have been established at the trial upon cross-examination. *Taylor v. Sheppard*, 1 Y. & Col. 371. 1279

Where a party agrees not to do a particular act, and there are other terms in the agreement which are so vague that the court cannot enforce them, it will not grant an injunction to restrain the breach of the negative term. *Kimberley v. Jennings*, 6 Simon, 340. 1279

The court will not give any assistance to a party seeking to enforce a hard bargain. *Id.*

Injunction granted to restrain the goods of a partnership from being taken in execution for a debt due from one of the partners, who died before the writ was delivered to the sheriff. *Newell v. Townsend*, 6 Simon, 419. 1279

### INNKEEPER.

A., on a fair day, coming to an inn kept by B., with a horse and gig, orders the horse to be put into the stable, but giving no special direction as to the gig. The horse is put into the stable, and the gig is placed with other carriages in the public highway, near the house, where it is the practice of B. to put carriages on fair days. The gig is stolen. B. is answerable for the loss. *Jones v. Tyler*, 3 Nev. & M. 576; 1 Adol. and Ellis, 522. 1280

When a guest arrives at an inn with a horse and gig, and gives directions to the ostler to take his horse in, but says nothing about the gig, a promise to take the gig into the inn may be implied. *Id.*

An admission by an innkeeper that he left money entrusted to him for the purpose of taking up a bill, in his cash-box in his tap-room, where it was lost, together with a much larger sum of his own, is evidence of gross negligence to go to a jury. *Doorman v. Jenkins*, 4 Nev. & M. 170. 1281

The landlord of an inn has a lien on the goods of guests for board and lodging, and wine supplied to such guest's order, whatsoever may be the amount, provided the guest be possessed of his reason, and not an infant. Therefore, the sheriff, under a writ of *fi. fa.* against the guest, can only take the guest's goods, subject to the lien of the landlord for such his bill, and not merely subject to a lien for a reasonable quantity of wines, &c., only. The landlord of an inn has a lien for money lent to his guest, if it was agreed between them at the time of the loans that the guest's goods should be a security for the sums lent. *Proctor v. Nicholson*, 7 C. & P. 67—Abinger. 1281

An indictment lies against an innkeeper who refuses to receive a guest, he having room in his house at the time; and it is not necessary for the guest to tender the price of his entertainment, if his objection is not on that ground. And it is no defence for the innkeeper that the guest was travelling on a Sunday, and at an hour of the night after the innkeeper's family had gone to bed; nor is it any defence that the guest refused



to tell his name and abode, as the innkeeper had no right to insist upon knowing those particulars; but if the guest come to the inn drunk, or behaves in an indecent or improper manner, the innkeeper is not bound to receive him. *Rex v. Ivens*, 7 C. & P. 213—Coleridge. 1281

If a person conducts himself in a disorderly manner in a public-house, and the landlord requests him to depart, and he refuses to do so, the landlord is justified in laying hands on him to put him out; and if, while the landlord has hold of him to put him out, the person lays hands on the landlord, this is an assault; and if it is seen by a peace officer, he is justified in taking the person into custody. *Howell v. Jackson*, 6 C. & P. 723—Parke. 1281

So, if a person, without committing any assault, make such noise or disturbance in a public-house as would create alarm, and disquiet the neighborhood, and the persons passing along the adjacent street, this would be such a breach of the peace as would not only justify the landlord in turning the person out of the house, but would justify the landlord in immediately giving the person into the custody of a peace officer, provided that this had occurred in the presence of the officer. *Id.*

In trespass for taking carriage horses which the plaintiff had hired of the defendant, to take him away from the defendant's inn; the defendant pleaded that the plaintiff refused to pay his bill for entertainment, and that the defendant did so to prevent the removal of the plaintiff's carriage. To this plea the plaintiff replied, he had "tendered" the defendant 45*l.*, and the defendant rejoined, denying the tender. It was proved that the plaintiff put down the money, and offered it, if the defendant "would take it in full of the bill."—Held, that this was not a valid tender, and that this evidence did not support the replication.—Held also, that on these pleadings the jury are not to consider the reasonableness of the defendant's bill. *Gordon v. Cox*, 7 C. & P. 172—Coleridge. 1281

### INQUIRY.

By 1 Will. 4, c. 7, s. 1, any writ of inquiry of damages issued in or by either of the courts, by whatever form of process the action may have been commenced, may be made returnable, and be returned on any day certain in term or vacation to be named in such writ; and at the return a rule for judgment may be given, costs taxed, final judgment signed, and execution issued forthwith, unless the sheriff, or other officer before whom the same may be executed, shall certify under his hand, upon such writ, that judgment ought not to be signed until the defendant shall have had an opportunity to apply to the court to set aside the execution of such writ, or one of the judges shall think fit to order the judgment to be stayed until a day to be named in such order; provided it shall be so postponed, or by the choice of the plaintiff or otherwise, and judgment shall be afterwards signed thereon, such judgment shall be entered of record as of the

day of the return of the writ, unless the court shall otherwise direct. 1281

Where a plaintiff has obtained a judgment non obstante veredicto, he may execute a writ of inquiry without leave of the court. *Shephard v. Halla*, 2 Dowl. P. C. 453. 1281

The master upon a reference to him, may receive affidavits, but cannot, except by special direction in the rule, receive viva voce testimony. *Noy v. Reynolds*, 4 Nev. & M. 483; 2 Adol. & Ellis, 401; 1 Har. & Woll. 14. 1282

Where it is necessary to move to confirm the master's reports. *Milton v. Rawlings*, 4 Dowl. P. C. 576. 1282

Upon a reference to the prothonotary to ascertain a disputed fact, a party cannot after a term has elapsed since the determination of the prothonotary have the matter referred back to him to be reheard, on the ground that an absent witness has since been discovered. *Edgington v. Nixon*, 2 Scott, 509; 2 Bing. N. R. 366. 1282

Where several suffer judgment by default in an action on a promissory note, service of the rule nisi to compute on one is service on all. *Figgins v. Ward*, 2 Dowl. P. C. 364; 2 C. & M. 424; 4 Tyr. 232. 1282

Service of a rule on the mother of the defendant, at his residence, held sufficient. *Warren v. Smith*, 2 Dowl. P. C. 216. 1282

Where an attorney has been served with process at chambers, from which he afterwards goes away to an unknown residence, a rule to compute may be served by leaving a copy at those chambers, (they being his last place of abode), and sticking another up in the King's Bench office. *Sealey v. Robertson*, 2 Dowl. P. C. 568. 1282

A rule nisi to compute, served by leaving a copy at a warehouse, where the bill of exchange was made payable, but which was shut up at the time:—Held, insufficient service. *Castle v. Sow-erby*, 4 Dowl. P. C. 669. 1282

Service of a rule nisi to compute on the defendant's landlady, is not sufficient. *Gardener v. Green*, 3 Dowl. P. C. 343. 1282

Service of a rule to compute at a house, where letters were directed to be left for the defendant, by a notice affixed to the house where he had lately been residing:—Held, sufficient. *Provis v. Cantley*, 1 Har. & Woll. 369. 1282

Service of a rule nisi to compute at a house where the defendant's family were still living, though he himself had gone away:—Held sufficient, without the leave of the court. *Payett v. Hill*, 2 Dowl. P. C. 688. 1282

Service of a rule nisi to compute, by putting it under the door of the defendant's chambers, is not sufficient, although the landress states that the defendant will probably have the rule in the course of the day. *Strutton v. Hawkes*, 3 Dowl. P. C. 25. 1282



In the case of a prisoner, and under special circumstances, the court ordered the prothonotary, in computing principal and interest on a promissory note, to inquire into the consideration for which the note was given, and to decide on the facts as a jury would do. *Fife v. Bruyere*, 1 Hodges, 317. 1283

The court will grant a rule to compute principal and interest on a promissory note, although it is clearly shown that the note has been destroyed. *Clarke v. Quince*, 3 Dowl. P. C. 26. 1283

Notice of a writ of inquiry was allowed to be served by sticking it up in the office, and leaving it at the defendant's last place of abode, though neither the process nor notice of declaration had been personally served. *Watson v. Delcroix*, 2 Dowl. P. C. 396; 2 C. & M. 425; 4 Tyr. 266. 1284

The days between Thursday next before, and Monday next after, Easter day, must not be reckoned or included in any rules or notices, or other proceedings, except notices of trials and notices of inquiry, in any of the courts of law at Westminster. Reg. Gen. E. T. 2 Will. 4. 1284

A defendant, to whom an irregular notice of inquiry is given, ought to return it forthwith, and state what objection he has to it. *Stevens v. Pell*, 2 Dowl. P. C. 355; 2 C. & M. 421; 4 Tyr. 267. 1284

Where a notice of inquiry was given, with eight days only instead of fourteen, and the defendant, instead of returning it, merely gave notice, after the lapse of six days, that he intended to apply to set it aside, without stating the objection, the court, on making the rule absolute for setting aside the inquiry, refused costs. *Id.*

Where a defendant is under terms to take short notice of trial, he is not bound to take short notice of inquiry. *Id.*

After judgment by default, and writ of inquiry executed, the court upon application ordered a new inquiry, on the ground that, as to part of the damages found, there was no evidence to warrant the finding of the jury; the defendant, however, in order to save the expense of a second inquiry, paid the plaintiff the whole of his demand:—Held, notwithstanding, that he was not bound to pay the plaintiff the costs of the inquiry. *Porter v. Cooper*, 3 Dowl. P. C. 662; 2 C. M. & R. 232. 1286

It is not necessary that a rule to set aside a writ of inquiry, should be drawn up on reading the undersheriff's notes. *Stevens v. Pell*, 2 C. & M. 710. 1286

No affidavit of merits is required, where the execution of a writ of inquiry is set aside, on the ground of irregularity in not giving notice of the inquiry. *Williams v. Williams*, 4 Tyr. 368. 1286

## INSURANCE.

*Parties.*—One of several part owners of a ship, without any express authority from the others, effected a joint insurance upon the entire ship, charging the premium and commission in the ship's accounts, which were open to the inspection of, and were actually inspected by the other owners, and not objected to:—Held, that the jury were warranted in finding that the managing owner had a joint authority to effect an insurance for the whole; and that consequently all the owners were liable to the broker, notwithstanding the credit was in the first instance given to the managing owner alone—it appearing that the broker was ignorant of the names of the other owners. *Robinson v. Gleadow*, 2 Scott, 250; 2 Bing. N. R. 150; 1 Hodges, 245. 1288

*Interest.*—B. sold to plaintiff, to be delivered at Portsmouth, from 500 to 700 barrels of oats, to be shipped by I. from Youghall. Four days afterwards, B. advised plaintiff that I. had engaged room in the packet to take about 600 barrels of oats on plaintiff's account. On the following day, plaintiff insured 400l. on oats per the packet; the oats were shipped, but the packet being bound for Southampton, and refusing to touch at Portsmouth, B. sold the oats again, and delivered the bill of lading to O. at Southampton; plaintiff insisting that he was entitled to the oats, and would assert his right by action. In the meantime the packet was lost, and after a long dispute, plaintiff, in consideration of 60l., by indorsement on the policy, vested the interest in the insurance in B.:—Held, that the plaintiff had a sufficient interest to sue defendant, the underwriter on this policy. *Sparkes v. Marshall*, 3 Scott, 172; 2 Bing. N. R. 761. 1290

*Seaworthiness.*—In a policy by a member of a mutual insurance club, there was a memorandum, amongst other exceptions, warranties, rules, terms, conditions, and agreements, that "all ships were to be inspected and approved by a committee of the club, and that all chain-cables were to be properly tested:"—Held, in an action for a loss, that it was not a condition precedent which made it necessary for the insured to prove that a chain-cable had been tested previously to the voyage. *Harrison v. Douglas*, 5 Nev. & M. 180; 3 Adol. & Ellis, 306; 1 Har. & Woll. 380. 1297

Payment of money into court in an action on a policy, admits that the ship was seaworthy. *Id.*

Where by the terms of a policy in a mutual insurance club, the amount of the loss is not to be drawn before a specified day, the defendant, in an action on the policy, by paying money into court, precludes himself from objecting that the action is brought too soon. *Id.*

*Risk.*—Upon an insurance from England to Barbadoes, and all or any of the West India colonies, to continue until the ship shall be arrived



# [INSURANCE]



at her final port of discharge, the risk terminates on the discharge of the outward cargo at any of the colonies. *Moore v. Taylor*, 3 Nev. & M. 406; 1 Adol. & Ellis, 25. 1309

The cargo having been landed at Barbadoes, with the exception of coals and bricks brought from England serving as ballast, (though of a greater weight than was requisite for that purpose), but used in the West Indies also as merchandize, the ship is lost in Barbadoes while about to proceed to another colony with bricks and coals, and with other articles loaded there: it is a question for the jury to decide, whether, notwithstanding the coals and bricks remaining on board, the outward cargo had not been substantially discharged before the loss occurred. *Id.*

Inception of risk on goods. *Doyle v. Powell*, 1 Nev. & M. 676; 4 B. & Adol. 267. 1310

By a policy of insurance, assurance was made "including risk of craft to and from the ship," on linseed oil cakes, "free of particular average unless general, or the ship was stranded." The cakes were put on board a lighter at their destination, and the lighter stranded and sunk, whereby a particular average loss was sustained:—Held, that the underwriters were not liable. *Hoffman v. Marshall*, 2 Bing. N. R. 383; 2 Scott, 559; 1 Hodges, 330. 1309

Inception of risk on goods. *Rickman v. Carstairs*, 5 B. & Adol. 651; 2 Nev. & M. 562. 1310

**Policy.**—A policy of insurance on a ship "lost or not lost," executed, after the ship is known by all the parties to be lost, in pursuance of a previous agreement to insure, is valid. *Mead v. Davison*, 4 Nev. & M. 701; 3 Adol. & Ellis, 303; 1 Har. & Woll. 156. 1315

Where, by the rules of an insurance association, insurances are to commence on the day on which the ship is accepted by the committee, and to continue in force for twelve months, a ship accepted in February, and lost in June, is well insured by a policy executed 3rd October. *Id.*

And no objection to its admissibility in evidence arises upon the Stamp Act, 35 Geo. 3, c. 63. *Id.*

A letter of attorney was given to execute policies in conformity with the above rules:—Held, that the execution of the above policy was thereby authorized. *Id.*

Under an insurance from the port of loading, a loading at one single place only is authorized. *Brown v. Tayleur*, 5 Nev. & M. 472; 1 Har. & Woll. 578. 1315

Where, therefore, a ship insured at and from her port of loading in North America to Liverpool, takes in part of her cargo at Cognac, on the coast of New Brunswick,—her afterwards sailing to Bouctouche, another place on the same coast, within seven miles of Cognac, and within the same legal port, taking in part of her cargo

there, and returning to Cognac, and there completing her cargo, is not a deviation, and the policy. *Id.*

**Warranty.**—A warranty to sail on or before a particular day, is not complied with by leaving the harbor on that day, without having a sufficient crew on board, although the remainder of the crew are engaged and ready to sail. *Graham v. Barras*, 3 Nev. & M. 125; 5 B. & Adol. 1011. 1318

A policy of insurance contained a warranty, "not to sail for B. N. A. after the 15th of August." The vessel, on the morning of the 15th of August, was cleared at the custom house of D., and ready for sea. She was then lying in the Custom-House Dock, which opens into the river L., which forms part of D. harbor. She was afterwards, on the same day, hauled out of dock, and warped down the river L. about half a mile, towards the mouth of the harbor, which was some miles distant, for the purpose of proceeding on her voyage to Q., in N. A. At the time of so moving the vessel, the master and crew knew it to be impossible to get to sea that day. The next day she was warped a little further down the river, and on the 17th, when the wind changed, she got to sea. The jury having found that the master and crew fully intended to sail for Q. on the 15th of August, if it had been possible, and did all they could, and used every means and exertion so to do, and that they intended by so doing to put themselves in a better situation for the prosecution of the voyage, and not merely and solely to fulfil the warranty:—Held, that the vessel was in the prosecution of her voyage on the 15th of August, and that the warranty not to sail for B. N. A. after that day had been complied with. *Cockrane v. Fisher* (in error), 1 C. M. & R. 809; S. C. nom. *Fisher v. Cochran*, 5 Tyr. 496; affirming S. C. 2 C. & M. 581; 4 Tyr. 424. 1318

**Loss.**—By a policy of insurance, certain hides were insured from the usual perils, "free of particular average, unless the ship be stranded." In the course of the voyage, the hides were so much damaged by salt water, that they were necessarily sold, and the ship proceeded on her voyage homewards, and was stranded:—Held, that the rights of the assured and underwriters were fixed and determined at the time of the sale of the hides, and that the subsequent stranding of the vessel did not satisfy the condition upon which the warranty depended. *Roux v. Salvador*, 1 Bing. N. R. 526; 1 Scott, 491; 1 Hodges, 49. 1330

Where, by the terms of the policy, the underwriter was not answerable for an average loss upon certain hides insured, and in the course of the voyage the hides became so damaged by one of the perils insured against, that they could not have been carried to the place of their destination, (in consequence of their state of putridity), whereupon the hides were sold at the nearest



port:—Held, that it amounted to a constructive total loss. *Id.*

Where the hides were sold in the state and under the circumstances above mentioned:—Held, that notice of abandonment was necessary to enable the assured to maintain an action for a total loss. *Id.*

*Adjustment.*—A plea of payment to an action of covenant by A., upon a policy of insurance effected by A. as agent, is supported by an indorsement on the policy by A., purporting that the loss had been adjusted, and the balance due from the defendant to A. paid, although the principal has not authorized such a settlement. *Gibson v. Winter*, 2 Nev. & M. 737. 1345

An insurance was effected on goods on board a ship consigned to Buenos Ayres. The ship, with the cargo, was captured by the Brazilian government, and condemned for an attempted breach of blockade. Notice of the capture was given by the insured to the underwriters, and an offer was made by the insured to abandon. The underwriters declined the offer of abandonment; and, after some negotiation, it was arranged that, on payment by the underwriters of 35l. per cent. on the sum insured, the policy should be delivered up to be cancelled. The per centage was accordingly paid, and the policy cancelled. Some years afterwards, in pursuance of a convention between Great Britain and the Brazilian government, the goods were ordered by the latter government, to be restored to the owners, and compensation to be made. A claim was made by the underwriters to the whole or a part of the sum awarded for compensation; but held, that the underwriters having declined the offer of abandonment, the payment of the 35l. per cent. was a compromise of their liability under the policy, and that they were not entitled to any portion of the sum awarded for compensation. *Brooks v. Mac Donnell*, 1 Y. & Col. 502. 1347

*Insurance Broker.*—By the custom of Lloyd's, premiums of insurance are matters of account between the underwriter and the broker, and between the broker and the assured, without any privity between the assured and the underwriter. The broker has, therefore, a claim upon the assured for the amount of the premium as the policy is effected, whether he has paid the underwriter or not,—and whether the underwriter has, by the policy, confirmed the premium to be paid, or has taken the covenant of the broker to pay it. *Power v. Butcher*, 5 M. & R. 327. 1352

*Life Insurance.*—A suppression or false representation of facts material to be known by the insurers, vitiates a policy of insurance, although it was in answer to a parol inquiry; and the policy is, by the articles of the insurance office, to be void on false answers being given to certain written inquiries. *Wainwright v. Bland*, 1 Mees. & Wels. 32. 1357

Therefore, where a party, going to insure her life for two years, gave false answers to verbal inquiries, whether she had effected similar insurances at other offices:—Held, that the policy was thereby avoided. *Id.*

Quere, whether a party may insure his life for the benefit of another who provides the funds to pay the premiums, and intends to take the benefit of the policy? *Id.*

By a declaration and statement as to health, &c., signed by the assured previous to effecting a policy on a life, it was agreed, that, if any untrue averment was contained therein, or if the facts required to be set forth in the proposal (annexed) were not truly stated, the premiums should be forfeited, and the assurance be absolutely null and void. The statement as to the health of the life was untrue in point of fact, but not to the knowledge of the party making it:—Held, that the premiums were forfeited, and could not be recovered back. *Duckett v. Williams*, 2 C. & M. 348; 4 Tyr. 240. 1357

*Fire Insurance.*—The profits of a business are insurable, but they must be insured qua profits. *In re Sun Fire Office*, 3 Nev. & M. 819; S. C. nom. *In re Wright & Pole*, 1 Adol. & Ellis, 621. 1359

Under an insurance by A. of his "interest in the Ship Inn and offices," A. cannot recover compensation for the loss of his business as an innkeeper, in the interval between the fire and the rebuilding. *Id.*

A policy of insurance on a mill, millwrights' work, standing and going gear, engine house and steam engine, recited "that the aforesaid buildings were brick built, warmed by steam, lighted by gas, and worked by the steam engine above mentioned, in tenure of one firm,"—"standing apart from all other mills, and worked by day only." In an action of covenant to recover the amount of a loss by fire, held, that the recital did not mean that the steam engine was not worked by night. *Whitehead v. Price*, 2 C. M. & R. 447; 1 Gale, 151. 1359

A condition was indorsed on the policy avoiding it, if, after the insurance was effected, the risk should be increased by the erection or alteration of any stove, or the carrying on any hazardous trade, &c. The defendant pleaded, that after the making of the policy, the said steam engine was worked by night, and not by day only, whereby the risk was increased:—Held, that the plaintiff was entitled to judgment, notwithstanding a verdict for the defendant on this plea, it being bad in omitting to state that the engine was not worked in the same way before the time of the effecting of the policy. *Id.*

## INTEREST OF MONEY.

A banker was not (before 3 & 4 Will. 4, c. 42, ss. 28, 29, 30) liable to pay interest upon money deposited, although at the time of the deposit it



had been declared that interest should not be payable upon a certain event which did not happen. *Edwards v. Vere*, 2 Nev. & M. 120; 5 B. & Adol. 262. 1363

V. & Co., bankers, were assignees of a judgment obtained in Scotland against M. H. for 4100*l.* In 1829, M. H. deposited with V. & Co. 4100*l.*, and, by a memorandum in writing, it was agreed that that sum should be deposited in their hands for safe custody on account of M. H. and that from the time such deposit should be made, and during its continuance, V. & Co. were not to pay any interest thereon, and all interest should cease in respect of the amount due upon the judgment. M. H. afterwards became bankrupt, and his assignees, on the 12th of November, 1831, demanded from V. & Co. the 4100*l.* which they refused to pay:—Held, that they were not liable to pay interest on that sum from the time when payment of the principal was demanded. *Id.*

Independently of the 3 & 4 Will. 4, c. 42, s. 28, interest is not recoverable in an action for money had and received. Therefore, where A. consigned goods to B., with directions to remit the proceeds to C., to which B. assented:—Held, in an action for money had and received by C. against B., that interest was not recoverable, (there having been no notice that interest would be claimed), although by the course of dealing between A. and B. interest would have been payable as between them. *Frühling v. Schroeder*, 2 Scott, 143; 2 Bing. N. R. 77. 1362

In an action on an attorney's bill, the plaintiffs gave notice, pursuant to 3 & 4 Will. 4, c. 42, s. 34, that they should claim interest from the date of the notice. After the writ was issued, the bill was referred for taxation at the instance of the defendant, no terms being made as to the allowance of interest:—Held, that the plaintiffs could not afterwards have an assessment of damages for the purpose of recovering the interest. *Berlington v. Phillips*, 1 Mees. & Wels. 48. 1362

The Court of Exchequer Chamber cannot, under 3 & 4 Will. 4, c. 42, s. 30, allow interest upon the damages recovered in a personal action in which error is brought, except when the writ of error is tested subsequently to the day on which that act received the royal assent. *Burn v. Carvalho* (in error), 4 Nev. & M. 893; 1 Adol. & Ellis, 806. 1366

### INTERPLEADER.

*In what cases.*—The 1 & 2 Will. 4, c. 58, does not apply to claims in equity. *Sturgess v. Claude*, 1 Dowl. P. C. 505. 1368

A lien attaching upon the goods in dispute does not prevent the party who holds them from applying to the court for relief under the Interpleader Act. *Cotter v. England* (Bank), 3 M. & Scott, 180; 2 Dowl. P. C. 728. 1368

A party fairly applying for relief under the Interpleader Act, is entitled to his costs out of the fund, or out of the proceeds of the goods in dispute. *Id.*

A party who, by his own act, is placed in a si-

tuation to be sued, cannot call on the court to substitute another defendant under the Interpleader Act, 1 & 2 Will. 4, c. 58. *Belcher v. Smith*, 9 Bing. 82; 2 M. & Scott, 184. 1368

The motion under the Interpleader Act, 1 & 2 Will. 4, c. 58, is to the discretion of the court, and will not be allowed where, from the circumstances, it may be reasonably suspected that there is collusion between the defendant and the third party whom he seeks to substitute. *Id.*

The Interpleader Act, 1 & 2 Will. 4, c. 56, does not apply to a case where the defendant has a legal claim. *Braddick v. Smith*, 9 Bing. 84; 2 M. & Scott, 131. 1368

It seems that a wharfinger, who claims lien on goods for wharfage, &c., is not within the act. *Id.*

Where a defendant has been indemnified by a third party for not delivering up property in his possession, he has no right to relief under the Interpleader Act, and the court will discharge a rule obtained for that purpose, with costs. *Tucker v. Morris*, 1 C. & M. 73; 1 Dowl. P. C. 639. 1368

The court cannot give relief under the Interpleader Act to stakeholders, who are only threatened with proceedings; an action must be brought, and the plaintiff declare, before the court will interfere. *Parker v. Linnett*, 2 Dowl. P. C. 562. 1368

A stakeholder acting with good faith is entitled to his costs of coming to the court out of the fund in dispute, which are ultimately paid by the successful party. *Id.*

The holder of title deeds cannot apply, under the Interpleader Act, for protection against opposing claims. *Smith v. Wheeler*, 3 Dowl. P. C. 431; 1 Gale, 15, 163. 1368

Trover for title deeds is within the act. *Id.*

Where two parties claim to be entitled to a reward, the defendant, when sued by one of them to recover it, is not entitled to the relief given by the Interpleader Act. *Collis v. Lee*, 1 Hodges, 204; *S. P. Grant v. Fry*, 4 Dowl. P. C. 135. 1368

After the Court of Chancery have issued an injunction to stay a cause, the court will not grant a rule for interpleading. *Arayne v. Lloyd*, 1 Bing. N. R. 720; 1 Scott, 609; 1 Hodges, 166. 1368

The court discharged with costs such a rule. *Id.*

*Procedure.*—Claimants neglecting to appear under the Interpleader Act are precluded by the terms of the rule from enforcing their claims. *Ford v. Dillon*, 2 Nev. & M. 662. 1368

Where money has been paid into court by a stakeholder to abide the event of a feigned issue under 1 & 2 Will. 4, c. 58, the party succeeding cannot take the money out before judgment signed. *Cooper v. Lead Smelting Company*, 1 Dowl. P. C. 728; 9 Bing. 634; 2 M. & Scott, 810. 1368



On an application to a judge at chambers, under an Interpleader Act, an order was made, by consent of all parties, to refer the cause, on certain terms, to a barrister, instead of an issue being directed. The court refused to grant a rule nisi for varying the order, by introducing a fresh term into the reference, in consequence of information which one of the parties (an administratrix) had obtained since the hearing at chambers. *Drake v. Brown*, 2 C. M. & R. 270. 1367

A rule under the 1st sect. of the Interpleader Act, cannot be drawn up for a stay of proceedings, unless notice has been given. *Smith v. Wheeler*, 3 Dowl. P. C. 431; 1 Gale, 15. 1368

Such a rule may be drawn up to show cause at chambers. *Id.*

Where an auctioneer has one action brought against him in Com. Pleas, and another in K. B. by different claimants of the same property, he must, to relieve himself under the Interpleader Act, obtain rules in both courts. *Allen v. Gilby*, 3 Dowl. P. C. 143. 1368

If a part of a sum claimed by the parties has been paid to one of them before adverse claim made, the adverse claimant has a right to have the whole sum he claims paid into court, on the holder applying for relief under the Interpleader Act. *Id.*

A claimant called upon by a rule under the Interpleader Act to come in and state his claim, must give the particulars upon his affidavit, to enable the court to decide even whether he is to be made a party to an issue. *Powell v. Lock*, 3 Adol. & Ellis, 315; 1 Har. & Woll. 281. 1368

The court has no power to order rules made under the Interpleader Act, (1 & 2 Will. 4, c. 56), to be entered in any other manner than is pointed out by the 7th sect., viz. according to their true date. *Lambirth v. Barrington*, 2 Scott, 263; 4 Dowl. P. C. 126; 1 Hodges, 205. 1368

Where the defendant, in an issue tried under the Interpleader Act, died after verdict for the plaintiff, but before judgment was signed, the court will not order the rules of court to be entered nunc pro tunc. *Id.*

In an action brought by A. against B., the court, upon a motion under the Interpleader Act, made by B., direct that an action for money had and received shall be brought by C. against A., to try the right of certain money:—Held, first, that in an action brought in pursuance of such order, a special agreement might be given in evidence, which in ordinary cases would be admissible only under a special count. *Pooley v. Goodwin*, 5 Nev. & M. 466; 1 Har. & Woll. 567. 1368

**Costs.**—The costs of the applicant under the Interpleader Act, where he has acted bona fide, will, in the first instance, be directed to be paid out of the fund or the produce of the thing in dispute, to be repaid by the party ultimately successful. *Duear v. Mackintosh*, 3 M. & Scott, 174; 2 Dowl. P. C. 730. 1368

Where an issue is tried by direction of the

court under the Interpleader Act, the unsuccessful party is liable for the costs. *Bowen v. Bramidge*, 2 Dowl. P. C. 213. 1368

A party who applies to the court by motion, without having made application to the opposite party to do what the rule calls on him to do, is not entitled to the costs of the rule, if the opposite party, on showing cause, confines himself to the question of costs. *Id.*

An issue was directed under the Interpleader Act, and afterwards the claim was abandoned:—Held, on an application to the court for costs, that an affidavit in support of it must be intituled in the names of the parties in the original cause. *Elliott v. Sparrow*, 1 Har. & Woll. 370. 1368

Where a claimant, after an application under the Interpleader Act, abandons his claim after an issue directed, the sheriff is entitled to his costs from the time of directing the issue and of the application of those costs. *Scales v. Sargeason*, 4 Dowl. P. C. 231. 1368

**Bill of Interpleader.**—One of several defendants may pray that the plaintiff and the other defendants shall interplead. *Land v. North*, 4 Dougl. 266. 1368

It is sufficient to support a bill of interpleader, that each of the defendants has a claim to the matter in question, although one only can maintain an action at law, the principle being to prevent a plaintiff from being doubly vexed: it is therefore not necessary that he should have been actually sued. *Morgan v. Marnack*, 5 Mer. 107. 1368

A bill of interpleader is not demurrable because it does not offer to bring the money claimed into court. But the plaintiff must bring it in, before he takes any step in the cause. *Meux v. Bell*, 6 Simon, 175. 1368

Where a principal has created a lien in favor of another person, on funds in the hands of an agent, the agent may file a bill of Interpleader against his principal and the other claimant. *Smith v. Hammond*, 6 Simond, 10. 1368

## JURISDICTION.

The judges declined to answer a question proposed to them by the House of Lords, in terms which rendered it doubtful whether it did not extend to the construction of a bill before the House. *In re London and Westminster Bank*, 1 Bing. N. R. 197. 1369

The Court of Exchequer has no power under the 4 & 5 Will. 4, c. 62, s. 26, to order judgment to be entered up non obstante verdicto in a cause out of the Court of Common Pleas at Lancaster. *Potter v. Moss*, 3 Dowl. P. C. 432; 1 C. M. & R. 848; 5 Tyr. 513. 1369

The 26th section of the 4 & 5 Will. 4, c. 62, does not authorize the Court of Exchequer to entertain a motion, in a cause in the Common Pleas at Lancaster, to set aside an award made under an order of nisi prius, though a verdict was taken subject to the award. *Byrne v. Fitzhugh*, 1 C. M. & R. 597; 3 Dowl. P. C. 278. 1369



All the judges are now judges of the Court of Common Pleas at Lancaster, under the 4 & 5 Will. 4, c. 62. *Id.*

Where several actions are pending in different courts for the same cause of action, though one court will not allow its proceedings to be dependent on those of another, yet where, in an action for a libel brought in the Common Pleas, to which a justification was pleaded, the jury found for the defendant, and a rule nisi was then obtained for entering a verdict for the plaintiff, on the special plea, with a farthing damages, on the ground that the justification was insufficient, the court of K. B. allowed the defendant in another action here (for the same libel) against other persons, to have further time for pleading until the sittings in the next term, and afterwards again enlarged the time to the following term, in order that the defendant might know the decision of the Court of Common Pleas, as to the validity of the plea. *Clark v. Allbutt*, 4 Dowl. P. C. 684. 1369

Semble, that a judge of a court of record has not individually any power to fine or imprison for a contempt. *Rex v. Faulkner*, 1 C. M. & R. 525; 2 Mont. & Ayr. 311; 1 Gale, 210. 1369

Quære, whether a Court of Record can punish for a contempt which is neither committed in the face of the court, an obstruction of its process, nor an interference with the course of justice. *Id.*

A witness in a prosecution, tried at the K. B. sittings, struck the defendant after the trial was over, as both were in the lobby of the court. The witness being brought into court in custody, and evidence given of these facts, the judge committed him to the custody of the marshal for three days for this contempt of court. *Rex v. Wigley*, 7 C. & P. 4—Coleridge. 1369

Upon a plea of nul tiel record to a declaration in sci. fa. in the Exchequer, on a judgment obtained in the court of great sessions for Wales, before the passing of the 11 Geo. 4 & 1 Will. 4, c. 70, the plaintiff is entitled to the judgment of the court upon producing the certificate and affidavit of the record being in the hands of the officer, in pursuance of the rules of M. T. 1 Will. 4, though the actual judgment is not in court. *Howell v. Brown*, 3 Dowl. P. C. 805. 1370

The proper mode of procuring the superior court at Westminster to exercise the discretion vested in them by s. 14 of 11 Geo. 4, c. 70, of obtaining the practice of any Court of Great Session, &c., abolished by the act, is by motion. The practice in such a court, before its abolition by that act, cannot be pleaded to an action of sci. fa. on a judgment recovered therein. *Howell v. Bowers*, 2 C. M. & R. 621; 1 Tyr. & G. 88. 1370

### JURY.

If a defendant in an action of replevin, which is made a special jury cause, withdraws his avowries, and the judge directs him to pay "all costs," that will not include the costs of the

special jury. *Bell v. Tainthorp*, 2 Dowl. P. C. 518. 1375

The usual rule having been obtained for a special jury by the defendant, a judge at Chambers, upon the statement of the plaintiff's attorney, without affidavit, ordered a special jury to be struck next day. The court refused to set aside that order as being irregular. *Joseph v. Perry*, 3 Dowl. P. C. 699. 1373

The court will not hear counsel for a jurymen who has been fined for contempt. *Carme v. Nicol*, 3 Dowl. P. C. 115. 1375

Where the plaintiff or prosecutor has obtained and struck a special jury, and has withdrawn his record, the defendant may take down the record by proviso, and claim a trial by a common jury. *Rex v. Derbishire*, 1 M. & Rob. 307—Denman. 1374

By the operation of 6 Geo. 4, c. 50, s. 1, upon the letters patent appointing the postmaster-general, all deputies and officers appointed by him are excepted from serving as jurors. *Ex parte Atkinson*, 2 Dowl. P. C. 773. 1372

Semble, that an action for a libel in a newspaper, is a fit case to be tried by a special jury, if there be special pleas of justification, but not if the general issue only be pleaded. *Roberts v. Brown*, 6 C. & P. 757—Tindal. 1373

### JUSTICES OF THE PEACE.

All magisterial jurisdiction over places or precincts, which by the Boundary Act (2 & 3 Will. 4, c. 64) are included within the metes and bounds of any borough mentioned in the first division of schedules (A) and (B) to the Municipal Reform Act (2 & 3 Will. 4, c. 76), is, from the passing of the latter act, vested exclusively in the borough justices. *Rex v. Gloucestershire (Justices)*, 6 Nev. & M. 115. 1377

In a borough to which the king has granted by charter that the borough justices shall have exclusive jurisdiction in misdemeanors without jurisdiction in felonies, and that the county justices shall not intrmit themselves within the borough; and in which a borough rate applicable to the purposes of a county rate was levied before the passing of 55 Geo. 3, c. 51, the county justices have no power to order the levying of a county rate, although by virtue of its charter the borough brings burthens upon the county. *Rex v. Shepherd*, 4 Nev. & M. 185; 1 Adol. & Ellis, 298. 1377

If a felony be committed in that part of the county of a town which has been added to it by the Boundary Act, 2 & 3 Will. 4, c. 64, and the Municipal Reform Act, 5 & 6 Will. 4, c. 76, it is triable in the county of the town. *Rex v. Piller*, 7 C. & P. 337—Coleridge. 1377

A conviction before the magistrates, upon an information under the game laws, is a judicial proceeding, at which all the king's subjects for whom there is room, and against whom there rests no special ground for exclusion, have a right to be present. *Daubney v. Cooper*, 5 M. & R. 314. 1378



An order of justices under the 35 Geo. 3, c. 191, sufficiently states the chargeability of a woman, by stating her to be "a widow, now pregnant." *Pattington v. Cottingham*, 2 Dowl. P. C. 473. 1373

The 3 Geo. 4, c. 23, s. 3, does not cure an omission in a conviction of the statement of a circumstance necessary to constitute the offence. *Rex v. Walsh*, 3 Nev. & M. 632. 1379

Where a local act of parliament declares that it shall be lawful for justices to issue their warrant to levy a rate imposed by certain commissioners under that act, upon a neglect or refusal to pay the rate, but does not contain any language directly making it compulsory on them to issue it, they may refuse to issue the warrant till the party has been summoned before them; and the court will not compel them by mandamus to issue a warrant in the first instance without any summons. *Rex v. Stafford (Justices)*, 1 Nev. & M. 94; 3 Adol. & Ellis, 425; 1 Har. & Woll. 326. 1378

Where, in such an act, the power of entertaining an appeal against a rate is in the commissioners appointed under the act, and not in the justices, the latter may still reasonably require the party to be summoned before them previously to their issuing their warrant. The provisions of such an act must be treated in that respect like those of the 43 Eliz. Id.

By statute establishing a gas light company, it was enacted, "that if any person should refuse or neglect, for ten days after demand, to pay any rent due from him to the company for the supply of gas, such rent should be recovered by the company or their clerk by warrant of any justice of peace for the town, &c.; and it should be lawful for the company or their clerk, or any person acting under their authority, with such warrant to levy the sum so due by distress and sale of the goods of the party so neglecting or refusing to pay, or the same might be recovered by action," &c. — Held, that a warrant so issued by a justice, without previously summoning and hearing the party to be distrained upon, was illegal, though a summons and hearing were not in terms required by the act. *Painter v. Liverpool Gas Company*, 3 Adol. & Ellis, 433. 1378

Where a magistrate grants a warrant in the nature of execution, he is bound first to summon and hear the parties, unless the statute under which he acts clearly renders the discharge of that function ministerial only, or in some other manner dispenses with the summons and hearing. Id.

In trover for distraining plaintiff's goods, the company justified under the above warrant, and stated that it was issued on the complaint of their collector, and that he by virtue of it and under their authority seized the plaintiff's goods for the purpose of levying a sum owing by him to them, and duly demanded by them according to the act: — Held, that the warrant, although it would have protected the clerk or an officer, was no justification to the company, they not having

acted in obedience to it, but having put it in force as parties. Id.

Two persons are convicted of a finable offence. Each should be severally fined. *Morgan v. Brown*, 6 Nev. & M. 57. 1388

A conviction, imposing a fine, will not entitle the magistrates to the protection of 24 Geo. 2, c. 44, in an action of trespass for levying the amount. Id.

Quere, whether magistrates have in any case a right to withdraw a warrant after they have once issued it? *Barrows v. Lascombe*, 5 Nev. & M. 330; 1 Har. & Woll. 457. 1384

Where magistrates, without authority, order the suspension of the execution of a distress warrant duly issued, and the officer afterwards execute such warrant, he is entitled, before action brought for the taking under such warrant, to a demand of a copy and a perusal of the warrant, under 24 Geo. 2, c. 44. Id.

The adjudication of magistrates, under 50 Geo. 3, c. 49, s. 1, upon the accounts of churchwardens and overseers rendered by them at the expiration of their office, is in the nature of an award, and cannot be re-opened by those magistrates for the purpose of correcting a supposed mistake in the settlement of the accounts. Id.

In case of a mistake, an appeal lies to the sessions. Id.

Where magistrates are empowered to settle and allow the accounts of a public officer, and, in case of a neglect or refusal by such officer, for fourteen days after the allowance, to pay over the balance found to be due from him, are directed, upon application of the parties interested, to issue a distress warrant for such balance, — they cannot after issuing a warrant in conformity with the power given to them, but before execution of it, order that the execution be suspended, on the ground of an error in the settlement of the accounts, unless the parties interested consent to such suspension. Id.

Thus, in the case of a warrant under 50 Geo. 3, c. 49, for the balance adjudged by magistrates to be due from churchwardens and overseers at the expiration of their office. Id.

Dubitatur, whether the order might not be suspended, on the ground that it had since appeared to the magistrates that there had been no neglect or refusal to pay for fourteen days after the allowance? Id.

Seemle, that if the distress warrant were a nullity, the magistrates might suspend it. Id.

Whether the magistrates have, in ordinary cases, where no party is specially interested in having the execution of the warrant, power to suspend a warrant which they have in due form issued, quere. Id.

In trespass for false imprisonment against two magistrates, the defendants gave in evidence a conviction under 7 & 8 Geo. 4, c. 30, s. 24, of the plaintiff, for "unlawfully and maliciously damaging," &c., a quantity of rushes for which they adjudged the plaintiff to pay the sum of 10s. as a reasonable compensation, and 6s. 6d. for costs;



and in default of immediate payment, the plaintiff to be imprisoned for one calendar month, unless the said sums should be sooner paid. The warrant of commitment stated the offence to be, that the plaintiff unlawfully trespassed on land in the occupation of D. T., and cut down and carried away a quantity of rushes, for which offence he was ordered to pay the sum of 10s. penalty, and the gaoler was ordered to detain him for the space of one month, or until he should be delivered by the due order of law:—Held, that the conviction sufficiently supported the commitment. *Daniell v. Philipps*, 1 C. M. & R. 612; 5 Tyr. 293. 1384

The return to a hab. corp., by a gaoler, stated that the prisoner was received by him under a warrant of commitment, reciting a conviction under the act for the prevention of smuggling, (3 & 4 Will. 4, c. 53, which authorizes justices to amend their warrant of commitment); that on a subsequent day some person came to the gaol, took away the warrant, and left in lieu thereof another warrant, dated the same day, under the hands and seals of the same justices, but which contained no statement of its being a substituted warrant; and that under this warrant he had since detained the prisoner:—Held, that it did not sufficiently appear that the second warrant was substituted by the authority of the justices, and that the prisoner was therefore liable to be discharged. *Rex v. Elmy*, 3 Nev. & M. 733; 1 Adol. & Ellis, 843. 1384

Where power is given to magistrates to commit by issuing forth their warrant (as under 5 Geo. 4, c. 18, s. 2,) such warrant must be in writing; and an imprisonment without a warrant, except during the period necessary to prepare the warrant, is illegal. *Hutchinson v. Lowndes*, 1 Nev. & M. 674; 4 B. & Adol. 118. 1386

The irregularity is not cured by a warrant of commitment drawn up on a subsequent day, dated as of the day of commitment. *Id.*

### LANDLORD AND TENANT.

*Contracts for Leases.*—It is no defence to a bill filed against a landlord for specific performance of an agreement for a farming lease, by a person to whom the benefit of the agreement has been assigned, that the party with whom the landlord contracted has become insolvent, provided the assignee is solvent, and in a condition to enter into the usual covenants, and there is no evidence that the contract was entered into upon considerations personal to the assignor. *Crosbie v. Tooke*, 1 Mylne & K. 431. 1387

Where a landlord agrees to grant a lease to A., his executors and assigns, upon certain conditions, and A. assigns his interest in the contract to B., and then becomes bankrupt, B., on performing the conditions, has a right to enforce the agreement specifically, notwithstanding his assignor's bankruptcy; and this right is not affected by a proviso, that, in case of the bankruptcy of A., the landlord shall have power to re-enter and sell the benefit of the contract and the premises, and hold the proceeds, subject to his

own claims, for the use of A.'s estate. *Morgan v. Rhodes*, 1 Mylne & K. 435. 1387

The insolvency of the intended lessee is a good ground of objection to a bill brought by him for the specific performance of a contract to renew a lease. *Price v. Asheton*, 1 Y. & Col. 441. 1387

To prove a settlement by renting a tenement, a witness produced a book containing the entry of an agreement for a present demise of a house, at 11l. per annum. The witness stated that he let the house as agent to his father, who was present, and that the terms were reduced to writing, to prevent mistake, and signed by the wife of the pauper, on purpose to bind her husband, the husband not being present; but that the entry was not signed by the witness or his father, nor did their name appear in any part. He further stated, that he had no memory of these things but from the book, without which he could not of his own knowledge be able to speak to the fact; but, on reading the entry, he had no doubt that the fact really happened:—Held, that the entry was neither a lease nor an agreement for a lease within the Stamp Act. *Rex v. St. Martin, Leicester*, 4 Nev. & M. 202; 2 Adol. & Ellis, 210. 1387

If an agreement for a lease contain no stipulation as to covenants, the party agreeing to take the lease has a right to a lease containing only usual covenants, and a restriction against particular trades, not being a usual covenant, cannot be introduced into the lease. *Proper v. Parker*, 3 Mylne & K. 280. 1387

Where, in an agreement for the lease of a house to be granted by the defendants to the plaintiff, it was stipulated that the lease should contain the usual covenants between landlord and tenant, and that the house should not be converted into a school, it is immaterial whether the plaintiff had or had not notice that the defendants derived their title under a lease from another person; because the agreement amounts to a representation on the part of the defendants, that they were at liberty to grant a lease conformably to the terms of the agreement. *Van v. Corpe*, 3 Mylne & K. 269. 1387

A party who enters into an agreement for an under-lease, without inquiring into the covenants of the original lease, has constructive notice of all usual covenants in the original lease. *Flight v. Barton*, 3 Mylne & K. 282. 1387

Quære, whether he has such notice of unusual covenants? *Id.*

But where a party entered into an agreement under a lessee for an under lease, and informed him of the nature of the business which he meant to carry on in the premises, and the lessee did not apprise him that there was a covenant in the original lease prohibiting such business, the silence of the lessee was equivalent to a representation that there was no such prohibiting covenant. *Id.*

It is the duty of a person contracting for an under-lease to inform himself of the covenants contained in the original lease, and if he enters and takes possession of the property he will be



bound by those covenants. *Cosser v. Collinge*, 3 Mylne & K. 283. 13c7

Where the original lease contained usual covenants, and the defendant entered into an agreement with the plaintiff for an under-lease, and took possession of the premises, no reference to covenants being made in the agreement, but the defendant's solicitor having had an opportunity of inspecting the original lease, it was held that the defendant was bound to accept a lease, with the unusual covenants contained in the original lease. *Id.*

A contract provided that a lease should be drawn, prepared, and executed at the sole expense of the lessor. In an action on the agreement by the lessee:—Held, that it was not necessary to aver that a lease was tendered to the lessor for execution. *Price v. Williams*, 1 Mees. & Wels. 1387. 6.

The declaration set out the agreement in terms; it contained words of present demise for fourteen years, but stipulated also for the execution of a future lease:—Held, that the declaration need not allege expressly what the agreement amounted to in law; whether it was an actual demise, or only an agreement for a demise. *Id.*

*Agreements or Leases.*]—A memorandum of an agreement to let, which contains words of present demise, and sufficiently ascertains the terms of the intended tenancy, will operate as a present demise, although it provides for the preparation of a future lease. *Warman v. Faithful*, 3 Nev. & M. 137; 5 B. & Adol. 1042. 1389

Whether an agreement for a lease shall enure as a present demise, is a question of intention to be collected from the instrument; therefore where an agreement for a lease contained a stipulation as to the terms upon which the tenant should hold till a lease was granted, but also contained a proviso that it should not be construed or taken to operate as a lease or actual demise:—Held, that it did not require a lease stamp. *Perring v. Brook*, 7 C. & P. 360—Coleridge. 1389

A memorandum having a lease stamp, by which A. agrees to let to B. certain lands mentioned in an annexed abandoned lease from A. to C., upon the conditions, agreements, &c., contained in the same lease, and by which A. and B., bind themselves to execute a lease similar to such abandoned lease, is itself a valid lease. *Pearce v. Cheslyn*, 5 Nev. & M. 652. 1389

The annexed lease may be read in evidence, although itself unstamped. *Id.*

*Construction*]—A demise by A. to B. for the term of his natural life may enure as a demise either for the life of A. or of B., according to circumstances. *Doe d. Pritchard v. Dodd*, 2 Nev. & M. 838; 5 B. & Adol. 689. 1393

Seemle, that if the habendum be to B., his executors, administrators, and assigns, a presumption is created in favor of a devise for the life of A. *Id.*

Such presumption is confirmed by a covenant

by A. with B. for quiet enjoyment during the life of A. *Id.*

Such a covenant per se would amount to a demise. *Id.*

In an action of assumpsit for money had and received, to recover back a sum alleged to have been overpaid by a tenant to his landlord, upon a settlement between them in relation to a distress for arrears of rent, it appeared that the defendant held the premises under a lease from Michaelmas, 1832:—Held, that a memorandum written in the margin of the draft of the lease, whereby the tenant engaged to pay rent for the preceding half quarter, was admissible in evidence for the purpose of negating the plaintiff's claim. *Cowne v. Garment*, 1 Scott, 275; 1 Bing. N. R. 318. 1393

Seemle, that assumpsit was the proper form of action, and not case, for an excessive distress. *Id.*

A demise of an incorporeal hereditament can only be valid by deed; a demise by parol of a right of hunting and sporting, together with a message, is therefore void. *Bird v. Higginson*, 4 Nev. & M. 505; 2 Adol. & Ellis, 696; 1 Har. & Woll. 61. 1392

By a deed to lead the uses of a recovery, lands are limited to A. for 1000 years, and subject thereto, to B. for life, remainder to C. for 200 years, remainder to D. for life, remainder to trustees to preserve, &c. remainder to the issue of D. successively, in tail, with the ultimate remainder to the heirs of D. The trusts of the first term are declared to be, upon non-payment of 800*l.* lent by A. to D., to raise that sum by sale, mortgage, or other disposition. The trusts of the second term are to repay B. for any interest paid by her to A., and to raise a further sum for B. Power to B. to demise for ten years, or for seven years from her death, to take effect in possession, reserving the best rent, &c. B. demises under the power for seven years from her death to E., reserving rent to D., or to the person entitled for the time being to the freehold or inheritance. The lease takes effect as an appointment under the power in advance of the term for 1000 years. B. and D. die. A. may distrain upon E. for the accruing rent. *Rogers v. Humphreys*, 5 Nev. & M. 511. 1392

To an avowry by A., E. pleads non tenuit, the tenure (if any) under A., created by the lease, is not negatived by showing that A. has joined with the issue of D. as a co-lessor with them in an action of ejectment against E., which is still pending. *Id.*

Such tenure could not be affected by the result of such action. *Seemle. Id.*

A printed instrument purporting to be a form of a demise of a farm, had originally contained in the habendum words creating a tenancy from year to year, but on producing the instrument in evidence, they were found to be struck through, and were proved to have been so struck through before the execution of the instrument by the party charged. The remaining words of demise were "for the term of one year fully to be complete and ended," and stood immediately pre-



ceding those which had been struck out. However, many subsequent stipulations remained in the leases, which seemed to be only applicable to a tenancy for longer than a year, or determinable by notice to quit:—Held, first that the words struck through might be looked at to ascertain the real intention of the parties in so erasing them, and consequently that the tenancy was for one year only; and next, that the stipulations inapplicable to such a tenancy must be considered as struck out, or as surplusage, unless the tenancy should continue for more than a year. *Strickland v. Maxwell*, 2 C. & M. 539; 4 Tyr. 346.

1392

By the same instrument of demise, after a covenant for payment of rent by the tenant, it was agreed, "that in case the tenant should duly observe and perform the several covenants and agreements thereinbefore contained on his part and behalf," and should peaceably quit the farm in pursuance of notice to do so, he should be entitled to a way going crop, to be taken from lands in seed or turnips the previous summer, such crop being to be left for the landlord, or his incoming tenant, at a valuation to be made by arbitrators or an umpire:—Held, that this clause did not give the tenant the right of possession of the land to the exclusion of the landlord, after the determination of the year's tenancy, but at most only a right to go on the land to improve the crop; and that the landlord might maintain trespass *quare clausum fregit*, for taking possession of the crop, and hindering him from having the use and occupation of the land, after the year was expired. *Id.*

Whether the payment of the rent was a condition precedent to the tenant's having the right to the way going crop, *quare*. *Id.*

A., the owner of certain freehold houses and land, with a yard adjoining thereto, demised, by parol, several of the houses. The tenants were in the habit of passing over the yard, and using a common pump and privy there. There was no evidence whether the yard formed part of the demise or not. In trespass by one of the tenants against the landlord for excluding him from the yard, the judge left it to the jury to say whether the landlord at the time of the demise had reserved the yard:—Held, that this was a misdirection, the question being whether he had demised it, and not whether he had reserved it. *Hebbert or Herbert v. Thomas*, 1 C. M. & R. 861; 5 Tyr. 603; 1 Gale, 53.

1392

In trespass to land, if the defence be that the plaintiff, who has the freehold, is out of possession by a demise, it is for the defendant to rebut the presumption that possession follows the freehold, by proving a demise. *Id.*

If under a parol demise for more than three years, void by the Statute of Frauds, the lessee enters and becomes tenant from year to year, he is bound by an undertaking to repair contained in such void demise. *Richardson v. Gifford*, 3 Nev. & M. 325; 1 Adol. & Ellis, 52.

1391

*Stamp*.—In support of an issue of assignment, the plaintiffs offered in evidence a deed executed by the defendant only, which when executed was intended by the parties to be the counterpart of a lease, and was stamped with a duty of 1*l.* 10*s.*; but the grantor having thereby parted with all his interest in the premises, the original deed became by operation of law an assignment:—Held, that the deed so tendered in evidence was not admissible for the purpose of proving an assignment, the proper stamp being 1*l.* 15*s.*, under the general clause to the 55 Geo. 3, c. 184, applicable to "deeds of any kind, not otherwise charged, or expressly exempted from stamp duty." *Baker v. Gosling*, 1 Scott, 58; 1 Bing. N. R. 246.

1395

Where an instrument which was in reality a lease, but which bore an agreement stamp for 15*s.* was executed in 1805, at which period the amount of the stamp on a lease, according to the act then in force, was 1*l.* 10*s.*, but was stamped in 1834, under the provisions of the 37 Geo. 3, c. 136, s. 2, with a stamp of 1*l.*, being the amount of the stamp then in force:—Held, that the proper duty had been paid. *Buckworth v. Simpson*, 1 C. M. & R. 834; 5 Tyr. 344; 1 Gale, 38.

1395

A lease contained a demise of two separate farms, with two habendums, differing from each other; a reservation of a separate rent in respect of each farm, and separate covenants, some applying to one farm, some to the other. The lessee entered on the whole at one time:—Held, that one ad valorem stamp for the amount of both rents was sufficient. *Blount v. Pearman*, 1 Scott, 55; 1 Bing. N. R. 408.

1395

*Assignment*.—Semble, an offer by an executor to a lessor to surrender to him a lease granted to his testator, is an answer to an action of covenant against him as assignee for breaches of a covenant to repair, as to all breaches accruing after that offer. *Reid v. Tenterden* (Lord), 4 Tyr. 111.

1399

In covenant against an executor, sued as an assignee, for breaches of covenants to pay rent and to repair, incurred in his time, it was pleaded, first, that the defendant was executor of the lessee; that the premises vested in him as such executor only, and not otherwise; that the profits of the demised premises at the time he became executor, and since that time hitherto, were less than the rent reserved; and that the defendant had paid to the plaintiffs before commencing the suit. 25*l.*, being all that remained in his hands of the said profits by him at any time received therefrom, and that he had never since received any such profit:—Held, on special demurrer, to be insufficient, for not stating that the defendant had no other assets of the deceased, which had come to his hands as executor to be administered. *Id.*

In two other pleas, the defendant added to the above statement, that the sum of 25*l.*, so paid before the commencement of the suit, was all the money that remained in his hands, not only on



account of the profits of the premises received by him, but all goods and chattels which were of the deceased which had come to his hands to be administered; and that he had not, at the time of the commencement of the suit, or at any time since, any profits or goods and chattels of the deceased in his hands to be administered:—Held, on special demurrer, to be insufficient for not stating, that during the interval between the payment of the 225*l.* and the commencement of the suit, defendant had no assets. *Id.*

A lessee for years under-demised for a term longer than the residue held by him, the under lessee covenanting to pay to the lessee, his executors and administrators, the yearly sum of 75*l.*, by quarterly payments:—Held, that notwithstanding the instrument amounted to an assignment, inasmuch as all the lessee's term was thereby conveyed, covenant lay at the suit of the executor of the lessee, to recover arrears of this rent accruing during the continuance of the lessee's term. *Baker v. Gostling*, 4 M. & Scott, 539. 1398

An executor who has occupied premises held by his testator under a lease, with covenants for payment of rent and taxes, and to keep the premises in repair, sued in covenant as assignee, in respect of the privy of estate, is liable on the covenant for payment of rent and taxes to the extent only of the profits: but, for a breach of the covenant to repair, he is liable to the same extent that any other assignee is liable. *Tre-meere v. Morrison*, 4 M. & Scott, 603. 1399

Quære, whether there is any distinction in this respect between the case of an executor, and that of an administrator. *Id.*

In assumpsit for use and occupation, held, that under the issue of non assumpsit, the defendant might give in evidence that the plaintiff had mortgaged the premises before the defendant came into occupation, and that the mortgagee had given notice to the defendant not to pay to the plaintiff any rent becoming due after such notice. *Waddilove v. Barnett*, 2 Bing. N. R. 538. 1399

Obedience to the mortgagee's notice as to rent due before the notice, must be specially pleaded. *Id.*

An assignee of a lease, containing covenants running with the land, is liable after he has assigned over, for a breach incurred after the assignment to him, and before his assignment over. *Harley v. King*, 2 C. M. & R. 18; 1 Gale, 100. 1400

In debt for rent on a lease, by lessor against the assignee of the lessee, the declaration stated that all the estate, &c. of the lessee came to and vested in the defendant, which allegation the defendant traversed, and the plaintiff joined issue. It was in evidence that defendant was assignee of only a part of the demised premises:—Held, that there was a fatal variance, and that the issue must be found for the defendant. *Curtis v. Spitty*, 1 Scott, 737; 1 Bing. N. R. 756; 1 Hodges, 153. 1400

Semble, that it is a nice and difficult question

whether a lessor can maintain an action in debt against the assignee of part of the land demised, to recover rent issuing from the whole of it. *Id.*

The surrenderee of a copyhold is an assignee of a reversion within the statute of 32 Hen. 8, c. 34, and may maintain an action of covenant upon a lease made by his surrenderor, and the defendant in such action cannot protect himself by alleging the invalidity of the lease. *Whitton v. Peacock*, 3 Mylne & K. 325. 1400

In 1762, a lessor having only an equitable estate in a certain field, demised a portion of the field to a lessee for 99 years. In 1773, the lessor having acquired the legal estate in the field, demised the residue of the field to the lessee for the same term, by an indenture, which recited the former lease, stipulated for its continuing in force, but provided that no more rent should be paid for the entire field than was paid for the first portion, and that the rent to be paid for the entire field was meant to be the same as that reserved for the first portion:—Held, that the assignee of the reservation could not sue the assignee of the lessee upon the covenants in the lease of 1762. *Whitton v. Peacock*, 2 Scott, 630; 2 Bing. N. R. 411. 1400

Liability of assignee. *Wolveridge v. Steward*, 1 C. & M. 644; 3 Tyr. 637. 1401

It is no defence at law to an action on an indenture of lease by the trustee of a party who has become bankrupt, that the defendants, the lessees, have performed their covenants with the assignees of the cestui que trust. *Britten v. Britten* or *Perrott*, 2 C. & M. 597; 4 Tyr. 473. 1401

*Forfeiture.*—A termor, after deserting the demised premises, delivered up the possession of them, with the lease, to a party who claimed by a title adverse to that of the landlord, with intent to assist him in setting up that title, and not that he should hold bona fide under the lease:—Held, that the term was forfeited by the act of betraying possession. *Doe d. Ellerbrock v. Flynn*, 1 C. M. & R. 137; 4 Tyr. 619. 1401

Where, during the existence of a lease containing a proviso for re-entry in case of assignment or underletting without licence in writing, the lessor, who had during the remainder of the interest in it, engaged to grant a new lease to the defendant to take effect on the expiration of the old lease—Held, that the lessor could not maintain ejectment against the defendant on the fact of his possession, though no licence in writing had been granted, as there was a waiver of the forfeiture if any had taken place, or else there was no forfeiture at all, for the defendant came in with the lessor's consent. *Doe d. Weatherhead v. Curwood*, 1 Har. & Woll. 140. 1403

A proviso in an agreement of demise that the tenant should within a certain time erect a shop front, &c., and that, if he did not do so, it should be lawful for the landlord or his agents to retake possession of the premises, and the agreement should be null and void, was held to make it a



lease voidable only at the election of the lessor. *Doe d. Nash v. Birch*, 1 Mees. & Wels. 402. 1401

Quere, whether a demand of rent, which became due subsequent to a forfeiture, amounts to a waiver of the forfeiture? *Id.*

A. lessor at will, B. lessee at will, C. under lessee at will: a demand of the possession made upon the premises from the wife of C. is sufficient to entitle A. to maintain ejectment. *Doe d. Blair v. Street*, 4 Nev. & M. 42. 1405

Whether a demand made off the premises from the wife of C. would be sufficient, quere?

A party, who defends in ejectment as landlord as to W., and as tenant as to B., cannot take advantage of a defect in the service of a demand of possession, made upon the tenant of B., for the purpose of determining an estate at will. *Id.*

*Surrender.*—A., the tenant of a house, three cottages, and a stable and yard, let at an entire rent, for a term of seven years, before the expiration of the term assigned all the premises to B. for the remainder of the term, the house and cottages being in the possession of under tenants, and the stable and yard in that of A. The landlord accepted a sum of money as rent up to the day of the assignment, which was in the middle of the quarter. B. took possession of the yard and stable only. The occupiers of the cottages having left them after the assignment, and before the expiration of the term, the landlord re-let them. A. paid no rent after the assignment, but the landlord received rent from the under-tenants. Before the expiration of the term the landlord advertised the whole of the premises to be let or sold:—Held, that this was a surrender by operation of law of all the premises. *Reeve v. Bird*, 1 C. M. & R. 31; 4 Tyr. 612. 1406

The plaintiff was tenant to A. of one close; K. was tenant to B. of another close; the plaintiff and K. verbally agreed to exchange their holdings; "the plaintiff to have B.'s land, and pay K.'s rent; K. to have A.'s land and pay plaintiff's rent." On the same day each took possession of the other's land. K. undertook to communicate their bargain to C., who was the agent of both A. and B.; he did accordingly, some days afterwards, communicate to him, and C. expressed his concurrence:—Held, that this was evidence to go to the jury of a surrender by K. to B. of his interest in B.'s close. *Bees v. Williams*, 2 C. M. & R. 581; 1 Tyr. & G. 23. 1409

A. demises to B., who underlets to C. In the middle of both terms it is agreed between A. and B., that B.'s tenancy shall cease, and between A. and C. that C. shall hold under A. for a longer term. This arrangement enures as a surrender from B. to A., and a new demise from A. to C. *Rex v. Banbury*, 3 Nev. & M. 292; 1 Adol. & Ellis, 136. 1409

By agreement dated in May, by which A., B., and C. were parties, A. and B. agreed to sell by auction an estate to which they were entitled as tenants in common, or in default of such sale,

that such parts of it as should not be sold after the 1st August and before the 1st September following should be divided into two equal lots between A. and B.; and that 100*l.* should be paid by A. to C., the principal tenant, as a remuneration for his giving up possession of his farm at Michaelmas following; and C. agreed to give up possession of his farm accordingly. No part of the estate was sold by the 1st September, but some portions were sold subsequently, and the remainder was divided between A. and B., but such division was not completed till the following March. C. continued in possession, by the desire of A. and B., until that time, and then quit-  
ted:—Held, that the agreement was not a surrender of A.'s term. *Weddall v. Capes*, 1 Mees. & Wels. 50. 1406

*Tenancy from Year to Year.*—Payment of rent is prima facie evidence of a tenancy from year to year. *Doe d. Pritchard v. Dodd*, 2 Nev. & M. 838; 5 B. & Adol. 689. 1413

Secus, where the existence of such a tenancy would imply that devisees in trust had conveyed away their estate, whilst a duty still remained to be performed by them, *semble. Id.*

The presumption is completely rebutted by showing that the rent paid and reserved is of the same amount as the rent reserved in an unexpired lease, the premises being at the time of such payment of rent of much greater value than the rent so reserved and so paid. *Id.*

A contract was made for the purchase of a public-house, 50*l.* were paid as a deposit, 70*l.* more were to be paid on the landlord's consent being obtained to a change of the tenancy. The purchaser sent some furniture to the house in question, and resided in a part of it, the vendor also still remaining in it:—Held, that the contract was conditional on a valid consent of the landlord being given; and that a verbal consent afterwards, revoked before any change of tenancy in fact had occurred, was not binding; that there had been no partial enjoyment of the object of the contract, and that therefore, on the failure of the condition, the 50*l.* might be recovered as money had and received. *Wrighton or Wright v. Newton*, 2 C. M. & R. 124; 1 Gale, 67. 1412

Defendant in possession, under a lease for fourteen years, assigned the lease, by way of mortgage, to plaintiff, and then committed a forfeiture, for which the lessor brought ejectment. It was then agreed, at a meeting of all the parties, that judgment should be signed in the ejectment, that the lessor should grant a new lease to plaintiff, and that plaintiff should grant an under-lease to defendant. The new lease was accordingly granted to plaintiff, who then delivered defendant the key, saying, "Go on as usual, pay the money" (due on mortgage), "and when you have done so, you shall have an under-lease."—Held, that this did not constitute defendant tenant from year to year. *Doe d. Rogers v. Pullen*, 3 Scott, 245; 2 Bing. N. R. 749. 1412

A party who has been let into the possession



of land in a contract of sale which has not been completed, is a tenant at will to the vendor. *Ball v. Cullimore*, 2 C. M. & R. 120; 1 Gale, 96. 1412

A feoffment with livery of seisin made on the land, determines a tenancy at will, though the tenant be not present, nor assenting to the feoffment; and the feoffee may maintain trespass against the tenant at will who has been entered on his possession. *Id.*

An under tenant who is in possession at the determination of the original lease, and is permitted by the reversioner to hold over, is quasi a tenant at sufferance: and the mere fact of occupation, coupled with the payment of rent for such time of occupation, does not raise the presumption of a demise for years unless there is some evidence to show an agreement for a demise for the term. *Simpkin v. Ashurst*, 1 C. M. & R. 261; 4 Tyr. 781. 1414

Where there is a demise from year to year, so long as the parties shall please, and a new tenant takes possession, whose occupation as tenant the then reversioner omits to determine by a notice to quit, the pleadings may allege a new relation of landlord and tenant, on the original terms, between the reversioner and the occupier. *Buckworth v. Simpson*, 1 C. M. & R. 834; 5 Tyr. 344; 1 Gale, 38. 1415

A. demised to B. certain lands and premises for one year certain, and then from year to year so long as the parties should think proper, with power to determine it on giving notice to quit; and the lease contained various terms and conditions as to the management of the lands and repairing the buildings. The lessee died, and his executors entered into the occupation of the premises, and continued to occupy, and paid rent:—Held, that they were chargeable in their personal character upon the terms contained in the original demise; their continuing to occupy, and the landlord abstaining from giving notice to quit, raising an implied promise on their parts to abide by the terms of the original contract. *Id.*

If a person takes lodgings on the first and second floors of a house, he has a right to the use of the door bell, the knocker, and the sky-light of the staircase, and the water-closet, unless it be otherwise stipulated at the time of the taking of the lodgings; therefore, if the landlord deprive the lodger of the use of either, an action lies. If the defendant in such a case merely pleads the general issue, he cannot show that the water-closet was useless before he removed it; but in mitigation of damages, he may go into evidence to show that the plaintiff and his family were bad lodgers, and that he did the acts complained of to cause them to quit the house. *Underwood v. Burrows*, 7 C. & P. 26—Ainger. 1416

Quære, whether a mortgagee, by giving notice of the mortgage to a tenant who comes into possession under a demise from the mortgagor after the mortgage executed, thereby makes him his tenant, unless something has been done to make a new tenancy between the tenant and the mort-

gagee. *Partington v. Woodcock*, 5 Nev. & M. 672; 1 Har. & Woll. 262. 1416

*Rent.*—A. demised a colliery to B., and B. covenanted to pay as rent "one third part of the money that should arise, be made, received, or produced from the sale of the coals;" and covenanted to keep "true accounts of all coal daily raised, and to make and deliver true copies thereof to A.:"—Held, that taking the two covenants together, the rent was to be calculated on the amount of coal sold, and not on the amount of money actually received. *Edwards v. Rees*, 7 C. & P. 340—Coleridge. 1418

A tenant in fee demised lands from year to year. He died, having devised the lands for life. The devisee for life received rent, but did not live long enough to have a right to determine the yearly tenancy:—Held, that the administrator of the tenant for life was not entitled to an apportionment of the rent, under the stat. 11 Geo. 2, c. 19, s. 15. *Botheroyd v. Woolley*, 5 Tyr. 522; 1 Gale, 66. 1418

By parol, a dwelling-house and premises were demised for a year, the lessee "accepted the lease and by virtue of the demise entered upon the demised land." Before and at the time of the demise, eight acres included in it had been demised to a third party, in whose possession they were, so that the lessee could not and did not enter upon them:—Held, that the lessee was in under the lease, he taking an interesse termini in the eight acres, and that the want of possession was not an equivalent to an eviction by the tortious act of the landlord, but was quasi an eviction by an elder title, and that, therefore, while out of the possession of the eight acres the rent was not suspended, but was apportioned, and might be distrained for. *Neale v. Mackenzie*, 2 C. M. & R. 84; 1 Gale, 119. 1418

By a local turnpike act it is provided, that in leases of the tolls, the rent shall be made payable to the treasurer, and that in default thereof, every such lease shall be null and void to all intents and purposes whatsoever. A lease is made whereby the rent is reserved to the trustees or their treasurer:—Held, first, that the reservation in the alternative is bad within the former part of this clause; and, secondly, that the words "null and void to all intents and purposes" are to be construed as meaning absolutely void, and not voidable only: and thirdly, that the above provision is not repealed by either of the general turnpike acts, 3 Geo. 4, c. 126, and 4 Geo. 4, c. 95, but remains in full force. *Pearse v. Morrice*, 4 Nev. & M. 48; 2 Adol. & Ellis, 84. 1418

Where a tenant, who is shortly about to quit his farm, advertises for sale by auction his stock, &c. upon the farm; his payment of rent already due and to be due at the expiration of his tenancy to his landlord, who has notice of the intended sale, does not raise an implied promise on the part of the landlord not to interfere with or prevent the sale, or the removal of the property. *Bushley v. Fisher*, 3 Nev. & M. 381. 1420

Seemle, that a receipt "for a quarter's rent



due from A." (the occupier), is of itself evidence from which a letting may be inferred. *Rex v. St. Martin, Leicester*, 4 Nev. & M. 202; 2 Adol. & Ellis, 210. 1420

Where there is a covenant in a lease to allow so much of the rent as may be necessary to be expended in repairing the premises, evidence of repairs and money expended thereon will support the plea of *riens in arriere* to an avowry. *Woods v. Rock*, 1 Alcock & Napier, 57. (*Irish*). 1421

Nomine pones. *Denton v. Richmond*, 3 Tyr. 630; 1 C. & M. 734. 1423

A lease contained a stipulation, that, for every acre, and so on in proportion for a less quantity of the land which the lessee should suffer to be occupied by any other person without the consent of the landlord, an additional rent should be paid. The tenant undertook to use, occupy, dress, and manure the land according to the custom of the country. The tenant, without the consent of the landlord, suffered other persons to use small portions of the land for the purpose of raising a potatoe crop. It was proved to be the custom of the country for farmers to pursue that course:—Held, that the landlord was entitled to the additional rent, this being an occupation by other persons. *Greenslade v. Tapscott*, 1 C. M. & R. 55; 4 Tyr. 566. 1423

Tenants in common cannot sue jointly for double value for holding over, where there has been no joint demise. *Wilkinson v. Hall*, 1 Scott, 675; 1 Bing. N. R. 713; 1 Hodges, 170. 1423

*Repairs.*—Where premises burnt. *M'Kenzie v. M'Leod*, 4 M. & Scott, 249; 10 Bing. 385. 1425

The jury having given damages (under 20l.) in an action by landlord against tenant for an injury to the former, arising from the tenant quitting premises occupied by him as tenant from year to year without having done repairs he was bound to do. The court refused to disturb the verdict, although it appeared that the larger portion of the repairs required ought to have been done by the landlord himself. *Woods v. Pope*, 1 Scott, 536; 1 Bing. N. R. 467; 6 C. & P. 783. 1424

If a tenant, who is bound to repair, leave, and at the end of the tenancy the premises be out of repair, the jury may give the landlord, in an action against the tenant, not only the amount of the actual expense of the repairs, but also a compensation for the loss of the use of the premises while they were undergoing repair. *Id.*

A declaration upon a covenant, whereby A. & B. jointly and severally covenanted to repair during the term, alleged as a breach, that neither A. nor B., whilst the latter was unmarried, nor A., nor B., nor C. her husband, since the marriage of B. with C. did repair during the term, &c. A plea that A. and B. and C. did, during the term, repair, &c. is bad on special demurrer. *Marshall v. Whiteside*, 4 Dowl. P. C. 766. 1424

Where a very old house is demised, with the usual covenants to repair, it is not meant that the

house should be restored in an improved state, or that the consequences of the elements should be averted; but the tenant has the duty of keeping the house in the state in which it was at the time of the demise by the timely expenditure of money and care. *Gutteridge v. Munyard*, 7 C. & P. 129; 1 M. & Rob. 334—*Tindal*. 1424

Where a lessee covenants to yield up the premises at the end of the term in as good condition as they were in when the lease was granted, and after the expiration of the term holds over as tenant from year to year, no implied promise arises to yield up the premises at the expiration of the new tenancy, in the state in which they were when the original lease was granted. *Johnson v. St. Peters, Hereford*, 6 Nev. & M. 106. 1424

A tenant from year to year is not bound to do substantial repairs: he is only bound to keep the premises wind and water tight. *Leach v. Thomas*, 7 C. & P. 328—*Patteson*. 1425

*Husbandry.*—Custom as to manure. *Roberts v. Barker*, 1 C. & M. 808; 3 Tyr. 945. 1426

A tenant, whose tenancy is determined after Lady-day, by an agreement which is silent as to way-going crops, is not entitled to such crops under a custom which gives to the tenant such crops upon a regular expiration of a Lady-day tenancy. *Thorpe v. Eyre*, 3 Nev. & M. 214; 1 Adol. & Ellis, 926. 1428

An action between the owner of land, and a party holding by his permission, but claiming to hold as bailiff and not as tenant, was referred to an arbitrator, who was to say what was to be done by the parties with respect to the land. He awarded that the holding was as tenant, that the tenancy should cease on the delivery of the award, and that possession of the land should be delivered up to the owner in one month after. On an issue between the landlord and an execution creditor of the tenant, whether the crops on the land at a certain time were the property of the party so found to have been tenant, the award was held to be admissible in evidence on the part of the landlord. *Id.*

Held, also, that the award did not of itself change the property. *Id.*

In an action against a tenant upon promises to cultivate a farm according to the course of good husbandry, and the custom of the country, if the declaration sets out the custom, and the defendant traverses it, the plaintiff must prove it as alleged. *Angerstein v. Handson*, 1 C. M. & R. 789; 5 Tyr. 583; 1 Gale, 8. 1427

If a tenant, during his tenancy, remove a dung heap, and, at the time of his so doing, digs into and removes virgin soil that is beneath it, the landlord may maintain either trespass *de bonis asportatis* or trover for the removal of the virgin soil. *Higgin v. Mortimer*, 6 C. & P. 616—*Parke*. 1427

A custom of the country, by which the tenant of a farm, cultivating it according to the course of good husbandry, is entitled, on quitting, to receive from the landlord or incoming tenant a



reasonable allowance for seeds and labor bestowed on the arable land in the last year of the tenancy, and is bound to leave the manure for the landlord, if he will purchase it—is not excluded by a stipulation in the lease under which he holds, that he will consume three-fourths of the hay and straw on the farm, and spread the manure arising therefrom, and leave such of it as shall not be so spread on the land for the use of the landlord, on receiving price for it. *Hutton v. Warren*, 1 Mees. & Wels. 466. 1427

Emblements. *Graves v. Weld*, 2 Nev. & M. 725; 5 B. & Adol. 105. 1429

*Quiet Enjoyment.*—A covenant by lessor, that lessee paying the rent and performing covenants shall quietly enjoy, is not a conditional covenant; and a plea stating the non-payment of the rent, or the non-performance of a covenant by the lessee (to insure), is no bar to an action by the lessee on the covenant for quiet enjoyment. *Dawson v. Dyer*, 2 Nev. & M. 559; 5 B. & Adol. 584. 1431

Defendant, a lessee, covenanted that plaintiff, paying rent, &c. should have quiet enjoyment of a term upon an underlease to commence in 1836: defendant having afterwards forfeited his own term by non-payment of rent to the superior landlord, plaintiff could not come into possession of the term to commence in 1836:—Held, that plaintiff could not sue on the covenant for quiet enjoyment; at all events not before 1836. *Ireland v. Bircham*, 2 Bing. N. R. 90; 2 Scott, 207. 1431

*Notice to quit.*—"I have no rent for you, because A. B. has ordered me to pay none." This is evidence of a disclaimer of tenancy. *Doe d. Whitehead v. Pittman*, 2 Nev. & M. 672. 1434

An agent to receive rents has no implied authority to give notice to quit. *Doe d. Mann v. Walters*, 5 M. & R. 357. 1436

Where notice to quit is given by an agent, the authority of such agent must be complete a half year before the expiration of the notice, or at least before the day of the demise is laid in a declaration in ejectment, brought in respect of such notice. *Id.*

In the case of an ordinary weekly tenancy, a week's notice to quit is not implied as part of the contract, unless there be a usage to that effect; but in absence of such usage, a weekly tenant who enters on a fresh week, may be bound to continue until the expiration of that week, or pay the week's rent. *Huffell v. Armitstead*, 7 C. & P. 56—Parke. 1435

*Landlord's Right to take Possession.*—If a tenancy of a house be determined, and the tenant has promised to leave on a particular day, but afterwards refused to do so, the landlord is not justified in putting the tenant's wife by force out of the house, and putting the tenant's furniture into the street; but if the tenancy be determined, and the tenant and his family be gone away, and the house locked up, no one being in possession, the landlord will be justified in breaking into the

house and obtaining possession. *Hillary v. Gay*, 6 C. & P. 284—Lyndhurst. 1441

If a landlord be lawfully on his tenant's premises for the purpose of making a distress, he may put up a bill in the window for the purpose of letting them, without thereby making himself liable as a trespasser. *Skidmore v. Booth*, 6 C. & P. 777—Tindal. 1441

*Tenant's Power to dispute Title.*—In an action of replevin, the landlord's title, under which the tenant has gained possession of the premises, cannot be disputed, although the tenant is prepared with evidence to show that the premises have been fraudulently conveyed to the landlord, and that the actual title is vested in another person. *Parry v. House*, Holt, 489—Dallas. 1441

Where a tenant, by mistake or misrepresentation, pays rent to a person not entitled to demand it, he is not precluded by such payment from giving evidence, on a plea of non tenuit, in replevin against the supposed landlord, to show that the latter is not entitled to the rent. *Rogers v. Pitcher*, 1 Marsh. 541; 6 Taunt. 202. 1441

The defendant, in March, 1832, took certain premises from F. and B., "agents for the trustees of the joint estates of T. and S. B." Upon the trial of an action for use and occupation brought by the plaintiffs, "as trustees of the joint estate of T. and S. B." against the defendant, it appeared by the plaintiff's own evidence, that, in 1831, they were trustees for the estate of S. B. only:—Held, that the defendant was estopped from taking advantage of this discrepancy, having in 1832 taken the premises of plaintiffs as trustees of the joint estate. *Fleming v. Gooding*, 4 M. & Scott, 455; 10 Bing. 549. 1441

If one party takes an interest in land under another, although that interest be wrongfully acquired, he cannot afterwards dispute the title of the person under whom he took that interest. *Doe d. Johnson v. Baytup*, 4 Nev. & M. 837; 3 Adol. & Ellis, 188; 1 Har. & Woll. 270. 1441

Where a party, under a fraudulent pretence, borrowed the keys of a house from another, and then retained the possession:—Held, that he could not dispute the title of the lender in an ejectment, so as to maintain his own possession. *Id.*

A. having, without title, entered upon land, and built a cottage, afterwards accepts a lease (by indenture) from B.: C. claiming the land as his own, pays to A. 20l., to give up the possession to him:—Held, (in ejectment on the demise of B. against C.) that A. has estopped himself from controverting the title of B., and that C. is bound by the estoppel, as having come in under, and received the possession from, B. *Doe d. Bullen v. Mills*, 1 Nev. & M. 25; 2 Adol. & Ellis, 17; 1 M. & Bob. 385. 1441

In defence to an action of ejectment, it may be shown that the parties under whom the plaintiffs claim had no title when they conveyed to him, although the defendant himself claims by a conveyance from the same parties, if the latter



conveyance was subsequent to that which the defendant seeks to impeach. *Doe d. Oliver v. Powell*, 1 Adol. & Ellis, 531; 3 Nev. & M. 616. 1441

Defendant, after being let into possession of certain premises by P., and paying rent to him, paid one quarter's rent to plaintiff, to whom P. had agreed to demise the premises for a long term. In an action by plaintiff for the succeeding quarter's rent, held, that defendant might show that the agreement between P. and the plaintiff was put an end to, and that the rent had been paid to P. *Brook v. Biggs*, 2 Bing. N. R. 572. 1441

A lessee for years, who covenants to deliver up possession of the premises, at the expiration of the term, to his lessor, his heirs and assigns, is not estopped by such covenant from showing, after the death of the lessor or the determination of the lease, that the lessor was only tenant for life of the property demised. *Doe d. Strode v. Seaton*, 2 C. M. & R. 728; 1 Tyr. & G. 19; 1 Gale, 303. 1441

P., N., and the plaintiff occupied successively premises, under a lease that had been granted in 1809, by parties having no right to make a lease. The defendant in 1827 became possessed of the fee. In the years 1829 and 1831 respectively, the defendant distrained on P. and on N. for arrears of rent, which they paid:—Held, that these payments amounted to such an acquiescence by P. and N. in the title of the defendant, that they, and those deriving possession from or under them, were estopped from disputing it; and this although the defendant himself produced in evidence the lease of 1809, and failed to show that it had been assigned to him. *Cooper v. Blandy*, 4 M. & Scott, 562. 1441

Previous to 1812, a person built a house on a piece of waste ground, and, before he acquired a title to it, gave up possession to the tenant of the adjoining land, who held it under a lease granted in 1812. The latter let the premises to the defendant:—Held, in ejectment by the landlord of the adjoining land against the defendant, that the latter was estopped from denying the title of the tenant, and the tenant from disputing that of the landlord. *Doe d. Wheble v. Fuller*, 1 Tyr. & G. 17. 1441

### LEGACY.

*Assent.*]—Where A., the legatee of a term, enters and occupies for a short time, and then quits the possession, it is a question for the jury whether the executors have or have not assented to the bequest; and if a party contract with A. for an underlease, it may be left to the jury to say whether the contract was made with A. in his own right, or as agent to the executors. *Richardson v. Gifford*, 3 Nev. & M. 325. 1445

*Recovery.*]—Where an executor agrees with a legatee to allow him interest on his legacy, if he will permit it to remain in his hands, it becomes a loan to the executor, for which he is personally liable at law, and cannot plead plene admini-

stravit in bar to an action by the legatee. *Wasney v. Earnshaw*, 4 Tyr. 806. 1445

In an action against executors (upon an account stated) for a legacy, it is competent to the plaintiff to impeach any particular item or items on the credit side of the account. *Ross v. Savory*, 2 Scott, 199; 1 Hodges, 269. 1445

The executors of a will, under which A., an insolvent debtor, was entitled to a legacy, gave his assignees a balanced account, wherein they admitted 622*l.* to be the amount of the legacy, but, on the other side, they debited the insolvent with a loan of 400*l.*, advanced on the security of the legacy when it was in reversion; the assignees proved, at the trial, that the instrument by which the loan was secured was void under the Insolvent Act:—Held, that they were entitled to recover the whole of the legacy. *Id.*

E. by will bequeathed, subject to debts and legacies, the residue of his personal estate to his executors, upon trust, to divide the same into two equal parts, and to divide one of such parts into six equal shares, and to pay one of such shares unto each of his cousins, E., T., J., W., and J. H., and the remaining as therein mentioned, and appointed M. his executor, who duly proved the will. M., having taken upon himself the execution of the will, called a meeting of the residuary legatees, at which J. H. was present, and exhibited an account, charging himself with assets, and paid some of the legatees the greater portion of their share of the residue, and was about to pay J. H., but was prevented from so doing. Another meeting was afterwards called, at which J. H. was not present, when the executor exhibited another account, charging himself with assets, and crediting himself with payments and disbursements, and amongst others, with having paid "cash for legacy duties." To this was appended a supplemental account, containing, amongst others, the following item:—"By cash retained for J. H., 179*l.* 10*s.*" In an action for money had and received, and on account stated, brought by J. H. against the executor, to recover the amount of the legacy:—Held, that the action was maintainable. *Hart v. Minors*, 2 C. & M. 700. 1445

*Ademption.*]—Testator gave to his wife his house in B., and the furniture in the said house. The lease of the house expired in the testator's lifetime, and he took another house, and removed his furniture to it:—Held, that the legacy was adeemed. *Colleton v. Garth*, 6 Simon, 19. 1444

*Legacy Duty.*]—A. devises real estates to B. and C. in trust to convey to the use of D. for life, remainder to B. and C. for D.'s life to preserve contingent remainders, remainder to the use that E. shall take out of the premises such annuity or yearly rent-charge not exceeding 500*l.* per annum for her life as D. shall appoint, such annuity to be paid to her clear of all taxes and deductions whatsoever; and in default of issue of D. the testator devised the premises charged with the annuity or rent-charge to F. D. appoints that the annuity shall be the full annuity of 500*l.* D. dies, F. enters, and is compelled by



Exchequer process to pay the legacy duty on the annuity:—Held, first, that the annuity was chargeable with legacy duty; secondly, that the legacy duty is a "tax," within the words of the devise; and thirdly, that F. takes the land subject to the payment of legacy and legacy duty, and cannot call upon E. for repayment of the legacy duty. *Stow v. Davenport*, 2 Nev. & M. 805; 5 B. & Adol. 359. 1446

Executors cannot be called upon to pay legacy duty upon the whole of a residue bequeathed to them in trust to divide the interest among poor pious persons, in 10*l.* or 15*l.* as they should see fit. *In re Wilkinson*, 1 C. M. & R. 142; 4 Tyr. 513; S. P. Att.-Gen. v. Nash, 1 Mees. & Wels. 237. 1446

If any of the objects of the above bounty should have received to the amount of 20*l.* or upwards, by having been selected to receive such bounty on more than one occasion, legacy duty would attach on such amount, and the duty would be calculated according to the nearness of blood of such individual, and in that case the executors would be accountable for and bound to retain the duty chargeable on such amount. *Id.*

A testatrix, after giving several legacies free of duty, bequeathed a part of her estate to trustees, "upon trust to pay off all and every debt and debts of her first husband, that could be legally and satisfactorily proved against him, as it was her will and desire that the same should be discharged."—Held, that the creditors were liable to the duties payable upon this bequest. *Foster v. Ley*, 2 Scott, 438; 2 Bing. N. R. 269; 1 Hodges, 326. 1446

A bill being filed in Chancery to ascertain the debts due from the testatrix's late husband, the parties appeared before the court, and the amount of the debts was ascertained and paid in full; but the court neglected to give directions for the payment of the legacy duties, pursuant to 36 Geo. 3, c. 52. The duties were subsequently paid by the executors, when the accounts were passed through the Stamp Office:—Held, that they could maintain an action, to recover the amount of the duties, against the legatees in respect of whose legacies they were paid. *Id.*

A testator devised real estates to trustees, for the benefit of several parties for life, and after their deaths to be distributed amongst their children, &c.; and the will contained a power by which the testator directed that it should be lawful for the trustees to sell the same, or part, &c., "as shall appear most expedient to my trustee or trustees for the time being, towards the management of my property and affairs." Some portion was sold shortly after the testator's death, because, being suitable for building, it was advantageous to the estate to sell it; and the remainder, after being subject to the trusts for ten years, was sold under an order of a court of Equity:—Held, that the money arising from neither sale was liable to legacy duty. *In re Evans*, 2 C. M. & R. 206. 1446

An instrument vesting property in trustees, for the benefit of the grantor for his life, and after his decease for the benefit of other persons, with

a power of revocation, is not testamentary, and consequently not liable to the payment of legacy duty. *Tompson v. Browne*, 3 Mylne & K. 32. 1446

A testatrix gave to L. for his life an annuity or clear yearly sum of 500*l.*, to be paid and payable half yearly, out of real estate, clear of all taxes and outgoings. The annuitant takes it clear of the legacy duty. *Louch v. Peters*, 1 Mylne & K. 483. 1447

Where a testator in his will directs that one class of legacies "shall be paid prior to his debts and other legacies, and that all his legacies shall be paid within two years, free from legacy duty," the exemption from duty is not limited to such legacies only as are payable within two years; but the general words, "all my legacies," will include a legacy given by a subsequent codicil, which is made payable at a different time. *Byne v. Curry*, 2 C. & M. 603; 4 Tyr. 479. 1447

*Jackson v. Forbes*, 2 C. & J. 352; 2 Tyr. 355, affirmed in Dom. Proc. Att. Gen. v. Jackson, 3 Tyr. 962. 1448

Proceedings against executors for legacy duty. *In re Piggot*, 1 C. & M. 827; 3 Tyr. 559. 1449

#### LICENCE.

A room used for public music or dancing is within the stat. 25 Geo. 2, c. 36, although it is not exclusively used for those purposes, and although no money be taken for admission; but the mere accidental or occasional use of a room for either or both those purposes will not be within that statute. *Gregory v. Tuffin*, 6 C. & P. 271; 1 M. & Rob. 313—*Lyndhurst*. 1449

Proof that there is nothing painted on the house denoting that it is licenced under that statute, is sufficient prima facie evidence in an action for penalties that it is unlicenced. *Id.*

If a room be continually used for the purpose of music and dancing, it will be for the jury to say whether it is not kept for those purposes; and a room kept for drinking, and music, and dancing, is within the stat. 25 Geo. 2, c. 36. *Gregory v. Tavernor*, 6 C. & P. 281—*Gurney*. 1449

#### LIEN.

A mortgage deed was delivered to A., an auctioneer, for the purpose of obtaining payment of the principal and interest due thereon from the mortgagor, and A. made several applications for that purpose:—Held, that A. had no lien on the deed in respect of the charge for making those applications. *Sanderson v. Bell*, 2 C. & M. 304. 1451

Defendants, proprietors of a scribbling and fulling mill, stipulated that all goods on hand should be subject to a lien for a general balance. Having received certain wool and cloth of the plaintiff, to be scribbled and fulled, and certain oil and dyeing materials, to be used by the plaintiff on the wool, for which purpose the plaintiff had access to the oil and dyes in a room of which the defendants kept the key:—Held, that the



defendants had no lien for their general balance on the oil and dyeing materials. *Cumpton v. Haigh*, 2 Bing. N. R. 449. 1450

In an action of trover for wool, a defendant may plead, since Reg. 5, H. T. 4 Will. 4,—1st, the general issue; 2d, a lien by custom; 3d, a lien by agreement; 4th, a lien by custom, with a statement that the wool was deposited by one having a prima facie title to it; and, 5th, a lien by custom, with a statement that the wool was deposited with the defendant by the plaintiff's agent:—*Leuckart v. Cooper*, 1 Scott, 481; 1 Bing. N. R. 509; 7 C. & P. 119; 1 Hodges, 16. 1450

Whether, by the custom of trade of London, whoever the person may be who houses goods with an up-town warehouse-keeper the warehouse-keeper has a right to detain them for all that is due from such person in respect of charges for goods previously deposited by such person, quære? But it seems that such a custom would not be unreasonable. Id.

To trover for a policy of insurance, defendant, after stating the existence of mutual accounts between him and the assured, pleaded a lien for a general balance due to him as an insurance broker, the plaintiff replied a bill of exchange given and taken as payment for this balance, and not due at the time of the conversion in question. Upon demurrer:—Held, that defendant could not, without pleading it as a defence, rely also on the mutual credit between the parties to justify his detention of the policy. *Hewison v. Guthrie*, 2 Bing. N. R. 755. 1450

A. put a phaeton into the possession of M., for him to paint it, and paid M. beforehand for the painting. M. never painted it, but placed it on the premises of B., where it stood three months:—Held, that B. had no lien on the phaeton for his charge for the standing of it, unless the jury were satisfied that M. had placed it there by the authority of A. *Buxton v. Baughan*, 6 C. & P. 674—*Alderson*. 1450

### LIGHTS.

A., the side of whose house adjoined B.'s lawn, wrote to B. as follows:—"Before the last coat of paint is put on the side wall, we wish to place a window in it, and our workmen say it can be finished off more neatly with your permission to place the necessary ladder, &c. The motive for doing this is, that I should gain a more cheerful view of the common, and passing objects." B. replied, "You are welcome to place a ladder in my grounds."—Held, that this did not amount to a licence by B. to A. to open a window in the side of A.'s house; and therefore that A. might obstruct the window by an erection on her own land. *Bridges v. Blanchard*, 3 Nev. & M. 691; 1 Adol. & Ellis, 536. 1453

Quære, whether a parol licence to have the light and air come unobstructed from A.'s land to a window to be opened in B.'s house, which adjoins A.'s land, can be revoked after the window has been opened? Id.

Quære, whether such a right can be conveyed

by parol licence, or whether it is an easement which lies in grant. Id.

No licence or covenant from A. the owner of adjoining land, to put out or not to obstruct windows in the house of B., is to be inferred from the circumstance of A.'s being a party to the deed by which the house, with the windows in it, was conveyed to B., and by which deed A. conveyed part of the adjoining land to B. *Blanchard v. Bridges*, 5 Nev. & M. 567. 1453

Or from the circumstance of A.'s witnessing, without objection, the progress of the building. Id.

The right to unobstructed access of light and air through a window, is lost by a material alteration in the side of the wall in which the window was placed. Id.

A., in licensing B. to build to the extremity of B.'s ground adjoining that of A.'s, expressly reserves to himself the right of building to the extremity of his own ground when he shall think proper to do so. A. may at any time, within twenty years, build to the extremity of his own land, though he thereby render the house of B. dark, damp, and uninhabitable. Id.

To sustain an action on the case for darkening the plaintiff's windows, it is not sufficient that a ray or two of light should be obstructed. The question is, whether, in consequence of the obstruction, the plaintiff has less light than before, to so considerable a degree as to injure the plaintiff's property in point of value or occupation. *Pringle v. Wernham*, 7 C. & P. 377—*Denman*; *S. P. Wells v. Ody*, 7 C. & P. 410—*Parke*. 1453

A party may so alter the mode of enjoyment of ancient lights as to lose the right to them altogether. *Garritt v. Sharp*, 4 Nev. & M. 834; 3 Adol. & Ellis, 325; 1 Har. & Woll. 224. 1453

### LIMITATION OF ACTIONS AND SUITS.

*Personal Actions.*—The statute of limitations is not a bar in cases of fraud. *Ex parte Bolton*, 1 Mont. & Ayr. 60. 1456

The fact of the statute of limitations having run since the debt accrued, is no ground for setting aside the plaintiff's proceedings. *Potter v. Macdonel*, 3 Dowl. P. C. 583. 1456

Where a client employs an attorney to conduct a suit, it is an entire contract to carry on the suit to its termination, and determinable only on reasonable notice; and where no such notice has been given, the statute of limitations is no bar to that part of the demand which is for business done more than six years before the commencement of an action by the attorney for business done in the suit, which was not brought to a termination till within six years of the commencement of the action. *Harris v. Osbourn*, 2 C. & M. 629; 4 Tyr. 445. 1457

A., in consideration of B.'s supplying C. with goods, guarantees to B. the payment of the price. B. having supplied C. with goods, and C. having neglected to pay the price, A., in consideration



of B.'s extending to C. a period of two years and upwards for the liquidation of his debt, agrees to reserve to B. all right and claim which B. may now have against him, A., by virtue of the security previously entered into on C.'s behalf, and to be bound by it, if, at the expiration of such period, B.'s demand shall not have been fully discharged:—Held, that A.'s liability attached upon default made by C. after the expiration of two years and a few days; that B.'s right of action then accrued; and that, therefore, the statute of limitations then began to run *Holl v. Hadley*, 4 Nev. & M. 515. 1457

The statute of limitations in assumpsit begins to run from the time when the cause of action accrues. Therefore, where by a local turnpike act the trustees were to pay first the expenses of obtaining the act, and next the expenses of erecting toll-houses, &c., a builder who brought an action for work and labor in so doing more than six years after the work done, but within six years of the time when the trustees had funds in hand by having paid off the expenses of the act, it was held that he was too late, as the action was maintainable immediately after the work done, though the execution would have been postponed. *Emery v. Day*, 1 C. M. & R. 245; 4 Tyr. 695. 1457

Where a local turnpike act provided that all orders of the trustees should be entered in a book kept for that purpose, an order by them to pay a bill is not an act done so as to take a debt out of the statute of limitations, under 9 Geo. 4, c. 14, unless it so be entered in writing, the only act capable of taking a cause out of the statute being the payment of principal or interest. *Id.*

The 3 & 4 Will. 4, c. 27, s. 42, limiting the recovery of arrears of interest and rent to six years, does not apply to actions commenced before the 24th July, 1833, when it was passed. *Paddon v. Bartlett*, 5 Nev. & M. 383; 1 Har. & Woll. 477. 1458

Covenant for rent arrear may be brought within the time limited by 3 & 4 Will. 4, c. 42, s. 3, and is not limited to six years by 3 & 4 Will. 4, c. 27, s. 42. *Paget v. Foley*, 3 Scott, 120; 2 Bing. N. R. 679. 1458

A devisee, claiming an annuity granted by will, is not barred under 3 & 4 Will. 4, c. 27, ss. 2, 3, by the lapse of 20 years, if he has never received any payment in respect of the annuity. *James v. Salter*, 2 Scott, 750; 2 Bing. N. R. 505. 1458

By the will the annuity was charged on testator's freehold, provided certain leasehold property specified in the will proved to be insufficient:—Held, that, even as against the annuitant, the will by itself was no evidence that the testator died possessed of leasehold property. *Id.*

Where it appears on the face of the bill that the cause of suit accrued more than six years before the filing of the bill, a defendant need not plead the statute of limitations, but may demur. *Hoare v. Peck*, 6 Simon, 51. 1460

Where a judgment creditor had allowed twenty years to elapse without taking steps to recover his debt, and then ascertained that during the

twenty years a suit had been instituted for the benefit of the specialty creditors of his debtor and that under a decree in the suit they had received part payment of their debts, and that there was money in court available for the payment of the remainder:—Held, that he was barred by the statute of limitations from proving his debt before the Master, and receiving payment rateably with the other creditors. *Berrington v. Evans*, 1 Y. & Col. 434. 1460

A. is mortgagee from B. of certain leasehold coal-mines and barges, &c. B. afterwards demises the mines, and assigns the barges to C. A. may bring trover against D., who tortiously seizes and sells the barges and part of the produce of the mines. The seizure and sale were for tolls claimed to be due to a canal company:—Held, that no injury resulted to it until the sale; and that therefore an action brought within six months of the sale, but more than six months after the seizure, was not barred by a clause in the canal act, limiting the commencement of actions for any thing done in pursuance of that act to within six months after the fact committed. *Frazer v. Swansea Canal Comp.* 3 Nev. & M. 391; 1 Adol. and Ellis, 354. 1461

Semble, however, that, in an action by C., in respect of such seizure and sale, the period of limitations would have run from the time of the original seizure, whether the action were framed in trespass or in trover. *Id.*

A dock act authorized a company to make and maintain docks, and to appoint a dock master, who should have power to direct the mooring, unmooring, moving and removing of all vessels into or in the docks, and should have control over the space of 100 yards from the entrance into the docks, so far as related to the transporting of vessels in and out; the company to be sued in the name of their treasurer; and every action brought against any person for any thing done in pursuance of the act, to be commenced within six calendar months after the fact committed. In an action brought against the treasurer for damage done to a vessel by means of improper directions given by the dock-master in transporting her into the docks:—Held, that giving such directions was a thing done in pursuance of the act, and that the action should have been commenced within six calendar months after those directions were given. *Smith v. Shaw*, 5 M. & R. 225. 1461

*Merchant's Accounts.*—If goods are supplied by A. to B., and five years afterwards there are mutual dealings between the parties, quære, whether the first item comes within the exception of merchants' accounts in the stat. of limitations. *Moore v. Strong*, 1 Scott, 367; 1 Bing. N. R. 441; 1 Hodges, 28. 1462

A conversation at the time of a purchase, is admissible in evidence for the defendant, in an action for the price of goods, although it may let in a set-off otherwise barred by the statute of limitations. *Id.*

A. occupied a house and land under B., at the rent of 16*l.* a year, and A., at B.'s request, entered into his employment as a farming bailiff, and to perform other services, in the place of another



person who had been employed by A., and had been paid 12s. a week. A. continued in B.'s service for more than twelve years; but there was no payment of rent on the one hand, or of wages on the other. In an action brought by A., to recover wages for twelve years, deducting the rent:—Held, that this was not such an open account as would take the case out of the statute of limitations since the 9 Geo. 4, c. 14; but there must be a part payment in cash, or what is equivalent to it, to have that effect. *Williams v Griffiths*, 2 C. M. & R. 45; 1 Gale, 65. 1462

*Avoidance by Process.*—By 2 Will. 4, c. 39, s. 10, no writ issued by authority of the act shall be in force for more than four calendar months from the day of the date thereof, including the day of such date, but every writ of summons and capias may be continued by alias and pluries, as the case may require, if any defendant therein named may not have been arrested thereon or served therewith: provided always, that no first writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon or served therewith, or proceedings to or towards outlawry shall be had thereupon, or unless such writ, and every writ (if any) issued in continuation of a preceding writ, shall be returned non est inventus and entered of record within one calendar month next after the expiration thereof, including the day of such expiration, and unless every writ issued in continuation of a preceding writ shall be issued within one such calendar month after the expiration of the preceding writ, and shall contain a memorandum indorsed thereon or subscribed thereto, specifying the day of the date of the first writ; and return to be made in bailable process by the sheriff or other officer to whom the writ shall be directed, or his successor in office, and in process not bailable, by the plaintiff or his attorney suing out the same, as the case may be. 1463

In a *qui tam* action, if the declaration do not appear on the record to be filed within a year of the writ, it is necessary to connect it with the writ by evidence of the time when the declaration was filed, and showing the writ to be continued on the roll down to that time. In the C. P. the placitum being always intitled of the term in or after which the trial takes place, it furnishes no evidence of the date of the declaration. *Thistlewood q. t. v. Cracroft*, 6 Taunt. 141; 1 Marsh. 497; 1 M. & S. 500. 1463

Where a writ of summons, tested in time to save the statute of limitations, was resealed in consequence of an alteration in the description of the defendant and the county in which he resided, and was not served until after the six years had expired:—Held, that the resealed did not amount to a re-issuing of the writ, and that it was not necessary for the plaintiff to show when the re-sealing took place. *Braithwaite v Montford* (Lord), 2 C. & M. 408; 4 Tyr. 276. 1463

A bill of Middlesex was a good continuance of a latitat, in order to save the statute of limitations. *French v. Mawood*, 2 Dowl. P. C. 565. 1464

The court will not allow process to be served at the house of the agent of a defendant out of

the jurisdiction, in order to save the statute of limitations; but the plaintiff must proceed according to the provisions of the 2 & 3 Will. 4, c. 39, s. 10. *Frith v. Donegal* (Lord), 2 Dowl. P. C. 527. 1464

The proviso in the 10th section of the 39th cap. of 2 & 3 Will. 4, the Uniformity of Process Act, as to an alias or pluries issuing within a month from the expiration of the preceding writ, only applies to cases where it is sought to prevent the operation of some statute of limitation. *Nicholson v. Rowe*, 2 C. & M. 469. 1463

In ordinary cases the alias or pluries may be sued out at any time, and the continuances, if necessary, may be entered (as formerly) at any time. *Id.*

A plea of the statute of limitations stated that the cause of action did not accrue within six years next before the commencement of the suit. Plaintiff replied, that the cause of action did accrue within six years, &c. —Held, that without specially replying process issued, the plaintiff might on the above replication prove a *quo minus* to have issued within the six years, and produce the roll to show the continuances regularly entered up accordingly. *Dickenson v. Teague*, 1 C. M. & R. 241; 4 Tyr. 450. 1463

If continuances are regularly entered upon the roll, the court will not look at any thing in order to contradict the roll, e. g. a writ produced to show that a second writ, an alias, was tested on a day subsequent to the return day of the first. *Id.*

Since 2 & 3 Will. 4, c. 39, s. 10, it is not necessary to serve or endeavor to serve a writ which is issued to avoid the effect of the statute of limitations; it is sufficient to return it non est inventus, and enter it of record. *Williams v. Roberts*, 1 C. M. & R. 676; 3 Dowl. P. C. 513; 5 Tyr. 421; 1 Gale, 56. 1463

But the expense of such of the writs as are unnecessarily issued will not be allowed to the plaintiff. *Id.*

*Acknowledgment in Bar.*—What a sufficient acknowledgment. *Dabbs v. Humphrey*, 4 M. & Scott, 285; 10 Bing. 446. 1464

Form of acknowledgment. *Lechmere v. Fletcher*, 1 C. & M. 923; 3 Tyr. 450. 1470

To take a case out of the statute of limitations, the acknowledgment of a debt must contain an express or implied promise to pay. *Linley or Linsell v. Bonsor*, 2 Scott, 399; 2 Bing. N. R. 241; 1 Hodges, 365. 1465

Defendant having accompanied an acknowledgment of debt with an assertion that he should have nothing to do with the claim; that he wished the claimant would make him a bankrupt, and that he would rather go to gaol than pay the claimant:—Held, that it was properly left to a jury to consider whether the acknowledgment was one from which a promise to pay could be implied. *Id.*

In a letter written to the plaintiff within six years, the defendant says: "I can never be happy until I have not only paid you every thing, but all to whom I owe money;" and "your account



is quite correct; and oh! that I were now going to enclose you the amount of it:"—Held, that this was evidence to go to the jury of an acknowledgment, taking the case out of the statute of limitations. *Dodson v. Mackey*, 4 Nev. & M. 327. 1465

Held, that such promise, accompanied by this expression—"It is impossible to state to you what will be done in my affairs at present; it is difficult to know what will be best, but, immediately it is settled, you shall be informed:" is an absolute unconditional promise, and not a qualified or conditional promise. *Id.*

Whether proof of such letters, together with proof of a bill drawn more than six years ago, by the plaintiff on the defendant, and accepted by the latter, would entitle the plaintiff to recover more than nominal damages, *quære*. *Id.*

Under 9 Geo. 4, c. 14, s. 1, an acknowledgment signed by the agent of the debtor will not retrieve a debt barred by the statute of limitations; it must be signed by the debtor himself. *Hyde v. Johnson*, 3 Scott, 230; 2 Bing. N. R. 776. 1469

Where a letter, acknowledging the existence of a debt, which was produced for the purpose of taking the case out of the statute of limitations, did not contain any date:—Held, that the time when the letter was written might be supplied by parol evidence. *Edmunds v. Downs*, 2 C. & M. 459; 4 Tyr. 173. 1471

In an action on a promissory note payable with interest, the words in the letter acknowledging the debt were as follows:—"I shall be most happy, to pay you both interest and principal as convenient:"—Held, that this was a conditional promise, and that the plaintiff was bound to give some evidence to show that the defendant was able to pay, or that it was convenient for him to do so. *Id.*

*Payment on Account.*]—*Semble*, part payment will not bar the interest, where the debt to which it is applied consists of several items. *Brigstock v. Smith*, 2 Tyr. 445; 1 C. & M. 433. 1471

The payment of interest on a note, given by churchwardens on the parish account from time to time by the vestry, is a sufficient acknowledgment of the debt to take the case out of the Statute of Limitations, as against the makers: *a fortiori*, where one of them has audited the parish accounts, in which payments of interest on the note are entered. *Crew v. Petit*, 3 Nev. & M. 456; S. C. nom. *Rew v. Pettet*, 1 Adol. & Ellis, 196. 1471

Payment of interest upon a promissory note by the makers to the personal representatives of the payee within six years of the commencement of the action:—Held, a sufficient acknowledgment to take the case out of the statute of limitations, although the letters of administration under which the party claimed to whom the payments were made were not obtained in the diocese in which the note was *bonum notabile*. *Clarke v. Hooper*, 4 M. & Scott, 353; 10 Bing. 480. 1471

A testator bequeathed to his two daughters

250*l.* each, to be paid when they arrived at the age of twenty-one, and, till that period, the expenses of board, clothes, and education, to be borne and paid by his executors. He appointed executors and also trustees, with all necessary powers to fulfil the will. At a meeting of the trustees and executors, for the purpose of settling the testator's affairs, the executors paid over to the trustees, *inter alia*, 500*l.*, to be set apart for the payment of the legacies to the daughters, when they attain the age of twenty-one. This sum was afterwards lent by the trustees to the defendant on a promissory note, which described them as "trustees acting under the will of the late Mr. W. B." (the testator):—Held, that a payment of principal and interest to one of the legatees within six years was sufficient to take the case out of the statute of limitations, and that the trustees had a right to maintain an action on the note. *Meggison v. Harper*, 2 C. & M. 322; 4 Tyr. 94. 1471

The mere fact of the payment of a sum by defendant to plaintiff is not enough to take a case out of the statute of limitations without some evidence to satisfy a jury, first that it was a payment of a debt, and next that it was not the discharge of a balance due, but a payment intended to be applied to the part discharge of the particular debt. *Tippetts v. Heane*, 1 C. M. & R. 252; 4 Tyr. 772. 1471

In order to take a case out of the statute of limitations a payment of 12*s.* as interest money was proved: this does not justify a verdict finding a debt for 13*l.* 10*s.* *Leeson v. Smith*, 4 Nev. & M. 304. 1471

A verdict for nominal damages only could upon this evidence have been sustained, *semble*. *Id.*

Though a verbal acknowledgment of part payment, or of payment of interest thereon, is insufficient, within the 9 Geo. 4, c. 14, s. 1, to take a case out of the statute of limitations; yet, if the payment of a sum of money is proved as a fact, and not by a mere admission, its appropriation to a particular account, whether in respect of principal or interest, may be shown by declarations of the party making the payment, and such declarations need not have been at the time of such payment. *Waters v. Tompkins*, 1 Tyr. & G. 137; 2 C. M. & R. 723. 1471

To show a part payment within six years, so as to bring the case within the exception in the statute, the plaintiff proved a payment of a portion of his demand by one F., the trustee under a deed of composition, who was expressly instructed to make the payment as a full satisfaction, instead of which he handed the money over as a part payment, and took a receipt accordingly. This payment so made was expressly repudiated by the defendant:—Held, that this was not a payment within the exception. *Linley or Linsell v. Bonsor*, 2 Scott, 399; 2 Bing. N. R. 241; 1 Hodges, 305. 1471

A delivery of goods by a debtor to his creditor in liquidation of a previous debt, is a sufficient part payment to take the case out of the statute of limitations. *Hooper v. Stevens*, 7 C.



& P. 260; 1 Har. & Woll. 480: S. P. Hart v. Naish or Nash, 2 C. M. & R. 337; 1 Gale, 171 1471

Indorsements on a promissory note, admitting the receipt of interest are presumed to have been written at the time they bear date. Smith v. Battens, 1 M. & Rob. 341—Taunton. 1471

An entry in a bankrupt's examination, of a certain sum being due to A., is evidence of an account stated between them, and is a sufficient acknowledgment to take the case out of the statute of limitations. Eicke v. Noakes, 1 M. & Rob. 350—Tindal. 1471

*Pleadings.*—A plea of set-off stated, that the plaintiff made his promissory note payable to A. C., which was duly indorsed and delivered to the defendant at A. C.'s death, by A. C.'s administrator, and was unpaid. Replication, that the supposed cause of set-off on the said note did not accrue to defendant within six years, in manner and form, &c.:—Held, that this replication admitted not only the making of the note, but the indorsement of it to the defendant by A. C.'s administrator, and that the defendant might, therefore, avail himself of memorandums of the payment of interest, written on the note by A. C. (before Lord Tenterden's Act) to bar the statute of limitations. Gale v. Capern or Capron, 1 Adol. & Ellis, 102; 3 Nev. & M. 863. 1471

In an action on a promissory note drawn in a foreign country, and due about twenty years since, the defendant pleaded the statute of limitations, and the plaintiff replied that he resided abroad until within six years of the commencement of the action. The court afterwards (upon terms) allowed the defendant to add a plea, setting up a provision of the law of the country where the note was made and the parties resided, similar in its effects to the statute of limitations. Huber v. Steiner, 4 M. & Scott, 328. See tit. "Foreigner." 1471

Declaration, that the defendant sixteen years before delivered his promissory note, payable on demand, with interest, to the plaintiff, but neglected to pay except interest, which he paid up to a day within six years. Plea, that the cause of action did not accrue within six years:—Held sufficient. Hollis v. Palmer, 2 Bing. N. R. 713. 1471

In assumpsit for goods sold and delivered, the general issue and a plea of the statute of limitations were pleaded. The plaintiff's replication traversed the latter plea. His evidence consisted of such an admission by the defendant as would have been evidence to go to a jury, on the general issue, that a debt was owing from him to the plaintiff, but he did not prove when the debt was contracted. No evidence was given for the defendant in support of his plea:—Held, that it was incumbent on the plaintiff to support the affirmative terms of his replication, by showing that the debt was contracted within six years, or that the acknowledgment or promise was made in some writing signed by the defendant, so as to take the case out of the statute, pursuant to 9 Geo

4, c. 14, and a nonsuit was entered accordingly. Wilby v. Henman, 4 Tyr. 957; 2 C. & M. 658. 1471

*Claim to Realty.*—In ejectment, it is no answer to a prima facie title from twenty years' possession, that such possession was in continuation of that of a sister, who entered by abatement into the land to which her elder brother (whose issue is alive) was entitled as heir, and who died more than twenty years before the ejectment was brought. Doe d. Draper v. Lawley, 3 Nev. & M. 331. 1473

The lord of the manor is barred by the statute of limitations from entering for a forfeiture after twenty years. Whitton v. Peacock, 3 Mylne & K. 325. 1473

A wrongful continuation of possession for twenty years after the expiration of a title, under which the tenant lawfully entered, constitutes such an adverse possession as will, under the statute of limitations, create a bar to an entry, or to an action of ejectment. Doe d. Parker v. Gregory, 4 Nev. & M. 308. 1473

As, where husband of tenant for life holds over twenty years after her decease. Id.

A fine could be levied only by a person having the freehold either by right or by wrong. Id.

L. R. died seized of freehold premises, leaving a widow and a son (by her), R. R., his heir at law, twelve years old. The widow entered into receipt of the rents, and two years afterwards married again, and went to reside on the premises, which she occupied with her second husband during his life, and from his death until her own, the whole period of such occupation by her being more than fifty years. During her occupation she frequently said that the premises after her death belonged to R. R., but she left a will devising the property to H., her son by her second husband, and describing it as having descended to her from her mother. After her death, H., then in possession, promised that he would sign an agreement to rent the premises under R. R., but he never did sign it:—Held, that upon these facts a jury were bound to find an adverse possession of the widow during the fifty years. Doe d. Roffey v. Harbrow, 3 Adol. & Ellis, 67. 1473

G., under whom defendant claimed, was let into possession twenty-two years before action brought, by virtue of a contract with P. for the purchase of an allotment accruing to P. under an inclosure act, which provided that a purchaser let into possession of an allotment should have the same rights as the vendor. G. paid interest on a portion of the purchase money for some years, but never completed the purchase:—Held, that even after a lapse of twenty years his possession was not adverse to P.'s title; held, also, that it did not lie in the mouth of G., or any claiming under him, to raise as an objection to P.'s title, that the commissioners of inclosure had made no formal award. Doe d. Milburn v. Edgar, 2 Bing. N. R. 496. 1473

Where a lease for years, determinable on lives,



was granted in 1732, and in 1734 the same lessor granted a similar lease of the same premises to another lessee, who always afterwards paid rent; and another person, who was in possession at the granting of the second lease, claimed to be entitled to the estate, on the ground that one of the lives in the first lease was in existence, and continued to hold it until his death in 1811.—Held, that he had no adverse possession to give him the freehold. *Rex v. Axbridge*, 4 Nev. & M. 477; 1 Har. & Woll. 74. 1475

Held, also, that his widow, who continued to hold after his death in the same manner until she died in 1827, had only a claim on the continuation of the estate which her husband had, and therefore acquired no right by adverse possession. *Id.*

Land was devised in 1724 by a man to his wife in fee; and, after having married again, she lived on the property with her second husband for nine or ten years, and then went to reside elsewhere, and were never afterwards in possession, but under what circumstances they left was not explained. The wife died in 1823, before her husband, who survived until 1832.—Held, in ejectment, that the heir of the wife was barred by the adverse possession of above forty years; though the wife was always under the disability of coverture, and the husband had a tenancy by the courtesy during his life, and it was admitted that no fine had been levied. *Doe d. Corbyn v. Branton*, 4 Nev. & M. 664; 3 Adol. & Ellis, 63; 1 Har. & Woll. 162. 1473

A lease for years was granted to a married woman living apart from her husband, under the supposition that she was a feme sole.—Held, on a question whether there had been an adverse possession, that it was not a misdirection to put it as a question, whether the possession had been adverse as against the wife, instead of as against the husband? *Doe d. Wilkins v. Wilkins*, 5 Nev. & M. 434; 1 Har. & Woll. 574. 1473

A., thirty years ago, died seised of a cottage, having a son, B., and a daughter, C. At his death, C., his daughter, then unmarried, took possession of it; and afterwards married D., and after his death, W. After her death, W. remained in possession sixteen years.—Held, that the son of B., who was the heir of C. as well as being the heir of A. & B., might recover in ejectment, although W., including the term he had occupied the cottage with his wife, had had more than twenty years' possession of it. *Doe d. Tranter v. Wing*, 6 C. & P. 533—Williams. 1473

In a plea under the stat. 2 & 3 Will. 4, c. 71, it is sufficient to allege that the user had existed for forty years before the commencement of the suit, and it need not be alleged to have been for forty years before the act complained of in the declaration. *Wright v. Williams*, 1 Mees. & Wels. 77. 1473

A replication of a life estate to a plea of enjoyment for forty years under the stat. 2 & 3 Will. 4, c. 71, must show that the plaintiff is the person entitled to the reversion expectant on the determination of the life estate. *Id.*

Held, that the conveyance of a manor by the

Commissioners of Woods and Forests on the part of the Crown, did not entitle the purchaser to maintain ejectment against the possessor of land inclosed from the waste of the manor, more than twenty years before the conveyance, without leave of the Crown. *Doe d. Wait v. Morris*, 2 Bing. N. R. 159.

### LUNATIC.

An order of removal of a lunatic to an asylum, made by two justices under the 9 Geo. 4, c. 40, stated that the justices, "having made inquiry into the circumstances and place of last legal settlement of the said H. B. (the lunatic), we have adjudged that his said settlement is in the parish of St. N.:"—Held, that it was sufficiently in accordance with the form in the schedule to that stat.; and not objectionable on the ground that it contained no present adjudication upon the place of settlement. *Rex v. St. Nicholas, Leicester*, 4 Nev. & M. 624; 3 Adol. & Ellis, 79; 1 Har. & Woll. 141. 1477

A subsequent order under the same statute, after reciting the former order of removal, directed the overseers of the parish where the settlement was, to pay a weekly sum "for the maintenance, medicine, and care of the said H. B. (the lunatic) during so long time as the said H. B. hath been and shall be under the care of the keeper of the asylum:"—Held, that it was bad as to so much as was retrospective in its operation, but valid for the residue. *Id.*

Two justices ordered F. C., the wife of R. C., a Scotchman, having no settlement in England, and a lunatic, to be removed from parish A. where she had become chargeable to parish B., which was adjudged to be her lawful settlement. The order did not state where the husband was when it was made.—Held, that the order was not void on the ground that it would effect the separation of husband and wife, because it was not to be presumed that when it was made the husband was residing in parish A., or was not residing in parish B. *Rex v. Stockton*, 5 B. & Adol. 546. 1477

A hab. corp ad testificandum may be obtained to bring up the body of a confined lunatic to give evidence in a cause upon an affidavit, showing that he is not a dangerous lunatic, and that he is in a fit state to be brought up. *Fennell v. Tait*, 1 C. M. & R. 584; 5 Tyr. 218; 3 Dowl. P. C. 161. 1477

### MANDAMUS.

*Generally.*—A mandamus will not go, unless it is clear that there has been a direct refusal to do that which it is the object of the mandamus to enforce, either in terms or by circumstances, which distinctly show an intention in the party to withhold from doing the act required. *Rex v. Brecknock and Abergavenny Canal Company*, 4 Nev. & M. 871; 3 Adol. & Ellis, 217; 1 Har. & Woll. 279. 1479

Where upon being required to do a particular act, the party said that he was ready to do it upon being indemnified, which the applicant re-



fused to do, but afterwards took no further steps by making a direct application or otherwise to obtain an unconditional refusal:—Held, that the refusal was not sufficient to warrant the court in granting a mandamus. *Id.*

By statute incorporating a canal company, the affairs of the company were to be managed by a committee, who were authorized to appoint a clerk for better carrying into execution the purposes of the act; the committee were required to enter in books an account of their disbursements, receipts, and transactions, and the books were to be open at all seasonable times to the inspection of the proprietors. A proprietor applied to the clerk for an inspection of the books which were under his charge. The clerk said he would refer the demand to the committee. The proprietor attended the committee, and there repeated his request; and the chairman said they would take time to consider it; ten days afterwards the proprietor applied again to the clerk, who refused the inspection of the books:—Held, that there had been no sufficient refusal by the committee to warrant the application. *Rex v. Wilts and Berks Canal Navigation*, 3 Adol. & Ellis, 477. 1479

Seem, that a party applying for a mandamus to give inspection of such documents, ought to show that when he demanded the inspection, he stated the object for which he wanted it. *Id.*

To ground an application for a mandamus to inspect books, quære, whether it is sufficient to show that the party entitled to inspect demanded liberty to do so, that his claim was disputed, but inspection offered him as a favor, and that he refused to accept it otherwise than as a right?—*Per Denman, C. J. Rex v. Trustees of North-Leach and Witney Roads*, 5 B. & Adol. 978. 1479

*Where it lies.*—Where a sheriff has set aside a judgment in the county court:—Held, that whether he could do so or not a mandamus could not be granted to compel him to issue execution on the judgment. *Eldridge v. Fletcher*, 1 Har. & Woll. 199. 1480

A mandamus will not lie to a treasurer of a borough to compel him to pay costs to witnesses under the order of a judge, founded on the 7 Geo. 4, c. 64, the treasurer being a ministerial officer, and subject for his refusal to an indictment. *Rex v. Jeyes*, 5 Nev. & M. 101; 3 Adol. & Ellis, 416; 1 Har. & Woll. 325. 1479

Where a statute does not allow a removal of proceedings by certiorari, the court will not indirectly bring them under review by a mandamus. *Rex v. Yorkshire W. R. (Justices)*, 1 Adol. & Ellis, 563; 3 Nev. & M. 802. 1480

A mandamus was granted commanding the lord of the manor to hold a court leet for the purpose of appointing a high constable of a hundred, though the day on which the court had been usually held for sixty years past had gone by, it not being distinctly sworn that the court was held on that particular day by prescription. *Rex v. Milverton (Lord of Manor)*, 3 Adol. & Ellis, 284; 1 Har. & Woll. 222. 1480

A mandamus lies to admit a clerk of trustees

under the General Turnpike Act. *Rex v. Ches-hunt Roads (Trustees)*, 5 B. & Adol. 439. 1479

Where a charter is granted to a corporation to hold a court for the trial of causes, the disuse of that court for two hundred years, and the want of funds to hold it, are no answer to a rule for a mandamus commanding them to hold it. *Rex v. Wells (Mayor)*, 4 Dowl. P. C. 562. 1486

The lords of the treasury recommended a retired allowance to a public officer, and obtained a vote of parliament for a particular sum, which was received from time to time under the Appropriation Act, by the proper officer. In several letters written by their secretary, these facts were stated, and directions given as to the mode of obtaining payment. The lords of the treasury refused to give an authority to him to pay it over to the individual to whom it was granted, unless upon conditions to which he would not agree:—Held, that he had a legal right to the amount so recommended, which the court would enforce by mandamus. *Rex v. Treasury (Lords)*, 5 Nev. & M. 589; 1 Har. & Woll. 533. 1480

The mandamus was directed to the lords of the treasury to issue the proper minute or authority to insure the payment. *Id.*

Whether the lords commissioners might return, that the state of public affairs rendered it expedient to withhold such payment, quære? *Id.*

Where under a parliamentary vote, money was placed under the control of the lords of the treasury for the benefit of A., they are not authorized to impose on A. a collateral condition of payment. *Id.*

A mandamus will not lie to the lords of the privy council, commanding them to receive a petition praying them to rehear a decision upon a case heard before and determined by them, upon an appeal from an ecclesiastical court to the judicial committee, instead of a court of delegates. *Ex parte Smith*, 4 Nev. & M. 582; 1 Har. & Woll. 128. 1480

Seem, that a mandamus will not go to an inferior court, merely for the purpose of compelling the hearing of a case already determined. *Id.*

*Justices and Sessions.*—The court will not issue a mandamus to a magistrates to do an act subjecting them to an action, of which the event may be doubtful. *Rex v. Buckinghamshire (Justices)*, 3 Nev. & M. 68. 1480

On motion for a mandamus to justices to issue a warrant to distrain for a poor's rate, it must appear clearly to the court that the warrant would be legal, and that the parties applying have no other remedy to enforce the rate. *Rex v. Hall*, 1 Har. & Woll. 83. 1480

Where a highway rate was made, and there was no appeal against it, and on application to two magistrates, they refused to issue a distress warrant, though an offer to indemnify them was made, but not actually tendered; and it appeared there was reasonable doubts as to the validity of the rate, and as to whether the magistrates would not be liable to an action if they issued the war-



rant:—Held, that the court would not grant a mandamus to compel them to do so. *Rex v. Somersetshire (Justices)*, 1 Har. & Woll. 82. 1480

The adjudication of the court of quarter sessions upon an appeal relating to an act done in pursuance of a local turnpike act, is final; and a mandamus does not lie to require the court to rehear such appeal. *Rex v. W. R. Yorkshire (Justices)*, 3 Nev. & M. 86; 1 Adol. & Ellis, 606. 1481

The court will not grant a mandamus requiring the justices at sessions to direct the putting in suit of a bond given by a high constable, for the due performance of his office, for the purpose of procuring reimbursement to a parish upon which the high constable has levied excessive rates in disobedience of an order of sessions. *Ex parte Carlton High Dale*, 4 Nev. & M. 312. 1481

*Writ and Return.*—A rule for a mandamus to the archdeacon, to administer the oath of office to a churchwarden, is absolute in the first instance, where there is no rival candidate, and no reason assigned for the refusal to administer the oath. *Rex v. Litchfield & Coventry (Archdeacon)*, 5 Nev. & M. 42; 1 Har. & Woll. 463. 1487

The rule is absolute in the first instance for a mandamus to swear in a chapel-warden, where, on the vacancy of a living, there is a dispute between the curate and sequestrator who should appoint, and each has appointed one. *Ex parte Penruddock*, 1 Har. & Woll. 347. 1487

A party whose right to an office has been established by a verdict, cannot have a peremptory mandamus to restore him to his office until he has signed judgment in the action. *Neale v. Bowles*, 1 Har. & Woll. 584. 1487

Where a rule for a mandamus to execute the office of mayor was moved so late in Trinity term, that the party had not time to answer the affidavits, the court enlarged the rule until the following term, though the charter day for electing a new mayor would previously occur, until which time the public would be deprived of the services of the mayor, and though it was suggested that the party could have no answer to make to the rule. *In re Walsall*, 1 Har. & Woll. 370. 1487

To a mandamus requiring A., a way-warden, to deliver to the churchwardens certain books of account, assessments, &c. in his custody, power, or possession, it is a good return to say, that on and since the teste of the writ, A. had not nor has had the books, &c., or any of them, in his custody, power, or possession. *Rex v. Round*, 5 Nev. & M. 427; 1 Har. & Woll. 546. 1488

If A. goes on unnecessarily to state that he had them not on a prior day, when it is surmised in the mandamus that they were demanded by the churchwardens, he is not bound to negative a possession intermediate between the demand and the teste of the writ. *Id.*

Whether, under the circumstances, the books, &c. were in the power of A., is a question to be

raised by a traverse to the return or by an action for a false return. *Id.*

Where, on return to a mandamus (to admit a copyholder), a concilium has been obtained, and the return, on argument, held sufficient in law, and a peremptory mandamus awarded, the court will not, at the instance of the party making such return, direct the prosecutor to demur, in order that the case may go to a court of error. *Quære*, whether, by the stat. 9 Ann., c. 20, s. 2, the return to a mandamus can be demurred to? *Rex v. The Lord of the Manor of Oundle*, 1 Adol. & Ellis, 283; 3 Nev. & M. 484. 1488

## MASTER AND SERVANT.

A contract, by which a servant hires himself to a master as a footman and groom, is not dissolved by a subsequent contract, by which he engages to bind himself to serve in a different character at higher wages and in a foreign country, although the servant accompanies his master into such foreign country; the service performed abroad being the same as that originally contracted for. *Rex v. Buckingham*, 3 Nev. & M. 72. 1493

A hiring at so much per month is a hiring for a year. *Fawcett v. Cash*, 3 Nev. & M. 177; 5 B. & Adol. 904. 1493

A general hiring, in the absence of any custom to rebut the presumption, is to be presumed to have been a hiring for a year. *Id.*

A clerk hired at 12l. 10s. per month for the first year, to advance 10l. per annum until the salary is 180l., is hired for at least one year. *Id.*

A head gardener was engaged on an agreement that he should have yearly wages, and a house to live in rent free. Several inferior gardeners were subject to his directions, and the house he lived in was not under the roof, or a part of the master's dwelling-house. The jury having found that he was a menial servant; it was held the verdict was right, and that he was consequently liable to be discharged on a month's notice. *Nowlan v. Ablett*, 2 C. M. & R. 54; 1 Gale, 72. 1493

An agreement for the hiring of a servant may be proved by parol, although the terms of the agreement are, by the direction of the parties, written down by a third person; such writing, though read over to the parties, not being signed by them. *Rex v. Wrangle*, 4 Nev. & M. 375; 2 Adol. & Ellis, 314; 1 Har. & Woll. 41. 1493

If a servant, when he is taken into a service, brings a written character, and is afterwards dismissed for ill behavior:—Semble, that the master does no wrong, if before he returns the character to the servant, he writes upon it that the person was afterwards in his service and dismissed for ill behavior. *Taylor v. Rowan*, 7 C. & P. 70—Abinger. 1496

Every man has a right to work for the best price he can get; but, if others choose to work for less than the usual prices, the law will not permit that violence should be committed towards them, or towards those by whom they are



employed, or those with whom they are connected. *Rex v. Batt*, 6 C. & P. 329. 1493

A bequest of a year's wages to each of the testator's servants, over and above what may be due to them at the time of the testator's decease, applies to such servants only as are usually hired by the year. *Booth v. Dean*, 1 Mylne & K. 560. 1493

Where a servant under a general hiring at the rate of so much per annum is dismissed for misconduct, he is not entitled to any portion of the wages of the current year. *Turner v. Robinson*, 2 Nev. & M. 829; 6 C. & P. 15; 5 B. & Adol. 789. 1495

So, although the master has previously recovered damages against him for the same act of misconduct. *Id.*

A clerk hired generally by the year at a certain salary, may, upon a dissolution of the contract by mutual consent within the year, recover salary pro rata, without any express agreement to that effect. *Thomas v. Williams*, 3 Nev. & M. 545; 1 Adol. & Ellis, 685. 1493

So, also, he may recover pro rata where the contract has been dissolved by mutual consent within the year, but after the issuing of a commission of bankruptcy. *Id.*

The departure of the clerks upon the ceasing of the trade is evidence of a dissolution of such contract. *Id.*

Where a yearly servant is dismissed by his master before the year is expired, for a cause which in law is sufficient to justify such dismissal, he cannot recover any wages; even pro rata for such a period as has elapsed before his dismissal. *Ridgway v. Hungerford Market Company*, 4 Nev. & M. 797; 3 Adol. & Ellis, 171; 1 Har. & Woll. 244. 1493

Where a justifiable cause of dismissal exists, it is sufficient to prevent the recovering of wages, though the servant might not in fact have been dismissed upon that ground; and it is not necessary that the cause relied on in answer to an action for wages, should have been stated at the time of the dismissal. *Id.*

A clerk to a public company, who was hired at a yearly salary, having received on the 29th March a communication that it was the intention of the directors to make a new appointment to the situation of clerk, entered, on the 11th April, on the minutes a protest to an entry of that communication, together with an order for calling a special court on the 17th April for the purpose of appointing a fit person to be clerk. On the 17th April, the directors, by a resolution, declared the clerk to be displaced from his situation. It was put as a question to the jury, in an action for salary, whether the entry of the protest was a sufficient ground to justify the dismissal, and they found that it was. A verdict having been found for the plaintiff, the court made absolute a rule for entering a nonsuit. *Id.*

An appointment of clerk to a public company, was by a resolution which stated the salary to be 200*l.* per annum, but said nothing as to the period of payment: the clerk acted as such, and

was paid several sums of 50*l.* each, at periods just after the usual quarter days of the year:—Held, that proof of these facts warranted a declaration in an action for salary, which alleged the contract to be at a salary of 200*l.* per annum, payable quarterly on the usual quarter days. *Id.*

Quære, whether a special action is not necessary to enable a yearly servant to recover wages, where the contract is put an end to before the year is expired? *Id.*

A servant is liable for an action of trover for a conversion for the benefit of his master. *Crauch v. White*, 1 Scott, 314; 1 Hodges, 61. 1494

The defendant received from one R. a bill of exchange, with notice that it was the plaintiff's property, and that it had been placed in the hands of R., for the purpose of his procuring it to be discounted for the plaintiff. R. being indebted to the defendant's mother, in whose employ the defendant was, the latter appropriated the bill in discharge of R.'s debt:—Held, that this was a conversion for which the defendant was liable in trover. *Id.*

In an action on the case for damage done to the plaintiff's cabriolet, against which the defendant's cart was driven, the defendant will be liable, although it should appear that the defendant's servant was not driving at the time of the accident, but had intrusted the reins to a stranger who was riding him, and who was not in the service of the defendant. *Booth v. Mister*, 7 C. & P. 66—Abinger. 1496

If a servant driving his master's cart, on his master's business, make a detour from the direct road for some purpose of his own, his master will be answerable in damages for any injury occasioned by his negligent driving while so out of the road. *Joel v. Morison*, 6 C. & P. 501—Parke. 1496

But if a servant take his master's cart without leave, at a time when it is not wanted for the purposes of business, and drive it about solely for his own purposes, the master will not be answerable for any injury he may do. *Id.*

A. ordered of B. two suits of livery a year for her coachman. B. supplied one suit of livery, and at the desire of the coachman supplied plain clothes instead of the other:—Held, that B. could only recover from A. the price of the livery actually supplied. B. had, on a previous bill delivered, been paid for a livery suit which he had furnished and immediately taken back from the coachman:—Held, that A. was entitled to be allowed the amount paid for this suit, on a plea of set-off for money had and received pleaded in an action for the amount of a subsequent account for clothes. B., who was a tailor, put lace, with the arms of A., his customer, wrought in it, on the livery suits he made for A. B. had the lace made in pieces of fifty yards each at a certain price, but when he made a livery suit, he charged A. with the quantity of lace used on that suit, but at a higher price per yard than he gave for it:—Held, that when A. ceased dealing with B., she was not bound to pay for any of this lace that B. then had in his hands. *Hunter v. Berk-*



eley (Countess Dowager), 7 C. & P. 413—Abinger. 1496

The provisions of 5 Geo. 4, c. 18, apply only to cases of penalties and forfeitures. *Wiles v. Cooper*, 5 Nev. & M. 276; 1 Har. & Woll. 560. 1497

Therefore magistrates have no power, under that stat., to commit a party to prison for the non-payment of a sum of money adjudged by them, under 20 Geo. 2, c. 19; 31 Geo. 2, c. 11; and 4 Geo. 4, c. 34, to be due as wages. *Id.*

In an information before magistrates, under 20 Geo. 2, c. 19; 31 Geo. 2, c. 11, and 4 Geo. 4, c. 34, for non payment of wages, it should appear that the relation of master and servant existed in one of the occupations therein specified between the debtor and the informant. *Id.*

### MINES.

In ejectment for a mine and land in Cornwall, the defendant cannot defend for a right of entry to dig for mines, and take the minerals known there by the name of "tin-bounds." *Doe d. Falmouth (Earl) v. Alderson*, 4 Dowl. P. C. 701; 1 Mees. & Wels. 210. 1498

A tenant agreed to work a coal mine so long as it was "fairly workable." There were coals in the mine, but of such a description that it would not pay to work it:—Held, that, under these circumstances, the tenant was not bound to work the mine, and that under the words "fairly workable," a tenant was not bound to work at a dead loss. *Jones v. Shears*, 7 C. & P. 346—Coleridge. 1498

A claim by an owner of a copper mine to sink pits on his own land, to fill such pits with iron, and to cover the same with water pumped from the mine, for the purpose of precipitating the copper contained in such water, and afterwards to let off the water impregnated with metallic substances into a water-course upon the land of another, is a claim to a water-course within the 2nd sect. of 2 & 3 Will. 4, c. 71. *Wright v. Williams*, 1 Mees. & Wels. 77. 1498

If a down be let, by an instrument not under seal, for the purpose of digging copper ore, an action for use and occupation may be maintained, if the defendant has ever taken possession; and if he has once taken possession, he is liable to all subsequent rent until the determination of the tenancy, whether he has continued to work the minerals or not; but if the defendant merely caused holes to be dug on the down, and had them filled up immediately, with a view merely to ascertain what sort of bargain he was about to make or had made, that would not be a taking of possession. *Jones v. Reynolds*, 7 C. & P. 335—Coleridge. 1498

### MISNOMER.

Quære, whether, since the 3 & 4 Will. 4, c. 42, s. 11, a defendant who has been arrested by a wrong christian name is entitled to be discharged

on motion? *Callum v. Leeson*, 2 C. & M. 406; 2 Dowl. P. C. 381; 4 Tyr. 266. 1502

Where a defendant was arrested by a wrong name, the affidavit to ground a motion that the bail-bond be delivered up to be cancelled must be intitled in the defendant's right name, "sued by the name of." *Finch v. Cocken*, 2 C. & M. 412; 2 Dowl. P. C. 383; 4 Tyr. 285. 1503

A defendant whose name was Cocken, was arrested upon a capias against him by the name of Cocker; he gave a bail-bond to the sheriff in the name of Cocken sued as Cocker; and the bail-bond being afterwards assigned to the plaintiff, he declared thereon against the defendant as Cocken sued by the name of Cocker. The defendant pleaded that no such writ as that stated in the declaration was issued against him. It was admitted that he was the real defendant. The plaintiff was nonsuited, but the court set aside the nonsuit, and ordered a verdict to be entered for the plaintiff, because, in point of fact, there was a writ against the defendant by the name of Cocker. *Finch v. Cocken*, 3 Dowl. P. C. 678; 2 C. M. & R. 196; 1 Gale, 130. 1502

Held, also, upon motion in arrest of judgment, that the declaration was bad, because a writ against Cocker did not authorize an arrest of Cocken, unless he was known as well by one name as the other, and there was no averment of that fact in the declaration; and that neither the 3 & 4 Will. 4, c. 42, s. 11, nor the rule of H. T. 2 Will. 4, s. 32, had made any alteration in the law in this respect. *Id.*

A copy of a writ of summons was served on a person by a wrong name:—Held, that he was not bound to make application to set it aside. *Hinton v. Stevens*, 1 Har. & Woll. 621. 1502

A notice of declaration, in which he was rightly named, was afterwards served:—Held, that he was bound to apply to a judge at chambers within four days. *Id.*

A sunday not being either the first or the last, is to be reckoned one of the four days. *Id.*

Since 3 & 4 Will. 4, c. 42, s. 11, a defendant arrested by a wrong christian name may be discharged on motion, if due diligence has not been used, according to Reg. 32 H. T. 2 Will. 4. *Ladbrook v. Phillips*, 1 Har. & Woll. 109. 1502

Inquiry of a partner of the defendant, who gave a wrong christian name, and at a banker's, where no information was obtained, was held sufficient. *Id.*

No advantage can be taken at the trial of a misnomer of the plaintiff, though there be a person of the name erroneously used. *Moody v. Aslatt*, 1 C. M. & R. 771; 5 Tyr. 492; 1 Gale, 47. 1504

It is a question of fact who is the real plaintiff. *Id.*

Plaintiff declared by the name of "W. M.," and the cause proceeded to issue in that name. It was sworn that the party intended as plaintiff was J. M., but there appeared to be a W. M., a



son of J., who was connected with the transaction in question. The court refused a rule to amend the proceedings by inserting the name of J. instead of W., observing, that if he, J. M., were really the person originally intended as plaintiff, the misnomer could not be taken advantage of at the trial. *Id.*

A defendant waives an objection of misnomer by taking out a judge's order, wherein he uses the name by which he was arrested. *Nathan v. Cohen*, 3 Dowl. P. C. 370. 1507

### MORTGAGE.

By agreement in writing, preliminary to an intended mortgage, the plaintiff undertook to advance the defendant a sum on the mortgage of certain named premises; the defendant was to deliver a complete abstract of title to the plaintiff's solicitor within a week after the date of the agreement, and to produce the title deeds necessary to verify the abstract, and deduce a marketable title within a month from such delivery. If the defendant did not do so at either period, the plaintiff was to have the option of considering the agreement void. It was then agreed that the defendant should forthwith pay the plaintiff all costs and charges incurred by him in investigating the title to the premises. Abstracts were delivered, but disclosed no title to some, and a defective title to other parts of the premises. The time for completing the title expired on 24th of September, 1831, but the negotiations went on till 14th of May, 1832; the defendant had repeated notice between those dates that the plaintiff's money was lying idle, but he tried to amend his title till the latter day, when it remained defective, and the bargain was broken off:—Held, that the original contract remained in force, and that its terms were not sufficiently comprehensive to enable the plaintiff to recover interest, or more than the costs of investigating the defendant's title. *Sweetland v. Smith*, 3 Tyr. 421. 1508

To trespass quare clausum fregit, by a mortgagor of a customary tenement, a justification under an entry by the mortgage trustee, who had by the mortgage deed no express power to sell on non-payment of the mortgage money, if the mortgagee requested him to do so, is not sufficient, unless it allege that such a request was made, and that the entry was for the purposes of the mortgage trusts, though there be also in the deed, a covenant by the plaintiff for the quiet enjoyment of the trustee, for that can only be intended to be in accordance with the trusts. *Watson v. Waltham*, 4 Nev. & M. 537; 2 Adol. & Ellis, 485; 1 Har. & Woll. 24. 1508

A power given to a trustee, in a mortgage deed, to sell, if the mortgagee requests, does not necessarily imply a right to enter upon the premises. *Id.*

A. gave an undertaking to pay C. 35l. upon the execution of a mortgage from S. to B. S. conveyed to B. the property intended to be the subject of the mortgages, by assigning it to him

in trust to sell it, and for B. to pay himself the sum advanced, and to pay 22l. to C. as part of his claim, and, after other payments, which were specified, to pay the surplus to S. C. was not only aware of this arrangement, but was at one time intended to have been a trustee under the deed of assignment:—Held, that this conveyance was a mortgage within the meaning of the undertaking, but that C. could not recover, in an action upon the undertaking, the 22l. mentioned in the deed, as he had allowed that to become a subject of the trusts. *Crook v. Beetham*, 7 C. & P. 761—Tindal. 1506

An equitable mortgage may be created by deposit of one title deed, where the other deeds are in the hands of the depositor's solicitors, but not as equitable mortgages. *Ex parte Chippendale*, 2 Mont. & Ayr. 209. 1506

Where an equitable security is given by the deposit of deeds, the plaintiff, on a bill brought to give effect to his security, is entitled to a decree for a sale. *Pain v. Smith*, 2 Mylne & K. 417. 1508

In the decree upon a bill by an equitable mortgagee, the equitable mortgagor will be allowed six months to redeem the deposited deeds. *Id.*

An equitable mortgage may be created of copyholds, by the mere deposit of the copy of court roll. It is therefore not sufficient for the protection of a purchaser or mortgagee of copyholds, that he should search the court rolls for incumbrances; he ought to require the vendor or mortgagor to produce an abstract of his title, and the copy of his administration to the copyhold premises; and if the latter document is forthcoming, its non-production must be reasonably accounted for. *Whitbread v. Boulnois*, 1 Y. & Col. 303. 1508

Where the creditors of a publican in London took from the latter a legal mortgage of copyhold premises as a security for an antecedent debt, and, at the time of taking this security, knew that the publican was indebted to his brewers, and likewise was aware of the ordinary practice in London of publicans depositing their leases with their brewers by way of mortgage:—Held, that the creditor had such notice of the transactions between his debtor and the brewers, as would have put a prudent man on further inquiry; and that, having omitted to make such further inquiry, the equitable security of the brewers had priority over his legal security. *Id.*

M. & Co. deposited with S. & Co., the mortgage deeds of certain colonial property, for securing a floating balance from M. & Co. to S. & Co., and afterwards executed an assignment of the mortgage debt, "in addition to the securities then already held by S. & Co.," but without making any actual assignment of the mortgage itself, or the mortgage property:—Held, that S. & Co. continued nevertheless the equitable mortgagees of the mortgaged property. *Ex parte Smith*, 2 Deac. & Chit. 271. 1508

An equitable mortgagee will not be preferred to a subsequent legal mortgagee, who has no notice of the equitable mortgagee; and the onus lies upon the former, claiming a priority, to prove



that the latter had such notice. *Ex parte Hardy*, 2 Deac. & Chit. 393. 1509

A., having mortgaged to B., demises to C., reserving a power of re-entry, and afterwards mortgages to D. all his interest. C. may set up the title of D. as an answer to an ejectment brought by A. under the clause for re-entry. *Doe d. Marriott v. Edwards*, 3 Nev. & M. 193; 5 B. & Adol. 1065. 1511

The declaration stated, that, by a certain indenture of mortgage, it was witnessed, that, in consideration of the sum of 1400*l.* then due to the plaintiffs from the defendants, the latter conveyed certain premises to the former, subject to a proviso, that, if the defendants should pay or cause to be paid to the plaintiffs the said sum of 1400*l.* on the 19th of March, 1833, the plaintiffs should reconvey the premises to the defendants; and the defendants covenanted that they would pay to the plaintiffs the said sum of 1400*l.* at the time and in manner thereinbefore appointed for payment of the same: breach, non-payment of the 1400*l.*, and interest, at the time and in the manner in the said indenture appointed for payment of the same:—Held, a sufficient allegation of the day of payment; and that the claim for interest in the breach, none being reserved by the indenture, did not vitiate the declaration, but might be struck out. *Tildasley v. Stephenson*, 4 M. & Scott, 442; 10 Bing. 545. 1512

#### NAVIGATION.

A river navigation act directed that the salary of the clerk to the commissioners should be paid by the proprietors of the tolls. A person seised in fee of a part of the navigation and tolls, granted annuities, and conveyed her part of the tolls, &c. to a trustee to secure the annuities, and to permit her to hold the conveyed premises and the profits thereof to her own use till default in payment of such annuities. By a subsequent deed she conveyed the premises in fee to Y., together with other property, in trust to sell as in the deed was directed, and to receive the proceeds of such sale, and the tolls and profits of the navigation, and out of the several receipts and profits to defray the costs and expenses necessary for carrying the trusts into effect, to pay up, and if possible discharge the annuities, to pay off certain creditors, and to hold the surplus, if any, for her benefit. The trustees under the last-mentioned deed entered into receipt of the tolls, appointed a collector, and represented himself to the commissioner as a mortgagee of the tolls, and as having a control over them, and over the repairs of the navigation, but refused to pay the salary of the clerk. The annuities were still subsisting. The clerk sued the trustee for non-payment of his salary:—Held, that it lay upon the trustee, having conducted himself as above stated, to show that he was not a proprietor within the meaning of the act:—Held, further, on reference to the several deeds, that he was such proprietor, although he only held the tolls in trust to pay creditors and discharge incumbrances, and although there was a legal estate outstanding in a trustee to secure the annuities. *Tibbits v. Yorke*, 5 B. & Adol. 605. 1513

The act passed in 1794 required, that certain notices should be given in the Northampton and Cambridge newspapers. There was at that time one newspaper published at each place. A newspaper was subsequently established, called the *Huntingdon, Bedford, and Peterborough Gazette*, and Cambridge and Hertford Independent Press, and it was published (among other places) at Cambridge:—Held, that publication of the notices in the former papers was sufficient. *Id.*

The plaintiff claimed a right to use a navigation, in respect of his occupation of a close abutting on the stream. It appeared that this close had formed a part of the King's Head Inn, until five years before the action was brought, when it was detached, and all the acts of the user of the navigation which were proved, were exercised by the occupiers of the King's Head Inn, before the property was divided:—Held, that there was no evidence to support the plaintiff's right to a verdict, as on such evidence a grant could only be presumed to the occupiers of the inn. *Bower v. Hill*, 2 Scott, 535; 1 Hodges, 334. 1514

Where a canal act gave to the proprietors of a navigation a power of making a canal, and of using the waters of a river for supplying it, but provided at the same time for securing to the owners of certain works the use of the surplus waters of that river. The making of the canal ascertained and fixed the rights of the parties, and the canal proprietors had no right afterwards to enlarge the canal, and draw a much larger quantity from the river, so as injuriously to affect the works in question. A declaration charging it to have been the duty of the canal proprietors to abstain from thus enlarging their canal, and alleging a breach of that duty sets forth a sufficient cause of action against them. *Glamorgan Canal Company v. Blakemore*, 1 Clark & Fin. 263; 5 Bligh, N. S. 547. 1514

A clause in a second act of parliament relating to the same canal, declared that the works thereby authorized should be completed within two years from the time of its passing, and that the money to be raised by it should not be applied to defray the expenses of any of the works not made within that time:—Held, that this clause not only limited the application of the money to the works completed within that time, but that no works should be carried on adversely to the interests of individuals, after the expiration of two years. *Id.*

A declaration framed on such a clause, and alleging for breach that works were so adversely carried on after the expiration of the two years, was held to contain a sufficient legal statement of a cause of action. *Id.*

The Swansea canal act, 34 Geo. 3, c. 109, gives the company tolls for all goods carried along the canal, which tolls, if not paid upon demand, they are empowered to recover by action; or they may seize the goods or other things in respect whereof such rates ought to have been paid, and the boat or other vessel laden therewith, and detain the same until payment of such rates, and all arrears due from the owner of the boats; and if such goods are not redeemed with-



in seven days after the taking thereof, the same are to be appraised and sold as in case of a distress:—Held, that this clause does not empower the company to sell the boats:—Held, also, that their right to seize is confined to the limits of the canal; and that, therefore, they are not authorized to seize goods after they have been landed. *Fraser v. Swansea Canal Comp.* 3 Nev. & M. 391. 1516

A canal company were authorized, by statute, to demand and sue for certain tolls upon the carriage of goods, in respect of which any such tolls ought to be paid, and to detain the same until payment made of such tolls, and of all arrears of the same then due from the owner of such carriage or goods; and in case such distress should not be redeemed within five days, to appraise and sell the same, as in a case of a distress for rent; they were not expressly authorized to levy any toll upon carriages:—Held, that teams could not be distrained for arrears of tolls due from the owners for goods carried in them, if they were not carrying goods of such owners at the time of his distress. *Jenkins v. Cooke*, 1 Adol. & Ellis, 372. 1516

The statute enacted, that any action, brought for any thing done in pursuance of the act, or in execution of the powers and authorities granted by it, should be brought within six calendar months next after the fact committed:—Held, first, that such a distress was a thing done in pursuance of the act. But, held, secondly, that where an owner of teams let them to a third person, and during such letting they were illegally distrained for arrears due from the person hiring, while not carrying such person's goods, and afterwards sold, such owner might sue within six months from the time of sale, on a count complaining of injury done to his reversionary interest by the seizure and sale. *Id.*

Under a local act, proprietors of lands were authorized to "contract for, sell, and convey" their lands to a canal company; such "contracts, agreements, sales, exchanges, conveyances, and assurances" were to be valid to all intents and purposes; were to be inrolled with the clerk of the peace, and copies thereof to be evidence; and upon payment of the sum agreed on for the purchase of lands, such lands were to be vested in the canal company:—Held, that a conveyance of land under this act must be in writing. *Doe d. Robins v. Warwick Canal Company*, 2 Bing. N. R. 483. 1516

By a canal act, a company of proprietors were restricted from any alterations of the canal after the expiration of two years. By the same act, a proprietor of a mill near the lower part of the canal, was entitled to all the surplus water of it:—Held, that the erection of a steam-engine after the two years, to pump water into the upper part of the canal, by which the carrying power of the canal was increased, and the surplus water diminished by the enlarged trade, was an injury to the mill-owner, for which he was entitled to damages. *Blakemore v. Glamorgan Canal Company*, 2 C. M. & R. 133; 1 Gale, 78. 1516

The statute directed that a mill-owner should be entitled to receive the surplus water by a weir above a certain lock, which the company were bound to keep water tight:—Held, that it was to be inferred that the company should not have the right of passing any water through the lock, though necessary to the lower part of the canal, except that which passed when barges were lowered through the lock. *Id.*

#### NEW TRIAL.

*In what Cases.*—The rule which forbids a motion for a new trial where the amount is under 20*l.*, except for misdirection of the judge, does not apply to trials before the sheriff, under the 3 & 4 Will. 4, c. 42, s. 17. *Edwards v. Dignam*, 2 Dowl. P. C. 642. 1519

In a cause decided by the judge of an inferior court on a writ of trial, this court will hear a motion for a new trial, on the ground that the verdict was against evidence, though the damages were below 20*l.* *Taylor v. Helps*, 5 B. & Adol. 1068. 1519

It seems that issues tried before the sheriff are within the rule adopted by the courts where the verdict is for less than 20*l.* *Henning v. Samuel*, 2 Dowl. P. C. 766. 1519

In the case of a writ of trial, no new trial will be granted on the ground of the verdict being against evidence, when the verdict is for less than 5*l.* *Packham v. Newman*, 1 C. M. & R. 585; 5 Tyr. 215. 1519

Where a new trial from the sheriff's court has been granted at the instance of the plaintiff, who afterwards neglected to re-try the cause, the defendant must take down the record by proviso. *Corone v. Garment*, 1 Hodges, 74. 1520

An inferior court cannot grant a new trial, except on the ground of fraud, or irregularity in obtaining the verdict. *Rex v. Oxford (Mayor)*, 3 Nev. & M. 877. 1520

*For what Cause.*—Where in trespass for a forcible entry into a mansion-house under color of making a distress for rent, and remaining there for three or four days, the defence was lib. ten., and a justification under a distress for rent, to enforce a claim to the property, for which there was not the slightest foundation, and the jury gave 1000*l.* damages, the court refused to grant a new trial on the ground of excessive damages. *Bland v. Bland*, 1 Har. & Woll. 167. 1521

No new trial will be granted merely for the purpose of reducing the amount of damages in an action on a bill of exchange. *Seally v. Powis*, 1 Har. & Woll. 2. 1521

3500*l.* having been awarded by a jury as damages, in an action against an attorney for breach of promise of marriage, the court refused to set aside the verdict on the ground that the damages were excessive. *Wood v. Hurd*, 2 Bing. N. R. 166. 1521

The absence of a witness is no ground for a



new trial: application ought to be made to postpone the trial. *Edwards v. Dignam*, 2 Dowl. P. C. 642. 1522

If a witness who is necessary to the plaintiff's case is not sent for in time, owing to the fraudulent management of the defendant's attorney in negotiating, till too late for the plaintiff to procure his presence at the assizes, the plaintiff should apply to a judge at nisi prius to put off the trial, and if refused, should withdraw the record; but he must not take his chance of success, for, if unsuited, the court will not grant a new trial. *Tarquand v. Dawson*, 1 C. M. & R. 709; 5 Tyr. 488. 1522

A rule for a new trial will not be granted on affidavits alleging that a material witness has been prevented from attending the trial, without showing grounds for a belief that the successful party is implicated in such misconduct; and it will not suffice to state merely a belief that the witness has been kept away at his instance. *Marsh v. Monckton*, 1 Tyr. & G. 34. 1522

Where a plaintiff had been nonsuited on the ground of a non-production of a bill of exchange, the court granted a new trial, upon an affidavit stating that the bill had been out of the jurisdiction of the court; had been sent for in due time, but not received until too late for the trial; and that it was then in the plaintiff's possession. *Atkins v. Owen*, 4 Nev. & M. 123. 1522

Where evidence is rejected which is tendered for one purpose, and it is inadmissible for that purpose, but is admissible in another view of the case not alluded to at the trial; the court will not grant a new trial as upon an improper rejection of evidence. *Rex v. Grant*, 3 Nev. & M. 106; 5 B. & Adol. 1081. 1524

An affidavit to contradict the statement of a judge as to what occurred at the trial before him is inadmissible. *Id.*

Seemingly, where a number of facts, which singly may be ambiguous, amount collectively to an unequivocal proof of a fact, e. g. the surrender of a term, a judge is not bound to submit them formally to a jury, unless the counsel expressly desires it. *Reeve v. Bird*, 1 C. M. & R. 31; 4 Tyr. 612. 1524

It is no ground for a new trial for misdirection, that the judge expresses a strong opinion upon the facts either way; the whole being left to the discretion of the jury, where the question is one peculiarly for their consideration. *Belcher v. Prittie*, 4 M. & Scott, 295; 10 Bing. 408. 1524

Where a jury had not acted according to a misdirection, but had given damages, the court would not grant a new trial, on the ground of the misdirection. *Twigg v. Potts*, 1 C. M. & R. 89. 1524

Where the defendant permitted the examination of an incompetent witness for the plaintiff to proceed, on the plaintiff's attorney undertaking to produce a release after the trial, his refusing to do so is no ground for a new trial. *Hemming v. English*, 1 C. M. & R. 568; 3 Dowl. P. C. 155; 6 C. & P. 542; 5 Tyr. 185. 1524

Where evidence has been improperly rejected, the court will grant a new trial, unless with the addition of the rejected evidence a verdict given for the party offering it would be clearly and manifestly against the weight of evidence. *Crease v. Barrett*, 1 C. M. & R. 919; 5 Tyr. 458. 1524

When a judge at nisi prius offers to receive such of a certain set of documents as are evidence of reputation, having rejected others that stated particular facts only, a new trial will not be granted if one of the latter kind is afterwards put in, and his attention be not called to its contents by objection made. *Id.*

Where evidence is rejected improperly, a new trial will be granted, unless it is quite clear that had the rejected evidence been admitted, a verdict founded upon it, as well as on the rest of the proofs on the same side, would have been clearly and manifestly against the weight of evidence, and certainly set aside on motion as an improper verdict. *Id.*

In trespass, *quare clausum fregit*, on a plea of a right over the locus in quo, a witness for the plaintiff, in cross-examination, spoke of the exercise of the same right by other persons besides the defendant; on his re-examination he gave evidence of the exercise of the right over places other than the locus in quo, and the jury found for the plaintiff:—Held, that the improper reception of this evidence was no ground for a new trial on the part of the defendant; the judge ought to have requested to expunge it from his notes at the trial. *Blewitt v. Tregonning*, 1 Har. & Woll. 432. 1524

Where in trespass there is a plea of prescription, and several pleas claiming under non-existing grants from different persons, and the evidence is usage, without showing any time at which such usage commenced, it is no misdirection to tell the jury there is no evidence on the pleas of non-existing grants. *Id.*

In trespass *quare clausum fregit*, there was a plea claiming a right by custom, and another by prescription, and several others by non-existing grants, the judge called the attention of the jury to the nature of the mode of claim, and told them that in order to support the prescription exclusive enjoyment was necessary:—Held, that it was no misdirection, as the expression "exclusive," was used to point their attention to the different nature of the claim by custom as a public right, and by prescription as a private right. *Id.*

It is no ground for a new trial that the judge, in his summing up, omits specially to leave to the jury a point made in the course of the trial, if the whole case was substantially left to them. *Robinson v. Gleadow*, 2 Scott, 250; 1 Hodges, 245; 2 Bing. N. R. 156. 1524

The alleged immateriality of evidence improperly admitted, is not a ground for refusing a new trial unless the court can see that the evidence did not weigh with the jury in forming their opinion, or that an opposite verdict given upon the remainder of the evidence must have been set aside as against evidence. *De Rutzen v. Farr*, 5 Nev. & M. 617. 1524



Where evidence tendered at the trial of a cause is formally objected to, and received, and the party by whom the evidence is tendered obtain a verdict, the court will, upon the application of the opposite party, grant a new trial, if the evidence appears to have been inadmissible, without entering into any inquiry as to the materiality of such evidence. *Doe d. Tatham v. Wright*, 6 Nev. & M. 132. 1524

Where the judge who tried the issue stated that he was not dissatisfied with the verdict, though he should have found otherwise had he been himself upon the jury, the court would not direct a new trial of the issue, if the application for a new trial rested solely upon the ground that the verdict was against the weight of evidence. *Gibbs v. Hooper*, 2 Mylne & K. 353. 1525

Where the jury find a verdict in opposition to the evidence of a witness, and the credibility of the witness is left to the jury, the court will not grant a new trial, though there was nothing to impeach the credit of the witness. *Lacey v. Forrester*, 3 Dowl. P. C. 668. 1525

In trespass for shooting a dog, the only witness called to prove the value stated it to be 2*l.* 10*s.*, and that was not contradicted; yet the jury found a verdict for 90*s.* The court refused to interfere either by increasing the damages or by granting a new trial. *Cann v. Facey*, 1 Har. & Woll. 482; 5 Nev. & M. 405. 1525

A new trial will be ordered after a verdict for the defendant, if the jury find their verdict against all the evidence in a cause on a misapprehension of the law, whether arising from their own mistake, or the misdirection of a judge. *Gregory v. Tuffa*, 1 C. M. & R. 300; 2 Dowl. P. C. 711; 4 Tyr. 830. 1525

Where, in an action for penalties for keeping an unlicensed house for music and dancing, &c., the evidence for the plaintiff was clear and positive, and might, if it was false, have been answered by evidence on the other side, the jury requested to have the act of parliament handed up to them, with which they retired to consider their verdict, and found in favor of the defendant. The court, under these circumstances, granted a rule for a new trial, considering that the jury must have put a misconstruction upon the act, and that it was equivalent, therefore, to a misdirection, on which ground alone a new trial, in such an action is usually granted. *Id.*

Where, in consequence of the affirmative of the issue being on the defendant, and his beginning, the jury made a mistake, and found a verdict for the defendant, when they intended to find for the plaintiff, the court refused to grant a new trial. *Bridgewood v. Wynn*, 1 Har. & Woll. 574. 1527

Where a verdict by consent was taken against a defendant, who was present in court, against his express instructions and directions, given privately in court to his counsel, but he did not openly assent or communicate his refusal to the other side, the court refused to interfere. *Wright v. Soreaby*, 2 C. & M. 671; 4 Tyr. 434. 1527

Where two issues were raised by the pleadings,

and the jury found upon both, but the judge before whom the cause was tried discharged the jury upon the second issue, upon misapprehension that the verdict upon one issue rendered the other issues immaterial, the court held that the proper course was not to move for a new trial, but to apply to a judge to have the verdict corrected according to his notes. *Hes v. Turner*, 3 Dowl. P. C. 211. 1527

Where, upon showing cause against a rule for a nonsuit or new trial, it appears that the verdict has been entered for an amount not warranted by the evidence, the court will make the rule absolute, unless the parties consent that the damages shall be reduced. *Leeson v. Smith*, 4 Nev. & M. 304. 1527

Where, in an action, tried under a writ of trial upon a promissory note for two guineas, in which the requisites of the statute 17 Geo. 3, c. 30, had not been complied with, the under-sheriff directed the jury to find for the defendant, and the jury brought in the verdict, "We find that the money is due, but that there is an informality of the note;"—Held, that if the verdict were not so clear that it could be entered for the defendant, that it amounted to a perverse verdict, and a new trial was granted, although the sum was under 5*l.* *Owen v. Pugh*, 1 Tyr. & G. 26. 1527

In an action by the indorsee against the indorser of a note, made specially payable at a particular place, where the allegation of presentment was taken on account of the variance at the trial:—Held, that it was no ground for a new trial. *Trinder v. Smedley*, 1 Har. & Woll. 164. 1528

Where the issue was delivered with notice of trial indorsed for one day, and a separate notice for another, and the defendant, acting on the notice on the back of the issue, did not attend at the trial on the day mentioned in the separate notice, the court granted a new trial, without costs. *Kerry v. Reynolds*, 4 Dowl. P. C. 234. 1528

If a judge at nisi prius decides erroneously as to the right to begin, the court will not on this account (at least without other reasons) grant a new trial. *Bird v. Higginson*, 2 Adol. & Ellis, 160. 1529

At the assizes in Yorkshire, the causes are entered by the marshal in two lists, one for the E. R. and the other for the W. R. A cause having by mistake been entered in the wrong list, was tried as an undefended cause, the defendant's attorney having searched only one list, without finding it; the court granted a new trial, and held, that the attorney was not bound to search both lists. *Hunter v. Hornblower*, 3 Dowl. P. C. 491. 1529

The court will not grant a new trial upon an affidavit by the defendant, stating that he was kept in ignorance by his late attorney of the state of the action; that he had a good defence upon the merits, and that the verdict passed against him by reason of the negligence of such late attorney. *Moody v. Dick*, 4 Nev. & M. 348. 1529

Seemle, that the defendant's remedy is by action against the attorney for negligence. *Id.*

Where a plaintiff gave notice that he should



take the cause down to trial as an undefended cause, and when it was called on the defendant's counsel said it was defended, whereupon it was not tried; but the plaintiff again took the record down and got the cause tried as undefended, without any new notice or setting it down in the paper, the court granted a new trial, without payment of costs. *Sprigge v. Rutherford*, 2 Dowl. P. C. 429. 1529

Where a cause which stood thirty off was taken out of its turn, as undefended, in the absence of the defendant's attorney, who was casually absent, no notice having been given that it would be taken as an undefended cause, the court set the verdict aside, and granted a new trial, the costs to abide the event. *Aust v. Fenwick*, 2 Dowl. P. C. 246. 1529

Where a verdict was obtained in the absence of the defendant, on account of no notice of trial being given, the court set aside the verdict, though the defendant did not swear positively to a good defence on the merits. *Williams v. Williams*, 2 Dowl. P. C. 350. 1529

Upon the trial of an issue in an action of debt on bond, before the sheriff, under the Writ of Trial Act, a variance appeared between the bond as stated in the declaration and the bond produced in evidence, the penalty in one being 260*l.*, and the penalty in the other 200*l.*: but the sheriff refused to nonsuit, and the plaintiff obtained a verdict; the court, however, refused a rule for a new trial, on the ground of the variance, though no amendment had been made, nor the facts found specially, as directed by the 24th section. *Hill v. Salter*, 1 Dowl. P. C. 380. 1529

Where upon the trial of an issue to try whether there was a good petitioning creditor's debt, the bankrupt took an objection to the constitution of the debt, which he never alledged in his petition, to supersede the commission, and the jury found a verdict against the petitioning creditor, the court of Review granted a new trial, on the ground of surprise. *Ex parte Christie*, 2 Deac. & Chit. 461. 1529

*On what Terms.*—Where a rule nisi for a new trial is granted, on the terms of bringing the amount of the verdict into court, the money must be brought in before the rule nisi is drawn up. *Clare v. Fiessel*, 2 Dowl. P. C. 617. 1530

The court will not make the payment of the costs of the day a condition precedent to the plaintiff's proceeding to a second trial. *Doe d. Evans v. Edwards*, 2 Dowl. P. C. 572. 1530

*Motions for generally.*—The court refused to allow affidavits to be used on showing cause against a rule for a new trial, where the rule had been moved for on the report alone, without any affidavits. *Doe d. Johnson v. Baytup*, 1 Har. & Woll. 270. 1530

In the King's Bench, the court may look at the record on discussing a motion for a new trial, although the rule is not drawn up on reading it; therefore, the court may look at the record on an application to set aside an award made pursuant

to an order of nisi prius, although the rule is not drawn up on reading it. *Sherry v. Oke*, 3 Dowl. P. C. 349. 1530

Where a motion for a new trial is by accident delayed beyond the four days, notice ought to be given to the other side, otherwise the expense of intermediate proceedings will fall on the party delaying to move. *Lester v. Lazarus*, 4 Dowl. P. C. 444. 1530

Though by the 4 & 5 Will. 4, c. 62, s. 26, where a cause is tried in the Common Pleas at Lancaster, the motion for a new trial, &c. is directed to be made in any one of the courts at Westminster, yet the courts require it to be made in the court of which the judge who presided at the trial is a member. *Forster v. Jolliffe*, 1 Scott, 54. 1530

A motion for a new trial under 4 & 5 Will. 4, c. 62, s. 26, in an action brought in the Common Pleas at Lancaster, must be made in the court of which the judge who presided at the trial is a member. *Foster v. Jolly*, 1 C. M. & R. 703; 5 Tyr. 239. 1530

While a rule nisi was pending for a new trial, in an action for invading the plaintiff's patent, the defendant sued out a sci. fa. for the purpose of trying the same right, but the court would not defer the discussion of the rule until a decision on the sci. fa. should be obtained. *Haworth v. Harcastle*, 4 M. & Scott, 448; 10 Bing. 551; 2 Dowl. P. C. 802. 1532

*Writ of Trial.*—On the motion for a rule nisi for a new trial, of a cause tried before the sheriff or judge of an inferior court, under the 3 & 4 Will. 4, c. 42, s. 17, the court require that the notes of the under-sheriff or judge should be produced, together with an affidavit verifying them, or that it should be sworn that an application has been made for them, with a statement of the reasons why they are refused, so that the omission to produce them may be accounted for. *Hall v. Middletown*, 4 Nev. & M. 368; 1 Har. & Woll. 7; *S. P. Mansfield v. Brearey*, 1 Adol. & Ellis, 347; *Burney v. Mawson*, 1 Adol. & Ellis, 248, n. 1532

The proper course is to have the notes of the presiding officer verified by affidavit, without affidavits of the facts. *Grainge v. Shoppee*, 2 Dowl. P. C. 645; 4 Tyr. 1000. 1532

Motions for new trials under the Writ of Trial Act can only be made on an affidavit of the facts; or on the under-sheriff's notes, verified by affidavit; and the court will not pay the same regard to the notice of the under-sheriff as they do to a judge's notes of a trial. *Johnson v. Wells*, 2 Dowl. P. C. 352; 2 C. & M. 428; 4 Tyr. 270. 1532

Where a motion for a new trial of a cause tried before the under-sheriff, under the 3 & 4 Will. 4, c. 42, was made on the notes of the under-sheriff, certified under his seal only, and not verified by affidavit, the court discharged the rule. *Id.*

On a motion for a rule nisi to set aside the verdict found on a trial before the sheriff on a writ of trial, the court, under special circumstances,



will not require the production of the sheriff's notes, if the motion be made by counsel engaged at the trial. *Barnet v. Glossopp*, 3 Dowl. P. C. 625. 1532

If an under-sheriff refuses to transmit his notes taken on the trial of an issue, the court will compel him to pay the costs consequent on his refusal. *Metcalf v. Parry*, 2 Dowl. P. C. 589. 1532

If an under-sheriff withholds his notes taken on a writ of trial after the court has required their production, he may be compelled to pay the expenses caused to the parties by their non-production; but he is not answerable for his agent's conduct in withholding them, unless it is shown that the latter acted under his direction. *Metcalf v. Parry*, 3 Dowl. P. C. 93. 1532

If a sheriff, before whom a trial takes place under 3 & 4 Will. 4, c. 42, s. 17, does not, after promising to do so, send his notes of the trial within the time proper for moving for a new trial, the court will enlarge the time for moving, and permit the facts proved at the trial to be laid before it on affidavit. *Thomas v. Edwards*, 2 Dowl. P. C. 664; 1 C. M. & R. 382; 4 Tyr. 835. 1532

On moving to set aside a verdict on a trial before the under-sheriff, on an objection founded upon the pleadings, it is not necessary to have an affidavit of the pleadings, as the *postea* is supposed to be in court. *Milligan v. Thomas*, 4 Dowl. P. C. 373; 2 C. M. & R. 756; 1 Tyr. & G. 134; 1 Gale, 320. 1532

Where a rule for a new trial is moved for on the under-sheriff's notes, on the ground of the absence of evidence to warrant the verdict of the jury, it is not competent for the other party to use affidavits. *Jones v. Howell*, 4 Dowl. P. C. 176. 1532

Upon trials before the sheriff, neither party is entitled to the sheriff's notes for the purpose of making a motion for a new trial. *Vickers v. Cocks*, 3 Dowl. P. C. 492. 1532

A motion for a new trial must in all cases be made within the four days, even though the case may have been tried before the sheriff in a distant county. If the four days are insufficient, a special application must be made to the court for further time. *Wheeler v. Whitmore*, 4 Dowl. P. C. 235; *S. P. Muppin v. Gillatt*, 4 Dowl. P. C. 190. 1532

In a case tried before the sheriff, the court refused to allow a motion for a new trial after the fourth day of the term, though the sheriff's notes had not been received until the fifth day, when the motion was made. *Anon.* 1 Har. & Woll. 146. 1532

The affidavit verifying the sheriff's notes, on a trial had under a writ of trial, pursuant to 3 & 4 Will. 4, c. 72, s. 17, need only state that the paper annexed contains the notes sent by the sheriff to the court. *Hellings v. Stevens*, 4 Tyr. 1001. 1532

Upon moving for a new trial of an inquiry of damages under a judgment upon demurrer, it is sufficient to produce the under-sheriff's notes

verified by affidavit. *Stephens v. Pell*, 2 Dowl. P. C. 629. 1532

# OFFICER.

Public officers. *Smith v. Latham*, 1 C. & M. 547; 3 M. & Scott, 251; 3 Tyr. 509; 9 Bing. 692. 1534

In order to maintain an action against the commissioners of the police, for money detained by an officer after the trial of a prisoner, it must be distinctly shown that it was accounted for by the officer to the commissioners. *Green v. Rowan*, 7 C. & P. 48—Gurney. 1534

To justify a constable in apprehending a party without warrant for an affray, it is essential that the party should have been engaged in the affray, and that the constable should have view of the affray while the party was so engaged in it, and that the affray was still continuing at the time of the apprehension. *Cook v. Nethercote*, 6 C. & P. 741—Alderson. 1541

A constable cannot execute the warrant of a judge of the King's Bench, directed to "all constables, &c.," and not addressed to him by name, in any other district than his own; for stat. 5 Geo. 4, c. 18, s. 6, by which the constable of every parish, &c. may execute any warrant of any justice, &c., within any parish, &c., situate within the jurisdiction for which the justice shall have acted in granting it, though not directed to him by name, and notwithstanding the parish in which such warrant is executed is not that for which he shall be constable, is confined to warrants issued by such justices of peace as have only a limited jurisdiction. In trespass against a constable for assaulting and falsely imprisoning the plaintiff, a plea, justifying the arrest under a judge's warrant, not directed to the defendant by name, is bad, if it does not state the arrest to have taken place within the defendant's own jurisdiction. *Gladwell v. Blake*, 1 C. M. & R. 636; 5 Tyr. 186. 1542

If a constable execute a warrant of a judge of K. B., not directed to him by name, out of his own district, and is sued in trespass, no demand need be made of perusal and copy of the warrant under 24 Geo. 2, c. 44, s. 6. Id.

A fine of 300*l.* for not serving an office, is excessive, where the highest previous fine was 100*l.*, and was found sufficient to produce an acceptance of the office. *Rex v. Mosley*, 5 Nev. & M. 261. 1540

So, although since the last refusal, the office has become more burthensome, and the number of persons qualified to serve has much diminished. Id.

A man may be liable to serve the office of constable in several constablewicks; but, if chosen constable in two constablewicks for the same year, acceptance of the first appointment will excuse his non-acceptance of the second, *semble*. Id.

A person who occupies and is rated for a warehouse, and occupies lodgings, in which he sleeps four or five nights in every week, within the same



constablewick, is liable to be chosen constable of such constablewick, scilicet. *Id*

A judge has no power under 3 & 4 Will. 4, c. 42, s. 32, to certify to deprive a police officer of his costs who is a defendant in an action and obtains a verdict, as that statute does not repeal s. 41 of the Police Act, 10 Geo. 4, c. 44, which gives police officers their costs as between attorney and client absolutely. *Humphrey v. Woodhouse*, 1 Scott, 396; 3 Dowl. P. C. 416; 1 Bing. N. R. 506; 1 Hodges, 64. 1543

It is unnecessary to demand perusal and copy of a warrant in a case where there is no remedy against the magistrates. *Cotton v. Kadwell*, 2 Nev. & M. 399. 1543

### OUTLAWRY.

By 2 Will. 4, c. 30, s. 5, upon the return of non est inventus as to any defendant against whom a writ of capias shall have been issued, and also upon the return of non est inventus and nulla bona as to any defendant against whom such writ of capias or distringas shall have issued, whether such writ of capias or distringas shall have issued against such defendant only, or against such defendant and any other person or persons, it shall be lawful, until otherwise provided for, to proceed to outlaw or waive such defendant by writs of *exigi facias* and proclamation, and otherwise, in such and the same manner as may now be lawfully done upon the return of non est inventus to a pluries writ of capias ad respondendum issued after an original writ: provided always, that every such writ of exigent, proclamation, and other writ subsequent to the writ of capias or distringas, shall be made returnable on a day certain in term; and every such first writ of exigent and proclamation shall bear teste on the day of the return of the writ of capias or distringas, whether such writ be returned in term or in vacation; and every subsequent writ of exigent and proclamation shall bear teste on the day of the return of the next preceding writ; and no such writ of capias or distringas, shall be sufficient for the purpose of outlawry or waiver if the same be returned within less than fifteen days after the delivery thereof to the sheriff or other officer to whom the same shall be directed. 1545

By s. 6, after judgment given in any action commenced by writ of summons or capias under the authority of that statute, proceedings to outlawry or waiver may be had and taken, and judgment of outlawry or waiver given, in such manner and in such cases as may be now lawfully done after judgment in an action commenced by original writ: provided always, that every outlawry or waiver had under the authority of that statute shall and may be vacated or set aside by writ of error or motion in like manner as outlawry or waiver founded on an original writ may now be vacated or set aside.

By s. 7, for the purpose of proceeding to outlawry and waiver upon such writs of capias or distringas returnable in the court of Exchequer, it shall and may be lawful for the Lord Chief Baron of the said court, and he is required, to appoint from time to time a fit person, holding some other

office in the said court, to execute the duties of a *placer, exigenter, and clerk of the outlawries in the same court.*

In proceeding to outlawry since the Uniformity of Process Act, it is not necessary that the capias should issue into the county in which the defendant is described as resident. *Morris v. Davis*, 1 Har. & Woll 513. 1545

The debtor's going abroad after an arrest for debt is reasonable cause for the creditors proceeding to outlawry, notwithstanding the creditor may know that the debtor has an agent in England. *Drummond v. Pigon*, 2 Bing. N. R. 114. 1545

Where a plaintiff, knowing the defendant to be abroad, and that he had an attorney in this country, secretly procured a return of non est inventus to a writ of capias, and proceeded then to outlaw the defendant, the court ordered the outlawry to be reversed, with costs. *Pigon v. Drummond*, 1 Scott, 264; 1 Bing. N. R. 354. 1545

Where a defendant moved to set aside proceedings to outlawry for irregularity, the last of the proclamations being in August, and the motion being made at the commencement of Michaelmas term:—Held, too late, it not appearing that the defendant was not apprized of the first commencement of the proceedings, but, on the contrary, there being reason to believe that he was; the onus lying on the defendant to show that he was ignorant of the proceedings. *Anderdon v. Alexander*, 2 Dowl. P. C. 267. 1545

On a motion to set aside proceedings to outlawry, on the ground that the writ of capias varied from the form given by the Uniformity of Process Act, it appeared that the writ was sued out by the plaintiff in person, and that the indorsement on the writ was—"This writ was issued by C. L., of No. 6, Berner's-street, Brunswick-square, the plaintiff within named, in person;" the form given by the act being "who resides at," &c. The writ was filed on the 4th of June, and might have been seen by the defendant at any time afterwards in the office:—Held, that it was too late in M. T. to take advantage of the objection, even if it were maintainable, though it was positively sworn that the plaintiff never knew of the outlawry till six weeks before. *Lewis v. Davison*, 1 C. M. & R. 655; 3 Dowl. P. C. 272; 5 Tyr. 198. 1545

Held, also, that it was a mere irregularity in the writ, and that the objection ought to have been taken by summons at chambers. *Id.*

In this case the writ was issued on the 17th of April, and was returned non est inventus on the 4th of June, the practice being that it could not be returned within four months, except under a judge's order:—Held, that it was no objection to the writ that it was returned before the four months expired, as it was not necessary to state the judge's order in the writ, and that it must be assumed it was done correctly. *Id.*

Held, also, that the exigent is not a writ within the meaning of the 12th section of the Uniformity of Process Act. *Id.*

The writ of exigent directed the proclamations



to be made at the parish church of the parish in which the defendant resided:—Held, that it was sufficient, it not appearing from any affidavit that there was any nearer church or chapel; and that, at all events, it was not necessary to mention that in the exigent. *Id.*

A party outlawed on civil process after judgment, and on his petition subsequently made to the Insolvent Debtors' court, adjudged to be discharged, is not entitled to a reversal of the outlawry, though the debt on which the outlaw is founded be included in his schedule. *Dickson v. Baker*, 3 Nev. & M. 775; 2 Dowl. P. C. 517; 1 Adol. & Ellis, 853. 1546

Seemingly, the court will make a conditional order for setting aside an outlawry, in order to prevent an insolvent from remaining in custody unnecessarily. *Nicholson v. Nichols*, 3 Dowl. P. C. 326. 1546

The mere fact of a *præcipe* not being found, is no ground for setting aside proceedings to outlawry: it is sworn that a *præcipe* was at one time left in the office. *Probert v. Rogers*, 3 Dowl. P. C. 170. 1546

Where a plaintiff proceeded against a defendant here and in America for the same cause of action, and the defendant was arrested in America, and took the benefit of the Insolvent Act there, the court would not, on that ground, set aside the proceedings to outlawry which had been taken here, but left the defendant to plead these facts, it being sworn that he went abroad to avoid his creditors. *Id.*

Rule for setting aside proceedings in outlawry will be discharged with costs, unless it appear that the application is made by an attorney authorized by defendant. *Houlditch v. Swinfen*, 2 Bing. N. R. 712. 1547

### PARLIAMENT.

In order to convict a person of an indictment for taking a false oath of a qualification to sit as member of parliament for a borough, the jury must be satisfied beyond all doubt that the property was not worth 300*l.* a year, and also that the defendant well knew that it was not of that value. *Rex v. De Beauvoir*, 7 C. & P. 17—Denman. 1548

In an action against an overseer for a penalty under section 76 of the Reform Act, 2 Will. 4, c. 45, for wilfully inserting in the list of voters the names of persons not entitled to vote, it is not essential that the defendant should have acted from any corrupt motive; it is sufficient if he has acted wilfully. *Tarr v. McGahey*, 7 C. & P. 380—Denman. 1548

A. was indicted under s. 58 of the Parliamentary Reform Act, 2 Will. 4, c. 45, for giving a false answer to the question, whether he had the same qualification to vote as that for which he was registered. A. had occupied a house at the time of the registration, for which he was on the register as a voter, but he had left it before the election, and the landlord's agent had, before the election, given the key of it to B., who had

put horses into the stable and beer into the cellar; but B.'s rent did not commence till after the election:—Held, that in the absence of evidence of the determination of the tenancy of A., the indictment could not be supported. *Rex v. Harris*, 7 C. & P. 253—Denman. 1548

Quære, whether, since the statute 4 & 5 Will. 4, c. 51, the keeper of an excise-office is an officer of excise within the meaning of the 7 & 8 Geo. 4, c. 53, s. 9, so as to be liable to the penalties imposed thereby on such officers for voting at elections for members of parliament. *Gooday v. Clark*, 2 C. M. & R. 273; 1 Gale, 177. 1548

Where, in an action for such penalties, the only evidence against the defendant was that he kept an inn, over the door of which was a board with the words "excise-office" painted on it; that his vote being objected to before the revising barrister in October, 1834, and his commission being called for, he had produced what the witnesses described as "something framed and glazed like a picture;" that he had received entries of buildings before the passing of the 4 & 5 Will. 4, c. 51, (August, 1834), but had since ceased to do so; and a witness stated that he had seen the defendant's commission, which was partly written and partly printed, and appointed him to collect duties of excise:—Held, that this was not evidence to go to the jury; that, on the 19th of January, 1835, when the defendant voted at the election, he was an officer of excise. *Id.*

This court will not grant a habeas corpus to enable a prisoner, in custody upon a conviction of misdemeanor, to vote at an election of a member of parliament. *In re Jones*, 4 Nev. & M. 340; 2 Adol. & Ellis, 436; 1 Har. & Woll. 7. 1548

An unfounded objection to a voter's name in the list, pursuant to the 2 Will. 4, c. 45, s. 47, by which he is prejudiced, having to attend the revising barrister, does not give such a legal or equitable claim for compensation for loss of time, &c. as will enable him to sue under the Westminster Court of Requests Act; and therefore, if the commissioners under it proceed on the claim, they may be restrained by prohibition. *Soames v. Rawlings*, 2 C. M. & R. 744; 4 Dowl. P. C. 501; 1 Tyr. & G. 46; 1 Gale, 299. 1548

To constitute the offence of bribery at an election, under 2 Geo. 2, c. 23, s. 7, by "corrupting a voter to give his vote" by giving him a bribe, it is not necessary that the voter should vote in accordance with the wishes of the person who gives the bribes. *Henslow v. Fawcett*, 4 Nev. & M. 585; 3 Adol. & Ellis, 51; 1 Har. & Woll. 125. 1549

The offence is complete, so far as the corrupter is concerned, by the act of giving the money, whether the voter have at the time of receiving it any intention of voting according to the bribe or not. *Id.*

A voter who agrees or contracts, for any money or other reward, to give or forbear to give his vote at an election, is liable to the penalties of 2 Geo. 2, c. 24, s. 7, though he never intended to perform the corrupt agreement. *Id.*



If a person who is not himself a candidate, and who is not known to the party who supplies refreshments to be an agent of a candidate, open a public-house at an election, and order supplies for the voters, he is personally liable to pay, and the Treating Act, 7 & 8 Will. 3, c. 4, will afford him no defence, if the goods were supplied entirely on his credit. *Thomas v. Harries*, 6 C. & P. 615—Parke. 1551

*Assumpsit* for the work and labor of the plaintiff as an attorney. Plea, as to all but 90*l.*, that the work and labor was performed by the plaintiff in endeavoring to secure the defendant's return to parliament, on two occasions, under an agreement, on the first occasion, that the plaintiff should receive no remuneration, but only his disbursements; and that no express contract was made between the plaintiff and defendant on the second occasion, and that 90*l.* was a fair remuneration for the plaintiff's services on that occasion:—Held bad, on special demurrer, as amounting to the general issue. *Jones v. Nanney*, 1 Mees. & Wels. 333. 1552

The court will not allow judgment to be entered up under 9 Geo. 4, c. 22, on the certificate of the Speaker of the House of Commons, for the costs of opposing an election petition, when it appears upon affidavit that the certificate was founded upon the report of a select committee for trying the merits of the petition, which was not duly appointed according to the provisions of that act. *Bruyeres v. Halcomb*, 5 Nev. & M. 149; 3 Adol. & Ellis, 381; 1 Har. & Woll. 410. 1552

Where a party, who has presented a petition to the House of Commons, complaining of an undue return, does not appear at the time appointed for taking the petition into consideration, or within an hour afterwards, a committee for the trial of the merits of the petition cannot be elected; but the petition should be discharged. *Id.*

Quære, as to the mode in which the Speaker's certificate for costs under 9 Geo. 4, c. 22, should refer to the report of the examiners appointed to tax those costs? *Id.*

The court will inquire into the propriety of the appointment of a select committee, when it is called upon to give effect to the Speaker's certificate, by allowing judgment entered up on it. *Id.*

The judges declined to answer a question proposed to them by the House of Lords, it being doubtful whether it was confined to the strict legal construction of existing statutes, or whether it did not also embrace that of a bill pending before the house. In *re London and Westminster (Bank)*, 1 Scott, 4. 1553

Where a person having privilege of Parliament, has been sued by bill and summons before the Uniformity of Process Act passed, and after the commencement of the action he loses his privilege, the process should be continued by distringas, treating him as an M. P., in order to avoid the statute of limitations. *Taylor v. Duncombe*, 2 Dowl. P. C. 401. 1553

## PARTNER.

*Contract.*—Where parties enter into a contract of partnership in violation of the law, it is void, and will confer no right on either party as against the other. *Armstrong v. Lewis* (in error), 2 C. & M. 274; 4 M. & Scott, 1. 1556

Where a personal office or employment is purchased with the partnership funds for the benefit of the partnership, the partner in whose name it is purchased is not necessarily a trustee of the profits for the other partners, after the term of the partnership has expired. *Clarke v. Richards*, 1 Y. & Col. 351. 1556

*Liability to others.*—A solvent partner may, after a secret act of bankruptcy committed by his co-partner, make the firm liable by accepting a bill for a previous liability. *Ex parte Robinson*, 1 Mont. & Ayr. 18. 1557

Quære, whether a partner can bind his co-partners by a parol submission to arbitration of a question of the legal liability of the partnership? *Boyd v. Emmerson*, 4 Nev. & M. 99; 2 Adol. & Ellis, 184. 1557

One partner has no implied authority to bind his co-partner to a submission to arbitration, respecting the matters of the partnership. *Adams v. Bankart*, 1 C. M. & R. 781; 5 Tyr. 425; 1 Gale, 48. 1557

One F., a partner in the plaintiff's house, transferred certain stock out of the defendant's name in the books of the bank of England, under a forged power of attorney, and without any authority from her, and caused the produce to be mixed with the money of the firm; F. having been convicted of another forgery, committed under similar circumstances, and executed:—Held, that the defendant might recover the amount in an action against the surviving partners for money had and received to her use. *Marsh v. Keating*, 1 Scott, 5. 1557

If a firm of three be dissolved by the retirement of one, and after the dissolution a creditor of the three draw on the three, and the two accept in the style of the three, the two are liable. *Ex parte Liddiard*, 2 Mont. & Ayr. 87. 1560

*Assumpsit* against two defendants, S. and M., for money had and received. Plea as to 25*l.*, parcel, &c., that, on, &c., the defendants were carrying on business in partnership, and employing many servants; that whilst they were such partners the plaintiff deposited with them as such partners the said sum of 25*l.*, as a security for his faithfully accounting for all monies received by him as their servant, to be repaid to him on quitting their employ; that they dissolved partnership, and it was thereupon agreed between them that the defendant, S., should take upon himself the payment of part of the debts, and retain in his employ certain of the servants; and that the defendant M. should take upon himself the payment of other debts, and retain in his employ others of the servants; and that in pursuance of such agreement, M. took upon himself the payment of 25*l.* to the plaintiff, and retained



the plaintiff in his sole employ: that the plaintiff had notices of all the premises, and assented to such agreement and retainer by M., and in consideration thereof discharged S. from his promise as to the 25<sup>th</sup>. Replication, that M. did not retain the plaintiff in his sole employ, nor did the plaintiff assent to such agreement and retainer, or discharge the defendant, &c., and issue thereon. After verdict for the defendant on this issue:—Held, that the plaintiff was entitled to judgment non obstante verdicto, on the ground that no contract was shown which made M. solely liable to the plaintiff. *Thomas v. Shillibeer*, 1 Mees. & Wels. 124. 1560

*Liability to each other.*—A. recovers against B., C., and D., partners in trade, upon their joint contract, and takes in execution B. only, who thereupon pays the whole sum recovered. B. cannot recover in a court of law against his co-defendants for contribution. His remedy is in equity, as in cases of a voluntary payment by one partner of a debt due from himself and his co-partners upon their joint contract. *Sadler v. Hickson or Nixon*, 2 Nev. & M. 258; 5 B. & Adol. 936. 1565

A. & B. entered into partnership to work a coal-mine, and the coal-mine being worked out, and the coal-pit being filled up, A. said he would join in no more coal-pits, and A. & B. agreed to divide the materials and utensils, each party taking one half in value, article by article, according to a valuation to be made; and, after the valuation had been made, B. agreed to take the whole at the valuation, and accordingly took possession thereof:—Held, that A. had an immediate right of action for a moiety of the value of the materials and utensils. *Jackson v. Stopherd*, 2 C. & M. 361; 4 Tyr. 330. 1565

Plaintiff agreed with defendant to convey by horse and cart the mail between N. and B., at 9<sup>th</sup> a mile per annum, and to pay his proportion of the expense of the cart, &c.; money received for the carriage of parcels to be divided between the parties, and the damage occasioned by loss of parcels, &c. to be borne in equal portions:—Held, that the agreement constituted a partnership, and not a mere measure of wages, and consequently, plaintiff could not sue defendant for the 9<sup>th</sup> per mile. *Green v. Beasley*, 2 Scott, 164; 2 Bing. N. R. 108; 1 Hodges, 199. 1565

A., at the suggestion of B., by letter, orders a cargo of timber of C. The invoice is made out in the name of A., and a bill of exchange is drawn by B. on A., for the amount of the freight, which is paid by A. In an action brought by C. against A. and B. for the price of the goods, it is competent to C. to show that A. and B. were jointly interested in the purchase. *Buppell v. Roberts*, 4 Nev. & M. 31. 1565

A. lends money to B. to enable him to commence a trade at 5 per cent. interest. After the loan, B. agrees to pay A. one-eighth of the annual profits, by monthly payments, which offer A. accepts, and B. accordingly makes several monthly payments, for which A. gives B. receipts on account:—Held, that the balance of the principal

and interest due from B. to A. was a good petitioning creditor's debt, not arising out of a partnership, nor affected by usury. *Ex parte Briggs*, 3 Deac. & Chit. 367. 1565

*Assumpsit for money paid, for interest, and on an account stated.* Plea, that at the time of the commencing of this suit, and at the time of the accruing of the causes of action in the declaration mentioned, the plaintiff and defendant carried on business in co-partnership, and that the causes of action arose out of transactions between the plaintiff and defendant as such co-partners; and that, at the time of the commencement of the suit, the accounts of the partnership were not settled or adjusted, or any balance struck between the plaintiff and defendant. On special demurrer:—Held, that the plea was ill; first, because it did not show that this was a partnership transaction; secondly, nor that the debt was due to the plaintiff and defendant jointly; thirdly, that if it was to be taken to be so alleged, the plea was bad as amounting to the general issue. *Worrall v. Grayson*, 1 Mees. & Wels. 166; 4 Dowl. P. C. 718. 1564

By articles of partnership, it was agreed that just and true accounts should be made out half-yearly, and signed by the partners, and that such accounts should not afterwards be called in question except for errors discovered in the lifetime of all the partners. The accounts were made out by one of the partners, and after the death of two of the other partners, it was discovered that the accounts were fraudulent:—Held, that the fourth partner was entitled to have the accounts of the partnership taken from the date of the articles. *Oldaker v. Lavender*, 6 Sim. 239. 1564

C., M. & N. carried on business under the name of J. K. & Sons; and being indebted to A., C. retired from the partnership, and M. & N. agreed to liquidate all the concerns of the partnership. M. afterwards retired, and advertisements of the dissolutions of both partnerships were at the same time inserted in the Gazette. N. then took in a new partner, and the business was carried on in the original name of J. K. & Sons. A.'s account was transferred to the new firm, and he received accounts and payments from them; but it did not appear that he ever saw the Gazette, or that either he or the new partner ever agreed to the substitution of the responsibility of the new firm for that of the old:—Held, that the three original partners were not released from their responsibility, but were liable at the suit of A. *Kirwan v. Kirwan*, 2 C. & M. 617; 4 Tyr. 491. 1565

*Dissolution.*—The lunacy of a partner is not ipso facto a dissolution of the partnership, but is a ground for the dissolution, if the other partner or partners come to the court for a decree of dissolution, on the ground of such lunacy. *Jones v. Noy*, 2 Mylne & K. 126. 1567

One of two partners having continued the partnership business for some time after the lunacy of the other, and having then sold the business of the representative of the deceased



lunatic partner, was held to be entitled to the partnership profits up to the period of sale. *Id.*

The court will direct an account of past partnership transactions, though the bill does not pray a dissolution; but it will make no order for carrying on partnership concerns, unless with a view to a dissolution. *Richards v. Davies*, 2 Russ. & Mylne, 347. 1567

The condition of a bond recited a deed of dissolution of partnership between the plaintiff and T., in which was recited an agreement, that, subject to the adjustment of the partnership accounts as therein mentioned, the stock-in-trade and partnership effects should belong absolutely to T., and all debts due from the partnership should be paid by T.; and that T., and the defendant as his surety, should indemnify the plaintiff by their joint and several bond against the partnership debts; and the condition was, that T. and the defendant, or one of them, should indemnify the plaintiff against the payment of the said partnership debts, and all costs, &c., and all actions to be brought in respect thereof. To a declaration on this bond, which set out the condition, and a breach of it in non-payment of a debt due from the partnership to M., who in consequence sued the plaintiff and T. for it, the defendant pleaded, that if the plaintiff was damaged, it was through his own default:—Held, that under this plea the defendant could not give in evidence the deed of dissolution, to show that it contained certain stipulations as to the adjustment of the accounts, which the plaintiff had not performed, not having paid over to T. a balance alleged to be due to the latter on such adjustment:—Held, also, that the defendant could not show, in reduction of damages, that the costs of T.'s defence to the action brought by M., were much less than the costs incurred by the plaintiff. *White v. Ansdell*, 1 Mees. & Wels. 348. 1568

**Actions.**—A solvent partner may sue out a writ in the name of his co-partners, or, if bankrupt, in the names of his assignees, as well as his own, in order to recover a debt due to the partnership. *Whitehead v. Hughes*, 4 Tyr. 92; 2 C. & M. 318; 2 Dowl. P. C. 258. 1571

But the partners who object have a right to be indemnified against the costs. *Id.*

One co-partner cannot sue separately for his portion of rents accruing to him and his fellows. *Decharms v. Horwood*, 4 M. & Scott, 400; 10 Bing. 526. 1571

An action will not lie at the suit of one of three co-partners to recover his proportion of rents of the estate received by an agent, where the agent claims the rents under a devise to himself. *Id.*

Seemingly, that money had and received was not the proper form of action in which to raise the question. *Id.*

#### PATENT.

In case for invading plaintiff's patent right to certain machinery for drying calicoes, &c., where

the specification, after setting forth the mode in which the cloth was to be extended for the purpose of drying, proceeded to state that it might be taken up again by the same machinery; a jury having found that the invention was new and useful on the whole, but that the machine was not useful in some cases for taking up goods, the court refused to set aside the verdict for the plaintiff and enter a nonsuit. *Haworth v. Hardcastle*, 4 M. & Scott, 720; 1 Bing. N. R. 162. 1577

A patent was granted to the plaintiff for certain machinery in the year 1824. In March, 1832, the Vice-Chancellor made an order for the trial of the plaintiff's right in an action in C. P. A verdict in that action being found for the plaintiff, and a rule nisi having been granted for entering a nonsuit or for a new trial, on the ground of the supposed invalidity of the patent by reason of an insufficient specification, and that rule being ready for argument, the defendant obtained a *scire facias* to repeal the patent. The court refused to postpone the discussion upon the rule, until after the decision of the court of King's Bench upon the *scire facias*. *Haworth v. Hardcastle*, 4 M. & Scott, 448; 10 Bing. 551; 2 Dowl. P. C. 802. 1580

By 5 & 6 Will. 4, c. 83, any person having obtained letters patent for any invention, may enter a disclaimer of any part of his specification, or a memorandum of any alteration therein, which when filed is to be deemed part of such specification. 1577

A patent claimed the invention of manufacturing tubes by drawing them through rollers, using a mandril in the course of the operation. A later patent claimed the invention of manufacturing tubes by drawing them through fixed dies or holes, but the specification was silent as to the use of the mandril:—Held, that the court, taking the whole of the latter specification together would infer that the mandril was not to be used, and that the latter patent was good. *Russell v. Cowley*, 1 C. M. & R. 864. 1577

Where, in summing up his inventory, a patentee stated it thus:—"My invention is the application of a self-adjusting leverage to the back and seat of a chair, whereby the weight on the seat acts as a counterbalance to the pressure against the back of such chair as above described:"—Held, that this was not a claim to the principle of the lever, but to an application of that principle to a certain purpose by certain means, and that the patent was good. *Minter v. Wells*, 1 C. M. & R. 505; 5 Tyr. 163. 1577

A patent was granted for an invention of "certain improvements in extracting sugar or syrups from cane juice, and other substances containing sugar." The specification stated the invention to consist "in a means of discoloring syrups of every description by means of charcoal produced by the distillation of bituminous schistus, or mixed with animal charcoal, and even of animal charcoal alone." It then stated that the "discoloration" was to be produced by means of a filter made of the charcoal, and that there was "nothing particular" in the carbonization of



the bituminous schistus, "only it is convenient before the carbonization to separate the sulphurets of iron which are mixed with it." The specification said nothing as to any previous operation on the syrup before it was submitted to the filter, but it did state that syrup, in a proper state, might be obtained by a mixture of sugar and water. In an action for the infringement of the patent, the defendant pleaded that the plaintiff did not, by any instrument in writing, describe and ascertain the nature of his said invention, and in what manner the same was to be performed; and also that the plaintiff did not cause any such instrument to be inrolled in Chancery:—Held, that the defendant sufficiently specified his invention, upon proof that it was applicable with advantage to the syrup after it had undergone a certain degree of heat, though it failed when applied to the first drawings of the syrup, and that a "discoloration" of such syrup and of syrup of sugar and water, warranted the title of improvements "in extracting sugar or syrup from cane juice." *Derosne v. Fairie*, 2 C. M. & R. 476: 5 Tyr. 393; 1 Gale, 109. 1577

Quære, whether an allegation that the patentee has specified his invention is not supported by proof that he has specified all that he has invented, though the invention be not so large as the title of the patent would imply?—Held, to be necessary that the plaintiff should prove bituminous schistus would answer, that the presence of iron in it would not be injurious, and that if it would it might be removed by means known to persons ordinarily acquainted with the subject; that the schistus might be purchased in a proper state in the market as an article of commerce, or that it might otherwise, without any secret or unknown means, be obtained in a fit state. *Id.*

Where a licence to use certain patent machines is granted by indenture, in which it is recited that the grantor has invented the machines, and has obtained letters patent for the sole use of the invention, and inrolled the specification,—parties (and privies) to the deed are estopped from pleading either that the invention is not a new invention, or that the grantor was not the first inventor, or that no specification was inrolled. *Bowman v. Taylor*, 4 Nev. & M. 264; 2 Adol. & Ellis, 278. 1579

Whether in covenant by the patentee of an invention, brought to recover rent reserved in respect of a licence to use the invention, a plea merely alleging that the invention was not new, or that the plaintiff was not the first inventor, without showing that the defendant had in consequence failed to have the exclusive enjoyment covenanted for, is a good plea by analogy to a plea of eviction, quære? *Id.*

Declaration in covenant stated that, by indenture, after reciting that plaintiff had invented certain improvements in the construction of looms, and had obtained letters patent for such invention, and that he had agreed with defendants to let him use the said invention for a certain part of the term granted by the letters patent, in consideration of certain covenants, &c. Plaintiff cove-

nanted to permit defendants to use and have the benefit of such invention and patent, and defendants, in consideration of the grant, &c., covenanted to perform the agreement on their part. Breach, non-performance. Pleas, after setting out the patent, that the supposed invention therein, and in the declaration mentioned, was not nor is a new invention; and the plaintiff was not the first or true inventor of the improvements of the said indenture and letters patent mentioned:—Held, on general demurrer, that, if the pleas amounted to a denial of the plaintiff having invented the improvements, or in the sense in which they alleged him to have done so, the defendants were estopped by their recital in the deed from contradicting the fact; and that if the pleas did not amount to such denial, but were intended merely to allege that the plaintiff was not the sole inventor, or that the invention had taken place long before the patent was granted, such pleas were no answer to the action. *Id.*

Brown being patentee of an engine, Broadhurst bought a licence of him to erect it in Cornwall only. Ridgway, by agency of Brown, contracted with "Brown & Co." to erect such an engine in Cambridgeshire, Brown telling Ridgway that Philip & Broadhurst were his partners. During the building of the Cambridgeshire engine, Broadhurst frequently came to inquire how it went on, and when it would be finished. After the engine had failed in its object, Ridgway previous to suing Philip & Broadhurst, inquired from Broadhurst if Brown had been correct in declaring that Broadhurst & Philip were his partners; to which he answered that he had. He then sued Philip & Broadhurst. The jury having found a verdict for the defendants, on the ground that Broadhurst was not a partner, the court refused to set it aside and grant a new trial. *Ridgway v. Philip*, 1 C. M. & R. 415; 5 Tyr. 131. 1579

A patent granted to the patentee the exclusive privilege of making, using, exercising, and vending the invention, and prohibited other persons from making, using, or putting in practice the invention:—Held, that the merely "exhibiting to sale" imitations of the invention was not any infringement of the patent; and a count in a declaration which only alleged an exposure to sale, was held bad on general demurrer. *Minter v. Williams*, 5 Nev. & M. 647; 1 Har. & Woll. 585. 1579

### PAWNBROKER.

An agreement for a secret partnership is a contravention of the law, made for regulating the business of a pawnbroker, and no legal partnership is thereby constituted. *Warner v. Armstrong*, 3 Mylne & K. 45. 1580

A. & B. carried on the business of a pawnbroker in partnership, under a deed. The business was conducted solely by A; and his name alone appeared over the shop door and upon the printed tickets and duplicates used by persons in that trade, and the licences contained the



name of A. only. Semble, that although the parties might by this contract have rendered themselves liable to penalties imposed by the stat. 39 & 40 Geo. 3, c. 99, yet, that there being no actual agreement for an infraction of the law, the contract was not void. *Armstrong v. Lewis* (in error), 4 M. & Scott, 1; 2 C. & M. 274. 1580

A. having deposited with B. certain goods as a security, a dispute arose concerning the goods, upon which B. obtained from C., a police magistrate, a summons requiring A.'s appearance on a day named. Upon the appearance before C., B. made oath to a written information, that he believed the goods to have been illegally pawned or disposed of by A. C. gave a further day to the parties, when, after evidence being gone into, C. committed A. for re-examination on a charge of suspicion of having unlawfully disposed of the goods of B.:—Held, that the charge was not sufficiently made so as to give the magistrate jurisdiction over the matter under the 8th sect. of the Pawnbrokers' Act, 39 & 40 Geo. 3, c. 99. *Tate v. Chambers*, 3 Nev. & M. 523. 1580

Quære, whether, in a case upon this statute, properly brought before a magistrate, the party may be committed for re-examination? *Id.*

## PAYMENT.

### I. PAYMENT INTO COURT.

*In what Actions.*—An action for damages, occasioned by the negligently running down the plaintiff's boat by the defendant's vessel, is not an action for a debt or demand within the meaning of the 3 & 4 Will. 4, c. 42, s. 17. *Watson v. Abbott*, 2 C. & M. 150. 1581

In an action against a sheriff for a false return, and for an excessive levy, and for not paying over the residue, the court refused to allow the sheriff to pay money into court with costs, though it appeared that the sheriff had by mistake returned money to pay hop-duty to the crown, but which was subsequently discovered to have been paid, and had also made charges for possession, and other charges usually made, but in strictness not allowable. *Woodgate v. Baldock*, 2 Dowl. P. C. 256. 1581

Where a whole count applies to a demand for unliquidated damages, money cannot be paid into court on a part of it. *Hodges v. Lord Litchfield*, 2 Dowl. P. C. 741. 1581

Where there are several counts for several causes of action, or several breaches are assigned in covenant, the defendant may plead payment into court of one entire sum in full satisfaction of all the counts or breaches. *Marshall v. White-side*, 1 Mees. & Wels. 188; 4 Dowl. P. C. 766. 1581

Money may be paid into court on one of several breaches of covenant contained in a lease set forth in declaration, if the plaintiff's particular specifies the sum he claims on that breach. *Smith v. King*, 2 Dowl. P. C. 751. 1581

In an action by landlord against tenant for

not repairing, the court refused to allow the defendant to pay money into court by way of compensation and amends, 3 & 4 Will. 4, c. 42, s. 21, under the plea given by Reg. 17, H. T. 4 Will. 4, and a plea of tender before action brought. *Serle v. Barrett*, 4 Nev. & M. 200: S. C. nom. *Dearle v. Barrett*, 2 Adol. & Ellis, 82. 1581

*Proceedings.*—Where an action of ejectment is brought on certain breaches, and money is paid into court on one of them, and the plaintiff takes it out and does not proceed to trial, the defendant is entitled to judgment as in case of a nonsuit. *Doe d. Stanley v. Towgood*, 2 Dowl. P. C. 404. 1583

Where a defendant has several defences to different parts of the plaintiff's demand, and intends to plead payment into court, as to other parts of the demand, he should first of all plead those pleas, and then the plea of payment of money into court as to the residue only. *Coats v. Stephens*, 3 Dowl. P. C. 784; 2 C. M. & R. 118; 1 Gale, 75. 1583

To a declaration in assumpsit, brought to recover the sum of 30*l.*, the defendant pleaded, first to the whole declaration, payment of the sum of 27*l.* 4*s.* 4*d.* into court, and that the plaintiff had not sustained damages to a greater amount; secondly, except as to 27*l.* 4*s.* 4*d.* non assumpsit; thirdly, payment of the sum of 10*l.* before action; and fourthly, as to all except 27*l.* 4*s.* 4*d.*, a set-off. The plaintiff replied, that he accepted the money paid into court, and was satisfied:—Held, that the defendant was not justified in signing judgment of non pros, for want of a replication to the said pleas. *Id.*

Upon a declaration of two counts, the defendant paid into court enough to cover the demand in the first instance, and obtained a verdict on the second; but having omitted to plead the payment as required by the new rules:—Held, that he was not entitled to costs. *Adlard v. Booth*, 1 Bing. N. R. 693; 1 Scott, 644. 1583

In an action to recover a sum of 8*l.* 2*s.* (as claimed by the particulars of demand), the defendant paid 1*l.* 18*s.* into court, under rule 19 of H. T. 4 Will. 4, which the plaintiff took out in full satisfaction of the action. The cause of action arose, and both parties lived within the jurisdiction of the county court of Cardiganshire; and by the order of a judge, the defendant was allowed to enter a suggestion on the roll of these facts, and that the action was brought for a sum under 40*s.*, and further proceedings were stayed, with the view of depriving the plaintiff of his costs; but the court set aside the order, on account of the form of the rule for paying money into court, the lateness of the application, and its not clearly appearing that the action was brought for less than 40*s.* *Farrent v. Morgan*, 3 Dowl. P. C. 792. 1582

*Effect.*—Effect of payment of money into court as an admission. *Lechmere v. Fletcher*, 1 C. & M. 623; 3 Tyr. 450. 1584

Effect as an admission. *Reid v. Dickons*, 5 B. & Adol. 499; 2 Nev. & M. 369. 1584



In an action of indebitatus assumpsit by the master of a ship, for wages, against A. W., D. S. W., and S. W., the plaintiff proved a contract in the handwriting of W., signed "A. W. & Co.," by which contract he was engaged as master of a vessel, at a yearly salary. He also proved services under the contract for several years; and he then put in a rule to pay into court a sum of money which was not equal to the amount of the wages. It appeared, on the part of the defendants, that D. S. W. was not a member of the firm of A. W. & Co., and was not an owner of the ship in question. The defendant, in the course of his case, went into accounts, including a variety of items, being disbursements on ship's account on the one hand, and items to the credit of the owners on the other:—Held, that under the circumstances, the whole account was referable to one contract, and that the four defendants, having paid money into court, were precluded from setting up, that one of the defendants, D. S. W., was not a party to the contract. *Ravenscroft v. Wise or Wylie*, 1 C. M. & R. 203; 2 Dowl. P. C. 676; 4 Tyr. 741.

1584

In assumpsit, the defendant pays money into court, and the plaintiff agrees to take the money and his costs. The costs are taxed, and paid by the defendant, and received by the plaintiff. The plaintiff altering his mind, does not take the money out of court, and offers to return the costs, which the defendant refuses to take. The plaintiff discontinues the action, and the costs of the discontinuance are taxed and paid to the defendant. These facts will not support a plea in another action for the same demand, alleging that the plaintiff received the money paid into court, and the costs in full discharge of the action. *Power v. Butcher*, 5 M. & R. 327.

1584

Payment of money into court on a declaration in assumpsit, containing special and common counts, founded on a variety of dealings between the parties, cannot be applied by the plaintiff to any particular count only, but the defendant may so apply it to the damage therein stated to have been incurred. *Drake v. Lewin*, 4 Tyr. 730.

1584

Where payment into court was made generally on a declaration containing one count, charging the defendant for the produce of sales, as factor on a del credere commission, and another, charging him with having negligently sold plaintiff's flour to an insolvent person, the defendant, in order to show the transaction in question to be one which was not admitted by the payment into court on the first count, gave letters in evidence to show that the plaintiff had admitted the sale in question to be his own affair, and not guaranteed by the defendant. The jury found a verdict for the defendant, and the court did not disturb it, on the ground that this evidence was improperly received. Id.

Where a defendant was sued at law for a sum of money, and the court allowed him to pay it into court to abide the event of an application by him to the court of Chancery for an injunction, which was accordingly made in January, 1834,

but the plaintiff having absconded without entering an appearance, the defendant was unable to get an injunction on the merits, though he had got the common injunction, the court of Exchequer refused to make an order that the defendant might receive the money out of court, though a considerable time had elapsed since the bill was filed. *Best v. Argles*, 3 Dowl. P. C. 701.

1583

## II. PLEA OF PAYMENT.

The new rules of pleading, Hil. 4 Will. 4, which direct payment and acceptance to be pleaded and replied, make no difference as to the operation of the statute of limitations. *Brooks v. Rigby*, 2 Adol. & Ellis, 21.

1586

Dicit. A plea of payment of a less sum of money into court, on a general indebitatus count or counts, is good, though the amount intended to be appropriated to each count is not shown. *Jourdain v. Johnson*, 4 Dowl. P. C. 534; 1 Gale, 312; 5 Tyr. 524.

1586

But, semble, that if there be a count on a bill of exchange, the defendant must, in pleading, answer the whole amount of the bill; and that a plea of payment of money into court alone, of a sum less than the amount of the bill, would be bad; and that it would be also bad, though of a larger amount, if he pleaded to a count on a bill and any other count, unless a sufficient amount be specifically appropriated, in the plea to the bill. Id.

In indebitatus assumpsit, the defendant pleads payment and acceptance in satisfaction; the plaintiff new assigns a different debt of the same amount with that confessed in the plea; non-assumpsit is pleaded to the new assignment. The only question for the jury is, whether two debts were incurred or one only. If, therefore, the plaintiff proves one debt, and the defendant proves payment of the amount, the effect of the defendant's evidence is to show, that the debt proved by the plaintiff is the debt confessed and avoided by the plea, and not the debt newly assigned; which latter debt, therefore, remains unproved upon the issue of non-assumpsit. *Hall v. Middleton*, 5 Nev. & M. 410; 1 Har. & Woll. 531.

1586

In an action of covenant, if the defendant pleads payment to the plaintiff on the record, who is only the nominal party to the suit, there being no fraud alleged, the court will not take the plea off the file. *Gibson v. Winter*, 1 Har. & Woll. 436.

1586

Debt for goods sold and delivered:—Plea, that before the commencement of the suit, and when the said sum of 20*l*. became due and payable, to wit, on &c., the defendant paid the plaintiff the said sum of 20*l*. according to the defendant's said contract and liability; concluding to the country:—Held, bad on special demurrer, for not concluding with a verification. *Goodchild v. Pledge*, 1 Mees. & Wels. 363.

1686

To a declaration on a bill of exchange with a count for work and labor, the defendant pleaded as to 35*l*., part of the money in the declaration



mentioned, that the bill as to that sum was an accommodation bill, concluding with a verification; and as to the sum of 40*l.*, other parcel of the sums mentioned in the declaration, he pleaded payment of that money into court, concluding with a verification; and as to the residue of the sums, and the promise in the last count of the declaration mentioned, and not before pleaded to, non-assumpsit. Upon the first plea the plaintiff took issue, and as to the last plea, added a similiter, but said nothing as to the plea of payment of money into court: at the trial the plaintiff obtained a verdict, with 30*l.* damages:—Held, that there was no ground for arresting the judgment. *Fallows v. Bird*, 4 Dowl. P. C. 183. 1586

A plea of payment into court must follow the form given by the new rules, and if other pleas are pleaded to part of the plaintiff's demand, the plea of payment into court should be put last, and pleaded to the residue. *Sharman v. Stevenson*, 3 Dowl. P. C. 709; 2 C. M. & R. 75; 5 Tyr. 564; 1 Gale, 74. 1586

A special demurrer to a plea of payment of money into court, that "it varies from the form given by the rule," is sufficient to raise an objection, that the plea is bad for want of a proper conclusion of a prayer of judgment. *Id.*

To a declaration in indebitatus assumpsit for money had and received, and on an account stated, the defendant pleaded as to 25*l.* parcel, &c. that the plaintiff ought not further to maintain his action, because the defendant brings into court here the said sum of 25*l.* ready to be paid to the plaintiff. And the defendant further saith, that the plaintiff has not sustained damage to a greater amount than 25*l.* in respect of the causes of action in the declaration mentioned, as to the sum of 25*l.*, concluding with a verification. The defendant, as to the residue of the monies in the declaration mentioned, pleaded non assumpsit:—Held, on special demurrer, that the plea, as to the payment of money into court, was ill, for not concluding with a prayer for judgment to the further maintenance of the action. *Id.*

To a plea of payment, 3*l.* 8*s.* 2*d.* in satisfaction and discharge of defendant's promise; replication, that defendant did not pay it in satisfaction and discharge, nor did plaintiff receive it in satisfaction and discharge:—Held, on demurrer, unobjectionable. *Webb v. Weatherby*, 1 Bing. N. R. 502. 1586

In an action for sheep sold and delivered, the defendant pleaded a payment of 175*l.* It was proved by J. J. that he received a sum of 175*l.* from the defendant's wife, and gave it to the plaintiff:—Held, that evidence might be given, that when the defendant's wife gave him the money, she told J. J. to take it to the plaintiff for the sheep. *Walter v. Lewis*, 7 C. & P. 344—Coleridge. 1586

To a declaration in assumpsit for non-performance of a contract to receive and pay for a copper, made to order at a specified price per pound weight, the defendants pleaded inter alia, the payment into court of 15*l.*, and that the plain-

tiff had not sustained damage to a greater amount:—Held, that they could not, under this plea, give in evidence that they had countermanded the order when only a part of the work had been done. *Stevens v. Ufford*, 7 C. & P. 97—Tindal. 1586

On a plea of payment, if that be the only one, the defendant is bound to begin. *Richardson v. Fell*, 4 Dowl. P. C. 10. 1586

Payment cannot be given in evidence under the plea of non-assumpsit in bar of the action. *Milligan v. Thomas*, 4 Dowl. P. C. 373. 1586

In assumpsit, payments which do not amount to a bar to the action, but merely go to reduce the plaintiff's demand, need not be specially pleaded, but may be given in evidence in mitigation of damages under a plea of non-assumpsit. *Shirley v. Jacobs*, 2 Bing. N. R. 88; *S. P. Lediard v. Boucher*, 7 C. & P. 1. 1586

Where it appeared that a sum of money had been paid to the plaintiff after action brought, and there was no plea of payment, the court on motion, the payment not being denied, allowed the damages to be reduced by that sum. *Richardson v. Robertson*, 1 Mees. & Wels. 463. 1586

Quere, whether payment either before or after action brought is admissible in evidence in reduction of damages? *Id.*

Where in debt on simple contract the defendant pleads payment of a certain sum, he must prove payment of that sum, (even though it be laid under a videlicet), in order to entitle him to a verdict on the whole plea. But the plea may be taken distributively, and the issue found for the defendant as to the amount proved to be paid, and as to the residue as to the plaintiff. *Cousins v. Paddon*, 2 C. M. & R. 547; 4 Dowl. P. C. 488; 1 Gale, 305; 5 Tyr. 535. 1586

Therefore, where in debt for goods sold and delivered, and work and labor done, the defendant pleaded, first, nunquam indebitatus; secondly, as to parcel of the sum demanded, to wit, 338*l.*, payment of 338*l.* in discharge of that parcel; thirdly, a set-off for money paid; the plaintiff proved a special contract for good, sound, saleable bricks, to be made for him by the defendant at a certain price per thousand, and delivery of so many as amounted, at that rate, to 396*l.*; the defendant proved payment of 314*l.* and a set off for 21*l.*, and proved also, that the bricks were badly made; and the jury found the value of those delivered not to be more than 335*l.* The court directed the verdict to be entered, on the plea of payment as to 314*l.*, for the defendant; as to the residue, for the plaintiff: on the plea of set-off as to 21*l.*, for the defendant; as to the residue, for the plaintiff: on the plea of nunquam indebitatus as to the whole sum demanded, except 335*l.*, for the defendant: so as to give the defendant judgment on the whole record. *Id.*

## PHYSIC.

A person created a doctor of medicine by a Scotch university cannot practise as a physician in England, unless licensed by the College of



Physicians. *Collins v. Carnegie*, 3 Nev. & M. 703; 1 Adol. & Ellis, 695. 1589

A fortiori, where the degree is granted without residence. *Id.*

Where a person, previously a stranger to the place, goes to a town which is the seat of a university, and is told that a certain building is the college, that a certain person whom he sees in it is the librarian, and this person shows him a seal in his custody, which he states to be the seal of the university, and produces a book which he states to be the Book of Acts (statute book) of the university, and such person compares such seal with the seal upon a diploma, the genuineness of which is in question, and makes a copy (which is duly examined) from the Book of Acts of an entry of an act conferring the degree of M. D.:—Held, that by a statement in evidence of these facts, the diploma is authenticated, and the act conferring the degree properly proved. *Id.*

Where a declaration alleged that plaintiff had been and was a physician, and exercised that profession in England, and on that account had been and was called doctor, meaning doctor of medicine, and then stated that defendant slandered plaintiff in his character of a physician practising in England, and denied his right to be called a doctor of medicine:—Held, that the plaintiff must prove that he was entitled to practice as a physician in England. Such proof is not furnished by showing the fact of his having so practised; nor by showing that he has received the degree of doctor of medicine at the university of St. Andrews. *Id.*

A surgeon is responsible for an injury done to a patient, through the want of proper skill in his apprentice; but, in an action against him, the plaintiff must show that the injury was produced by such want of skill, and it is not to be inferred. And if a person goes into a surgeon's shop and asks to be bled, saying he has found relief from it before, and does not consult the person there as to the propriety of performing the operation; if there are no external indications of its being improper, such person is justified in performing it, and the surgeon will not be answerable for its not producing a beneficial result. *Hancke v. Hooper*, 7 C. & P. 81—*Tindal*. 1590

It is not necessary to plead as a defence to an action on an apothecary's bill, that he has not a certificate to practise from the society of apothecaries, as that is part of the plaintiff's case. *Morgan v. Ruddock*, 4 Dowl. P. C. 311; 1 Har. & Woll. 505. 1590

Practising as an apothecary, is the mixing up and preparing medicines prescribed by a physician or by any other person, or by the apothecary himself. *Woodward v. Ball*, 6 C. & P. 577—*Williams*. 1590

The acting as a surgeon or accoucheur is not practising as an apothecary; nor would the party supplying medicine to a friend be so. But if the party sought his living by practising as an apothecary, that is sufficient, as it is not essential

that he should have gained his whole livelihood by his practice. *Id.*

When a surgeon attended patients in cases requiring surgical aid, and also dispensed medicines to them, not being certificated as an apothecary under 55 Geo. 3, c. 194:—Held, that he might recover for his surgical advice. *Simpson v. Ralfe*, 4 Tyr. 325. 1590

Seemingly, a surgeon may dispense medicines to his patient in a case which he attends requiring surgical aid. *Id.*

## PLEADING.

### I. GENERAL POINTS.

The date of the writ need not be stated in the declaration, notwithstanding the pleading rules of H. T. 4 Will. 4. *Du Pré v. Langridge*, 2 Dowl. P. C. 584. 1593

It is irregular to entitle a declaration of the court on the back of it only. *Ripling v. Watts*, 4 Dowl. P. C. 290; 1 Har. & Woll. 525. 1593

Declarations must be intitled on the face with the name of the court. *Id.*

A count for goods sold and delivered, stating that the defendant was, on, &c., indebted to the plaintiff in, &c., for goods sold and delivered by the plaintiff to the defendant at his request, without any further allegation of time:—Held good on special demurrer. *Lane v. Thelwell*, 1 Mees. & Wels. 140; 4 Dowl. P. C. 705. 1594

No objection on the ground of superfluity of contents can be taken on demurrer, but it must be the subject of motion. (Reg. Gen. Hil. 4 Will. 4, No. 6.) *Gardner v. Bowman*, 4 Tyr. 412. 1594

If a good cause of action at common law appear in the declaration, the defendant must, under the pleading rules of H. T. 4 Will. 4, plead any statutable illegality in the contract on which it is founded, in answer. *Barnet v. Glossop*, 3 Dowl. P. C. 625. 1594

A plea alleging a contract, must aver it to be in writing, if it be required by a statute to be so. *Taylor v. Hillary*, 1 Gale, 22. 1596

Whether upon a traverse of a grant alleged to be made by a party seised in fee, the title of the grantor can be questioned, quære? *Morris v. Dimes*, 3 Nev. & M. 671. 1597

A plaintiff sued on an account stated on the 5th February, the balance of which was in his favor. The defendant sought to give in evidence a subsequent account stated on March 10th, in which the balance was against the plaintiff:—Held, that, as the action was commenced after the new general rules of H. T. 4 Will. 4 came into operation, the defendant could not prove the second account stated, on the plea of non-assumpsit only, but should have pleaded payment or a set-off. *Fidgett v. Penny*, 4 Tyr. 650; 1 C. M. & R. 108. 1598

The record, in an action for slander, stated that



the writ issued on the 4th of June, and that the words were spoken on the 27th:—Held, that this discrepancy on the record was no ground for arresting the judgment. *Steward v. Layton*, 3 Dowl. P. C. 430. 1599

If a plea is a good plea when pleaded, but by the occurrence of subsequent matter becomes no answer to the action, the court will not on that account direct it to be taken off the file; therefore, when to a sci. fa. to revive a judgment, the plaintiff pleaded the pendency of a writ of error, the court refused to direct that plea to be taken off the file on the writ of error being quashed. *Snook v. Maddox*, 1 Har. & Woll. 584. 1599

The rules of H. T. 4 Will. 4, made under the power given to the judges by the 3 & 4 Will. 4, c. 42, s. 1, apply only to cases in which the courts have a common jurisdiction, and therefore embrace neither revenue causes or real actions. *Miller dem.*, *Miller ten.*, 3 Dowl. P. C. 408; 1 Scott, 387; 1 Hodges, 31; *S. P. Barnes v. Jackson*, 1 Scott, 525; 3 Dowl. P. C. 404; 1 Hodges, 59. 1599

The rules of pleading of H. T. 4 Will. 4, are part and parcel of the law of the land. *Roffey v. Smith*, 6 C. & P. 662—Denman. 1599

To a sci. fa. in this court, on a judgment obtained in the court of Great Session, before its abolition by the 11 Geo. 4 & 1 Will. 4, c. 70, the defendant pleaded that, by the practice of the court of Great Session, an affidavit ought to have been first made of the amount of the debt really due, which had not been done:—Held bad on demurrer, as well because it was a mere matter of practice, as because that practice was in fact abolished with the court; and that the only mode of making the objection available was by motion to the discretion of the court, who would have ordered such an affidavit to be made or not, as might appear right under the circumstances. *Howell v. Bowers*, 4 Dowl. P. C. 386; 2 C. M. & R. 621; 1 Tyr. & G. 88. 1600

## II. DECLARATION.

*Form.*—Declaration in trespass commencing—"A. B. and C. D. complains," &c., and stating that the defendant was summoned to answer the plaintiff—not demurrable. *Lyng v. Sutton*, 4 M. & Scott, 417. 1600

Actions commenced in inferior courts, and removed by habeas corpus, are not within the Uniformity of Process Act or the rule of M. T. 3 Will. 4. *Dod v. Grant*, 6 Nev. & M. 70. 1600

Therefore, in such cases the plaintiff may still declare against the defendant in the old form, thus: "A. B. complains of C. D. being in the custody of the marshal of the marshalsea of our lord the king, before the king himself: For that," &c. *Id.*

And the court will, in all cases of demurrer to such a declaration, assigning for special cause the supposed informality of the commencement, presume that the action commenced in an inferior court. *Id.*

But if the declaration did not in fact commence

in an inferior court, such a declaration is irregular, and may, upon motion, be set aside. *Id.*

*Accordance with Process.*—A declaration, laying the venue in a different county from that mentioned in the process, shall not be deemed a waiver of the bail. *Reg. Gen. K. B.*, C. P., and *Exch. H. T.* 2 Will. 4. 1600

This was the case before in C. P., *Reg. Gen.* 22 G. 3. 1600

But in K. B. the plaintiff lost his bail when he declared differently from his writ. *Hally v. Tipping*, 3 Wils. 61. 1600

Upon a writ against several, the plaintiff may declare against one only; but, if he declares against any other defendant afterwards, he will be irregular. *Coldwell v. Blake*, 3 Dowl. P. C. 656; 2 C. M. & R. 249; 1 Gale, 157. 1600

A plaintiff may, since the passing of the Uniformity Act, sue out bailable process against two, and declare against one only. *Carson v. Dowding*, 4 Dowl. P. C. 257; 1 Har. & Woll. 507. 1600

A *capias quare clausum fregit* was issued against A. and B., with an *ac etiam* in debt, upon which A. was arrested and put in bail; writs of special *capias*, alias, and pluries, grounded on an original in debt, and writs of exigent and proclamation were issued against both. A *supersedeas* issued as to A., and an exigent returned that B. was outlawed. A declaration in debt was delivered against A. only, alleging the outlawry of B. in that suit. On a motion to discharge the bail by entering an *exoneretur*, on the ground of a variance between the declaration and process:—Held, that they were not entitled to it, as the objection might be a ground of defence, in case the plaintiffs proceeded against them. *Gent v. Abbott*, 2 Moore, 301. 1600

Where the plaintiff, having a joint cause of action against five several defendants, sued out bailable process against one alone, under which he was arrested and put in bail, and afterwards sued out serviceable process against the other four, and all the defendants were named in the affidavit to hold to bail, and a declaration was delivered in which they were all included, but the bail-piece was taken in the name of the defendant only, against whom bailable process had issued; the court of C. P. refused to enter an *exoneretur* on the bail-piece, as there was no variance between the process and declaration, on the grounds that the plaintiff might sue out bailable process against one defendant, and serviceable against others; that four only could be included in one writ; that the bail-piece must agree with the writ under which the one defendant was arrested, and that the affidavit of debt corresponded with the declaration, which had been delivered as against all. *Christie v. Walker*, 7 Moore, 362; 1 Bing. 48. 1600

The names of two defendants having been inserted in the writ of summons, separate proceedings were taken against each:—Held irregular. *Pepper v. Whalley*, 1 Bing. N. R. 71; 2 Dowl. P. C. 821. 1600



A writ being general, and the declaration special, as assignee, held to be no ground for setting them aside as irregular. *Knowles v. Johnson*, 2 Dowl. P. C. 653. 1600

Plaintiff having sued out general process, and declared specially as administratrix, the court of K. B. refused to enter an exoneretur on the bail-piece. *Ashworth v. Ryal*, 1 B. & Adol. 19. 1600

If a plaintiff make an affidavit of debt, and sue out a writ in his own right, and afterwards declare as executor, the bail are discharged. *Manesty v. Stevens*, 2 M. & Scott, 563; 9 Bing. 400; 1 Dowl. P. C. 711. But see *Ilsey v. Ilsey*, 2 Tyr. 274; 2 C. & J. 330; 1 Dowl. P. C. 310. 1600

Where the plaintiffs issued a writ against the defendant in their own names, and declared in their own right, and described themselves in the affidavit to hold to bail as surviving partners, it was a fatal variance; and the court of C. P. ordered the bail-bond to be cancelled, and would not allow the plaintiffs to amend their writ and declaration on payment of costs. *Attwood v. Rattenbury*, 5 Moore, 209. 1600

A defendant, having been held to bail on an affidavit of a debt due from three defendants as surviving partners of another deceased, was discharged on filing common bail, the declaration being for a debt due from the three defendants alone. *Spalding v. Mure*, 6 T. R. 363. 1650

Accordance with process. *Thompson v. Dicus*, 1 C. & M. 768; 2 Dowl. P. C. 93; 3 Tyr. 873. 1600

Where a defendant has been arrested for goods sold and delivered, and money lent and advanced, though the declaration contains no count for goods sold and delivered, the court will not enter an exoneretur on the bail-piece. *Gray v. Harvey*, 1 Dowl. P. C. 114. 1600

Where the writ was in debt, and the declaration was jointly in assumpsit, the court refused to set them aside as being irregular, but left the party to demur. *Rotton v. Jeffrey*, 2 Dowl. P. C. 637. 1600

A variance between the writ and count (the act etiam being in case on promises, but the declaration in debt,) is not a ground for entering an exoneretur on the bail-piece, where the sum sworn to is under 40*l*. *Lockwood v. Hill*, 1 H. Black. 310. 1600

But where it exceeds that sum it is. *Mayfield v. Davison*, 10 B. & C. 223. 1600

Where a declaration was delivered in debt, the act etiam in the writ being in assumpsit, the court of C. P. ordered an exoneretur to be entered on the bail-piece on the application of the bail. *Maerberly v. Benton*, 5 Moore, 483. 1600

Where the writ was in trespass, but indorsed for a debt, and the declaration delivered was in an action of assumpsit; although no objection was taken to the writ until after the declaration was delivered, the court set aside both the writ and declaration. *Edwards v. Dignam*, 2 C. & M. 346; 4 Tyr. 213. 1600

Where the writ is irregular, as being in "trespass," and yet claiming a debt, and the defendant neglects to move to set it aside within proper time, yet, if it is followed by a declaration varying from the writ as in assumpsit, the court will set aside both declaration and writ. *Id*.

After issue joined in assumpsit for goods sold, the plaintiff added a special count for not delivering a bill of exchange, and having recovered on that count only:—Held, that the bail were discharged. *Thompson v. Macirone*, 4 D. & R. 619; 3 B. & C. 1. 1600

A declaration, which originally corresponded with the process, had been amended by a judge's order, by increasing damages, and adding counts for interest and commission:—Held, that this was no ground for exonerating the bail, the amount of damages being before an arbitrator, who might apportion them so as to prevent the bail being improperly charged. *Taylor v. Gregory*, 2 B. & Adol. 257. 1600

A writ being to answer the plaintiff in an action of trespass on the case, followed by a declaration in trover:—Held, irregular. *Baie v. Bolton*, 4 Dowl. P. C. 161. 1600

A declaration in an action on the case is a variance from a writ in an action on promises, and will be set aside, with costs. *Scrivener v. Watling*, 1 Har. & Woll. 8. 1600

The writ of summons was in an action "on promises," and those words were omitted in the declaration, but which appeared a good declaration in assumpsit:—Held, not to be an irregularity. *Straghan v. Buckle*, 1 Har. & Woll. 519. 1600

Where (since the Uniformity of Process Act) the defendant is arrested upon capias in assumpsit, and the plaintiff afterwards declares in covenant, the court will set aside the declaration, but will not direct that the bail be discharged. *Ward v. Tummon*, 4 Nev. & M. 876. 1600

A writ was to answer the plaintiff in a special action; "The declaration was on promises." A rule to set aside the declaration for irregularity was discharged, with costs. *More v. Archer*, 4 Dowl. P. C. 214. 1600

Where the writ of summons was to answer in trespass on the case, and had no indorsement of the sum demanded; and the particulars of demand, which had been delivered with the notice of declaration, showed a claim for wages, the court refused to set aside the writ for irregularity, the plaintiff not having declared. *Davies v. Jones*, 1 C. M. & R. 582; 5 Tyr. 182; S. C. nom. *Addis v. Jones*, 3 Dowl. P. C. 164. 1600

Bail are not liable on their recognizance, for any cause of action which is not stated in the affidavit to hold to bail. Where an affidavit to hold to bail is for 167*l*. and upwards, on a bill of exchange only, and the plaintiff recovers a general verdict for a greater amount, as well on the bill as for goods sold, the bail are only liable for so much as is recovered on the bill of exchange. *Wheelwright v. Jutting*, 1 Moore, 51; 7 Taunt.



304 : S. P. Lavender v. Kilner, 1 Tidd's Prac. 292. 1600

Where, in an affidavit to hold to bail on a bill of exchange for 523*l.* 17*s.* 6*d.*, the plaintiff declared on a bill for 523 livres, 17 sous, and 6 deniers, sterling:—Held, that there was no variance, so as to entitle the defendant to be discharged on filing common bail, the meaning of the two expressions being the same. Gould v. Logette, 1 Chit. 659. 1600

And where an affidavit to hold to bail stated, "that J. S. was indebted to the deponent in the sum of 44*l.* 11*s.*," being the amount of a certain inland bill of exchange, drawn by the said J. S. on the deponent, and by him accepted for the honor of the said J. S. payable to the order of the said J. S. at a day now past; and which said bill of exchange was paid by the deponent:—Held, that, although the declaration contained only the money counts for the amount of the bill, it was no variance from such affidavit. Brooks v. Clark, 2 D. & R. 148. 1600

It is too late to apply to have an exoneretur entered on the ground of a variance between the affidavit of debt and declaration, after plea demanded and time to plead given. Knight v. Dorsey, 1 B. & B. 48. 1600

If a plaintiff makes an affidavit of debt against two defendants, and issues a *capias* against both, but declares against one only, it is irregular. Woodcock v. Kilby, 1 Mees. & Wels. 41; 4 Dowl. P. C. 730; S. P. Bellotti v. Barella, 4 Dowl. P. C. 719. 1600

Where the defendant, in vacation, took out a summons at chambers, to set aside the declaration for such irregularity, which the judge dismissed, and refused the defendant time to apply to the court in term, and the defendant then took out a summons for time to plead:—Held, that this was not a waiver of the irregularity. *Id.*

When the affidavit of debt was for goods sold and delivered, but the writ was "in an action on the case," though indorsed with the amount of the debt:—Held, that though the writ was not irregular on that account, the arrest was irregular, as there could not be a good declaration on the writ, and the defendant was discharged. Barker v. Weedon, 4 Tyr. 860; 1 C. M. & R. 396; 2 Dowl. P. C. 707. 1600

Where the substantive cause of action does not require special bail without an order, if the plaintiff holds the defendant to bail on the money counts, and recovers nothing thereon, the court of C. T., on motion, will discharge the bail from their recognizance. Caswel v. Coare, 2 Taunt. 107. 1600

*Allegation of Venue.*—Where, by consent of both parties, the venue was laid in L.:—Held, that no objection could afterwards be taken to the venue, notwithstanding it ought, under an act of parliament, to have been laid in S. Furnival v. Stringer, 1 Bing. N. R. 68. 1601

In assumpsit for not repairing, the venue is not local, though the contract be only implied

from the situation of the parties. Buckworth v. Simpson, 1 C. M. & R. 834; 1 Gale, 38. 1600

In covenant by assignee of lessee against lessor, the plaintiff laid the venue in Middlesex, notwithstanding the lands to which the covenant applied lay in Surrey. The locality not appearing on the declaration, and no issue being raised on it:—Held, that the defendant was not entitled to a nonsuit. Boyes v. Hewetson, 2 Bing. N. R. 575; 7 C. & P. 127. 1600

Covenant against the personal representative of the lessee of a term, sued as assignee, in respect of the privity of estate, is a local action. Tremeere v. Morrison, 4 M. & Scott, 609. 1600

But where, in an action, the venue was laid in Middlesex, and the declaration alleged that the defendant "entered into the premises, and became possessed thereof, to wit, in the county aforesaid:—Held, (on demurrer), that it sufficiently appeared that the premises were situate in the county in which the venue was laid. *Id.*

Semble, that, to let in the objection, it must appear on the face of the record that the venue is laid in the wrong county. *Id.*

The insertion of a venue in a declaration, contrary to the 8th rule of H. T. 4 Will. 4, is not cause of demurrer. Fanner v. Champneys, 1 C. M. & R. 369; 4 Tyr. 859; S. C. nom. Harper v. Champneys, 2 Dowl. P. C. 680; Fisher v. Snow, 3 Dowl. P. C. 27. 1601

The improper introduction of a venue into a declaration, contrary to the rules of H. T. 3 & 4 Will. 4, c. 42, is no ground for setting aside the declaration, the proper course being to apply to a judge at chambers to strike it out. Townsend v. Gurney, 3 Dowl. P. C. 168; 1 C. M. & R. 590; 5 Tyr. 214. 1601

*Change of Venue.*—The venue will not be changed in an action on a written but unstamped agreement. Slack v. Chew, 3 Tyr. 810. 1604

The venue having been changed from L. to W.; in an action of covenant on a lease for non payment of rent for premises situate in H., the court refused to bring it back. Arden v. Mornington, 4 Tyr. 56. 1604

In an action on a deed, the venue may be changed under special circumstances, though an undertaking to try at sittings has been given. Johnson v. Nevison, 2 Dowl. P. C. 260; S. C. nom. Johnson v. Berresford, 4 Tyr. 57; 2 C. & M. 222. 1604

In an action for a libel published in a country local newspaper, the court allowed the venue to be changed upon special affidavit. Robson v. Blackwell, 2 Dowl. P. C. 635. 1604

In an action on a bill of exchange, the defendant is too late to change the venue after an order for time on the usual terms, and an undertaking to try at the sittings though it is sworn that all the witnesses reside in the county to which the venue is required to be moved. Haythorn v. Bush, 2 Dowl. P. C. 240. 1604

In covenant on a farming lease of land in



Essex, for breaches of covenants relating to the cultivation of the land, the court refused to allow the venue to be changed from Middlesex to Essex before issue joined. *Bohrs v. Sessions*, 2 Dowl. P. C. 699; 4 Tyr. 275; S. C. *Maude v. Sessions*, 1 C. M. & R. 86. 1604

Semble, that the venue may now be changed in a local action. *Briscoe v. Roberts*, 3 Dowl. P. C. 434. 1604

An allegation that an impartial trial cannot be had must be satisfactorily made out to induce the court to interfere. *Id.*

In an action on a promissory note, and for goods sold and delivered, the defendant cannot change the venue, without disclosing his ground of defence; and his application cannot be made before plea pleaded. *Parmeter v. Otway*, 3 Dowl. P. C. 66. 1604

Where part of the cause of action arises on a bill of exchange, the venue cannot be changed on the common affidavit; but in such a case the venue can only be changed under special circumstances. *Walthew v. Syers*, 3 Dowl. P. C. 160; 1 C. M. & R. 596; 5 Tyr. 217. 1604

In ejectment, to try the validity of a will, on the ground of insanity, the court refused to enter a suggestion on the roll, under 3 & 4 Will. 4, c. 42, s. 22, to change the venue from Somersetshire to London, on the ground that the testator lived in London at the time of his death, and that the evidence of an eminent medical man living in London was essential, where it appeared that the testator was most visited and best known at his country estate in Somersetshire, where the will was made, and in which county there were also many witnesses. *Doe d. Baker v. Harmer*, 1 Har. & Woll. 80. 1602

If a motion to change the venue rests on special grounds, it ought not to be made till after plea pleaded. *Cotteril v. Dixon*, 3 Tyr. 705; 1 C. & M. 661. 1606

An application by the plaintiff to change the venue in a local action, under the 3 & 4 Will. 4, c. 42, s. 22, cannot be made till issue is joined. *Bell v. Harrison*, 4 Dowl. P. C. 181; 2 C. M. & R. 733; 1 Gale, 269. 1606

Where the plaintiff knew the application would be made, leave was granted to change the venue after issue joined, though the witnesses might already be on their way to attend the trial. *Jones v. Gee*, 1 Har. & Woll. 183. 1606

If a defendant applies to change the venue after plea, the onus of showing special grounds for the change lies on him. *Higgins v. Houseman*, 3 Dowl. P. C. 549; 1 Har. & Woll. 218. 1606

In an action on a specialty, an application to change the venue cannot be made until after issue joined. *Youde v. Youde*, 4 Dowl. P. C. 32; 1 Har. & Woll. 338. 1606

Where a rule for changing the venue has been obtained on the common affidavit, in a case in which the venue can only be obtained on special grounds, and a rule is obtained for bringing back the venue, it will be no answer to the lat-

ter rule to show that there are special grounds for keeping the venue at the place to which it has been changed; but those grounds must be made the subject of an independent motion for changing the venue in the first instance. *Dawson v. Bowman*, 3 Dowl. P. C. 160; 1 C. M. & R. 594. 1607

If an application to change the venue has been improperly granted on the usual affidavit, and a rule is obtained to discharge it, it is no answer to that rule that there are special grounds for changing the venue, and the plaintiff will be entitled to retain it; for the special grounds of changing the venue should have been made the subject of a distinct motion. *Dalton v. Trevillion*, 5 Tyr. 216. 1607

Where a defendant had changed the venue to the county where the cause of action arose, it was held to be no reason for bringing back the venue, that the action was for the balance of an election dinner, and that the defendant was treasurer of the county, and an electioneering agent, and a person of great influence there—it being a special jury cause. *Hill v. Payne*, 3 Dowl. P. C. 695. 1608

Where in an action for libel, a rule was granted to change the venue from London to Lincolnshire; on the usual affidavit, a rule to bring it back to London, on affidavit that the libel was published there as well as in Lincolnshire, was made absolute, without calling on the plaintiff to undertake to give material evidence in London. *Clements or Clementson v. Newcome*, 3 Dowl. P. C. 425; 1 C. M. & R. 776; 6 Tyr. 492; 1 Gale, 60. 1608

In an action on the case for a libel published in a county newspaper, called the *Liverpool Chronicle*, the venue having been changed by the defendant, upon an affidavit that the cause of action arose in the county of Lancaster, and not elsewhere; and upon special grounds as to residence of witnesses, the court refused to bring back the venue to the former county, upon an affidavit that the plaintiff had eight witnesses in London, and that notice of trial had been given and briefs prepared, it appearing that several witnesses for the defendant lived at Liverpool, and the defendant agreeing to withdraw the general issue, rely upon his plea of justification, and furnish the plaintiff with a copy of the newspaper. *Greenalade v. Ross*, 3 Dowl. P. C. 697. 1608

It is not of itself a sufficient objection to an affidavit for changing the venue, that it is made by the attorney in the cause, and not by the defendant; but, semble, that, if defendant is in the country, it ought to be made by him. *Biddell v. Smith*, 2 Dowl. P. C. 219. 1607

An affidavit of a good defence on the merits is not necessary in order to changing the venue on special grounds, where the facts sworn to amount to a good defence; e. g. where it is sworn that the debt has been satisfied. *Johnson v. Beresford*, 2 C. & M. 222; 4 Tyr. 75; S. C. nom. *Johnson v. Nevison*, 2 Dowl. P. C. 260. 1607

If a defendant moves to change the venue as



of right, it is not sufficient to swear that the cause of action did not arise in the county stated in the declaration, and that it will be inconvenient for him to try there. He must make the ordinary affidavit, showing in which county the cause of action did arise. *Palmer v. Terry*, 2 Dowl. P. C. 566. 1607

An attorney is entitled to retain his venue in Middlesex, notwithstanding the Uniformity of Process Act, and his not having entered his certificate. *Partington v. Woodcock*, 2 Dowl. P. C. 550. 1607

The venue cannot be changed in an indictment for conspiracy, until issue is joined. *Rex v. Forbes*, 2 Dowl. P. C. 440. 1607

*Joinder of Counts.*—Two actions for penalties having been brought for the same offence, and the defendant having pleaded the prior action in bar of the second, in which the declaration contained six counts, though the declaration in the former action contained only four, a judge made an order that two of the counts should be struck out as being unnecessary; and the court refused to set aside that order. *Jones v. Key*, 2 Dowl. P. C. 265; 2 C. & M. 340; 4 Tyr. 238. 1612

*Semble*, that under the R. H. T. 4 Will. 4, the court or a judge has no jurisdiction to disallow two or more counts in a declaration, where they show different causes of complaint not varied in statement, description, or circumstances only. *Lawrence v. Stevens*, 1 Gale, 164. 1612

The common counts are separate and distinct counts for the purposes of pleading. *Jourdain v. Johnson*, 4 Dowl. P. C. 534; 5 Tyr. 524; 1 Gale, 312. 1611

The declaration in assumpsit contained, first, a count on a bill of exchange by the indorsee against the drawer, and then stated various debts of 100*l.* each for goods sold, &c., with the common conclusion in the form given by the rule T. T. 1 Will. 4. The defendant pleaded as to the first count of the declaration, and as to 12*l.* 2*s.*, parcel of 100*l.* in the second count, claimed to be due for goods sold, and as to 100*l.* in the second count alleged to be due on an account stated, and the promises made by the defendant in respect thereof, payment of 51*l.* 9*s.* 7*d.* into court in the form given by the rule of H. T. 4 Will. 4, and the general issue was pleaded to the residue:—Held, that this plea would have been clearly good to the declaration, except to the count on the bill of exchange; but, *quære*, whether it was good for not specifying how much was paid in on the bill?—Held, secondly, that the plea was bad on special demurrer, for treating the claims for goods, monies, &c., as one count, inasmuch as those demands being stated in the form given by the rule of T. T. 1 Will. 4, are not only to be considered as separate counts with a view to costs, but also for the purpose of pleading. But, *semble*, that if that form is not strictly followed, and there should be several debts or causes of action stated by way of indebitatus assumpsit, with one promise only, and without any words to make the promise, several quoad each of the

debts, such count must be treated as several for the purpose of costs, under the rule of H. T. 4 Will. 4, though it might not be so for the purpose of pleading. *Id.*

A declaration contained one count claiming a fee or reward, in the name of metage on coals imported into the port of T., alleged to be due to the plaintiff as lessee, under the corporation of T., of an ancient office of meter, to which the fee was stated to be incident; and another count claiming the same sum as a port duty:—Held, that these counts were only different statements of the same subject-matter of complaint, within the meaning of the rule of H. T. 4 Will. 4, and that one of them must be struck out. *Jenkins v. Treloar*, 1 Mees. & Wels. 16; 4 Dowl. P. C. 690. 1612

A declaration contained one count for double rent, on the 11 Geo. 2, c. 19, s. 18, and another count for use and occupation. The court refused a rule to strike out one of the two counts. *Thornton v. Whitehead*, 1 Mees. & Wels. 14; 4 Dowl. P. C. 747. 1619

Applications to strike out counts ought to be made to a judge at chambers in the first instance. *Ward v. Graystock*, 4 Dowl. P. C. 717. 1612

*In Inferior Courts.*—In an action of debt on a judgment of an inferior court, the declaration is bad on demurrer, if it does not contain an averment that the cause of action arose within the jurisdiction of the court below: it is not enough to allege that the plaintiff recovered his damages within that jurisdiction. *Read v. Pope*, 4 Tyr. 403; 1 C. M. & R. 302. 1613

Declaration stated that defendant was indebted to plaintiff within the jurisdiction of the county court for the wages of and due and owing to plaintiff within the jurisdiction, as the servant of the defendant. Admitted, that this was a sufficient allegation of the cause of action having accrued within the jurisdiction. *Chitty v. Dendy*, 3 Adol. & Ellis, 319; 4 Nev. & M. 842; 1 Har. & Woll. 169. 1613

Whether, in indebitatus assumpsit in an inferior court, an omission to state that the debt accrued within the jurisdiction, it being alleged that the defendant was indebted within the jurisdiction, and that the promise was made there, is error, *quære*? *Salter v. Slade*, 3 Nev. & M. 717. 1613

*Time of declaring.*—By 2 Will. 4, c. 39, s. 11, no declaration, or pleading after declaration, shall be filed or delivered between the 10th day of August and 24th of October, in any year. 1614

It is no ground for setting aside a declaration, that it has been delivered in defiance of an injunction of a court of equity, restraining the plaintiff from proceeding at law. *Horne v. Took*, 4 M. & Scott, 183. 1614

If a plaintiff proceeds by writ of summons, he cannot declare against the defendant until eight days after the service, inclusive of the day of serving the writ, have expired: and if he does, he



will not be entitled to the costs of his declaration. *Fish v. Palmer*, 2 Dowl. P. C. 460. 1614

It is not too late on the 25th to take advantage of an irregularity in declaring too soon, which has occurred on the 7th. *Id.*

It is no irregularity to declare before the expiration of eight days after service of the writ of summons, if the defendant has appeared. *Morris v. Smith*, 2 C. M. & R. 314; 4 Dowl. P. C. 198; 1 Gale, 187. 1614

The rule H. T. 2 Will. 4, No. 35, applies to all courts and to all causes, whether originally brought in a superior court, either by serviceable or bailable process, or removed there by habeas corpus. *Norris v. Richards*, 5 Nev. & M. 268; 1 Har. & Woll. 437. 1614

Where a cause is removed by habeas corpus from an inferior court, the cause is not out of court for want of declaration, until four terms from the time of bail put in. *Id.*

Where, therefore, a party arrested in a suit commenced in a borough court, removes the cause by habeas corpus into the K. B., and no further proceedings are had, the suit is not determined, so as to support an action for a malicious arrest, until a year after the return of the habeas. *Id.*

Upon such a removal, the defendant is not bound to accept a declaration after the expiration of two terms; but the plaintiff cannot be non-prossed. *Id.*

A plaintiff may declare *de bene esse*, when a bail bond has been taken, and special bail has not been put in within eight days after the arrest. *Hodson v. Mee*, 5 Nev. & M. 302; 1 Har. & Woll. 398. 1614

After the expiration of eight days from an arrest upon a writ of *capias*, and before special bail have been perfected, the plaintiff may declare *de bene esse*, whether special bail have been put in or not, and the rule in which it is a condition of the bail-bond standing as a security that the plaintiff shall have declared *de bene esse* is still in force. *Bailey v. Newbold*, 2 C. M. & R. 325; 4 Dowl. P. C. 177; 1 Gale 245. 1614

Where a defendant puts in bail, but does not justify, a declaration *de bene esse* is properly filed and not delivered. *Rex v. Sheriff of Middlesex*, 3 Dowl. P. C. 186. 1614

A plaintiff will be allowed time to declare, where in a joint action he cannot bring one of the defendants before the court, in consequence of his absence from this country. *Richardson v. Pollen*, 1 Hodges, 75. 1615

Where one of two defendants is in custody, and the plaintiff is proceeding to outlawry against the other, he must apply to the court or a judge for time to declare against the prisoner until the outlawry of the other is perfected. *De Lannoy v. Benton*, 1 Scott, 386. 1615

If a plaintiff's proceedings on a writ of summons are stayed by rule, he is bound to declare within a year after the expiration of that rule, or he will be out of court. *Unite v. Humphrey*, 3 Dowl. P. C. 532. 1615

The rule that the plaintiff must declare within one year from the return day of the process, applies to real as well as personal actions. *Barnes v. Jackson*, 1 Bing. N. R. 545; 3 Dowl. P. C. 404; 1 Hodges, 59. 1615

The year within which a plaintiff must, according to the rule of law, deliver his declaration, is, in real as well as personal actions, to be reckoned from the return day of the writ, and not from the date of the defendant's appearance. *Id.*

In quare impedit the writ was returnable Jan. 8th, 1834; defendants appeared Jan. 11th, 1834; plaintiff declared Jan. 10th, 1835. The court set aside the declaration as too late. *Id.*

After a summons had been taken out for setting aside an irregular declaration, and both parties having attended before the judge, who referred them to the court:—Held, that the plaintiff could not withdraw the declaration without paying costs. *Bellotti v. Barella*, 4 Dowl. P. C. 719. 1615

A declaration delivered, although in disobedience to an injunction in equity, is regular. *Horne v. Took*, 2 Dowl. P. C. 776. 1615

*Notice of Declarations.*—Interlocutory judgment cannot be set aside because the notice of declaration is irregular. *Smith v. Clarke*, 2 Dowl. P. C. 218. 1617

An objection to a notice of declaration, on the ground of variance from the writ, must be taken within four days from the term of serving the notice, whether in term or vacation. An intermediate Sunday counts as one of those days. Some of the days falling within the term, and some in vacation, is immaterial. *Hinton v. Stevens*, 4 Dowl. P. C. 283. 1616

When the court will not allow service of a declaration by sticking it up in the office, see *Heming v. Duke*, 2 Dowl. P. C. 637. 1617

In order to render good the service of a declaration, by sticking it up in the King's Bench Office, more than one attempt must be made to find the defendant. *Fry v. Rogers*, 2 Dowl. P. C. 412. 1617

A notice of declaration being filed, served in the country at 150 miles distance on the day the declaration is stated to be filed, is regular. *Rooke v. Sherwood*, 4 Dowl. P. C. 363. 1617

A motion to set aside a judgment as irregular for being signed too early, on the 13th, notice of declaration not having been given till the 5th, was held to be answered by an affidavit that the notice was served on the 4th; though it was not shown whether the notice was served on that day before or after declaration filed. *Id.*

Where, in the service of a notice of declaration, the probabilities are that it has come to the hands of the defendant, and the latter does not deny that it had come to his knowledge, the court will not set aside the service. *Rolfe v. Brown*, 3 Dowl. P. C. 628. 1617

Where the defendant's residence is unknown,



application must be made to the court in the first instance for leave to serve the declaration in a particular manner; and if the declaration is left at the defendant's last place of abode, the court will not afterwards declare such service to be good. *Troughton v. Craven*, 3 Dowl. P. C. 436. 1617

### III. IMPARLANCA.

Where a plaintiff declares in vacation, the defendant is entitled to an imparlance, notwithstanding the 2 Will. 4, c. 39, s. 11, and 2 Reg. Gen. H. T. 4, Will. 4, (Pleading Rules). *Freen v. Chaplin*, 2 Dowl. P. C. 523. 1618

The 2 & 3 Will. 4, c. 39, s. 11, abolished imparlances. *Wigley v. Tomlins*, 3 Dowl. P. C. 7. 1618

Since the Uniformity of Process Act, a defendant is not in any case entitled to an imparlance. *Nurse v. Geeting*, 3 Dowl. P. C. 157; 1 C. M. & R. 567; 5 Tyr. 179. 1618

### IV. TIME OF PLEADING.

Where a prisoner has been served with a rule to plead, the omission of an indorsement of notice to plead, on the declaration, will not render irregular a judgment signed for want of a plea. *Clementson v. Williamson*, 1 Bing. N. R. 356; 1 Scott, 267. 1619

A plea was allowed after the plaintiff had replied, and the cause was in the paper under special circumstances. *Jones v. Roberts*, 2 Dowl. P. C. 668. 1619

If a plaintiff treats a plea as a nullity, and signs judgment as for want of a plea, he so treats it for all purposes, and cannot afterwards say that it was merely irregular, so as to be a waiver of the demand of a plea. *Hough v. Bond*, 1 Mees. & Wels. 314. 1620

Necessity of rule to plead. *Mould v. Murphy*, 2 Tyr. 538; *Pryer v. Smith*, 3 Tyr. 820. 1621

A rule to plead in a wrong name is a nullity. *Warne v. Beresford*, 4 Dowl. P. C. 361. 1621

A judgment signed (after a defective plea) as for want of a plea, is irregular, unless a rule to plead has been given. *Id.*

Taking out a summons for time to plead is a waiver of a rule to plead. *Nugee v. M'Donell*, 3 Dowl. P. C. 579. 1621

After a rule to plead in Easter Term, in an action on a bill of exchange, defendant paid a portion of the bill, with costs to that time, and agreed to pay the residue, with the costs of the action, on the 1st October following, if it were not previously paid by another party: no payment having been made according to the agreement:—Held, that plaintiff might sign judgment in Michaelmas Term without a fresh rule to plead. *Usborne v. Pennell*, 1 Bing. N. R. 320; 1 Scott, 277. 1621

Rules to reply, or to plead any subsequent pleading, must be served. *Pound v. Lewis*, 2 Dowl. P. C. 744. 1621

Where the declaration was delivered on the 7th

to plead in four days, and on the 10th an order for particulars was obtained, which were delivered on the 13th:—Held, that judgment for want of a plea, signed at ten o'clock on the 15th, was regular. *Tate v. Bodfield*, 3 Dowl. P. C. 218. 1624

Where three months' time to plead are given generally, they are to be reckoned by lunar months, and not calendar months. *Soper v. Curtis*, 2 Dowl. P. C. 237. 1622

If the time for pleading does not expire until after the 10th of August, although it may be enlarged time, the defendant has still the same time for pleading as if the declaration had been filed or delivered on the 24th of October. *Wilson v. Bradslocke*, 2 Dowl. P. C. 416. 1622

If a plaintiff gives a greater number of days for pleading than by the practice of the court is required, the defendant is entitled to avail himself of that greater number. *Solomonson v. Parker*, 2 Dowl. P. C. 405. 1622

An order for seven days' time to plead, was obtained on May 15th; on the 22nd, pleas were delivered, but irregularly in several respects, and on the evening of that day, the plaintiff signed judgment as for want of a plea: the court set aside the judgment as having been signed too early. *Pepperell v. Burrell*, 2 Dowl. P. C. 674; 1 C. M. & R. 372; 4 Tyr. 811. 1622

Seven days time for pleading gives the whole of the seventh day to plead in, after excluding the day on which the order is made. *Id.*

If a defendant obtains an enlarged time for pleading previous to the 10th August, but which does not expire on that day, he is entitled to the remainder of the enlarged time after the 24th of October for the purpose of pleading. *Trinder v. Smedley*, 3 Dowl. P. C. 87. 1622

An indefinite time to plead will not be granted, on the ground that the defendant could not safely plead, till a rule, pending in another court, and involving the same matter of defence, is determined; but the court granted time to plead, fixing a certain day. *Clarke v. Allbutt*, 1 Tyr. & G. 71. 1622

Where the master of a ship was served with process in an action on the eve of his departure on a foreign voyage, the court allowed twelve months' time to plead. *Hunt v. Barkley*, 3 Dowl. P. C. 647; 1 Hodges, 103. 1622

Though the time for pleading be out, a judgment is irregular which is signed after a plea has been delivered. *Leigh v. Bender*, 4 Dowl. P. C. 201; 1 Gale, 269. 1623

A plaintiff has no right to sign judgment for want of a plea, before the time for pleading is out, although a bad plea may have been delivered. *Dakins v. Wagner*, 3 Dowl. P. C. 535. 1623

A defendant who had obtained time to plead, and afterwards an order for particulars of plaintiff's demand, delivered a plea not signed by counsel, though concluding with a verification, three days before the time for pleading expired. The plaintiff treated the plea as a nullity, and signed judgment the day before that on which the time for pleading expired:—Held, that, as the



defendant had all that last day for delivering a plea signed by counsel, the judgment was signed too soon. *Macher v. Billing*, 3 Dowl. P. C. 246; 1 C. M. & R. 577; 4 Tyr. 812. 1623

A declaration was delivered on the 4th of August, with notice to plead in four days:—Held, that judgment could not properly be signed till the afternoon of the 9th, for want of a plea. *Kemp v. Tyson*, 3 Dowl. P. C. 265. 1623

The afternoon in the Exchequer, for the purpose of signing judgment, does not commence in term till three o'clock. *Tate v. Bodfield*, 3 Dowl. P. C. 218. 1623

A plea, being delivered after nine o'clock in the evening, cannot be treated as a nullity; and a judgment signed on that ground, and no notice having been given of the objection to the defendant, was set aside. *Horsley v. Purdon*, 2 Dowl. P. C. 228. 1623

A motion to set aside an interlocutory judgment for irregularity, which was signed because a plea was pleaded in the name of a person who was not an attorney:—Held in time, on the 23rd, the day of executing the writ of inquiry, though the notice of executing the inquiry, was served on the 15th of May. *Hill v. Mills*, 2 Dowl. P. C. 696. 1623

A plaintiff cannot treat such a plea as a nullity. *Id.*

The rule, that an application to set aside a judgment by default on affidavit of merits, must be made within a reasonable time, applies as well to a prisoner as other persons. *Five v. Bruere*, 4 Dowl. P. C. 329. 1623

#### V. WHAT ARE ISSUABLE PLEAS.

Where a defendant, in an action against him as administrator, being under terms to plead issuable, pleads *plene administravit* and his own bankruptcy, the plaintiff may sign judgment as for want of a plea. *Serie v. Bradshaw*, 2 C. & M. 148; 2 Dowl. P. C. 289; 4 Tyr. 69. 1623

Where a judgment was set aside on payment of costs, with leave to plead *de novo*, the court refused to allow the defendant to plead that the plaintiff, an attorney, had not delivered a signed bill of costs, in pursuance of the statute, that not being a plea to the merits. *Becke v. Mordaunt*, 2 Scott, 178; 1 Hodges, 186. 1623

Where a defendant is under terms to plead issuable, the plaintiff cannot reply double; and if he do, the court will give leave to the defendant to assign it as cause of demurrer, and will allow it to be argued. *Gisbourne v. Wyatt*, 3 Dowl. P. C. 506; 1 Gale, 35. 1623

The term of "rejoining gratis" does not extend to a joinder in demurrer. *Jones v. Key*, 2 C. & M. 340; 2 Dowl. P. C. 265; 4 Tyr. 238. 1623

Where a defendant was under terms of rejoining gratis, and the plaintiff signed judgment for want of a rejoinder, when he might have himself added a similiter, the court set aside the judgment, but without costs. *Seaton v. Scale or Skeay*, 3 Dowl. P. C. 537; 1 Har. & Woll. 210. 1623

Although a defendant is under terms to rejoin gratis, and take short notice of trial, the plaintiff cannot sign judgment of non pros for want of a rejoinder, unless a demand for that purpose has been made. *Id.*

#### VII. PLEAS IN ABATEMENT.

In an action against A., a plea in abatement, alleging the nonjoinder of B. as joint contractor, is not sufficiently verified by an affidavit stating that A. & B. were partners during the period within which the cause of action was stated in the special counts of the declaration to have accrued, but which does not show that they continued in partnership down to the time laid in the common counts. *Dobbin v. Wilson*, 3 Nev. & M. 250. 1625

Upon a plea in abatement of pendency of another action in another court for the same cause, concluding with a *prout patet per recordum*, it is sufficient to satisfy the plea if a record of a writ is produced. *Kerby v. Siggers*, 2 Dowl. P. C. 659. 1625

The plaintiff issued two writs, one out of this court and the other out of the Exchequer. The first was never served; on the second the plaintiff declared. The defendant pleaded to the second action, another action, pending for the same cause in this court. The plaintiff replied *nul tiel record*, and served the defendant with a notice to produce. The defendant made up a roll from the præcipe of this court. The court directed it to be cancelled, with costs. *Kirby v. Siggers*, 2 Dowl. P. C. 813. 1625

Since the rule of H. T. 4 Will. 4. No. 15, it is not necessary to set out in the issue and Nisi Prius record a previous plea in abatement, and judgment of respondent *ouster* thereon, the omission to do so is no ground for setting aside a verdict, or arresting the judgment, even where the defendant had refused to receive the issue on that ground. *Pepper v. Whalley*, 5 Nev. & M. 437; 1 Har. & Woll. 480. 1625

A plea of privilege cannot be distinguished from a plea in abatement, and must be accompanied by an affidavit of verification. *Davidson v. Watkins*, 3 Dowl. P. C. 129. 1625

#### VIII. PLEAS IN BAR AND SUBSEQUENT PLEADINGS.

*Form.*—A plea must still conclude with a verification or to the country, notwithstanding the rules of H. T. 4 Will. 4. *Snow v. Stevens*, 2 Dowl. P. C. 664; S. C. nom. *Knowles v. Stevens*, 1 C. M. & R. 26. 1628

The rule of Hil. 4 Will. 4, that a plea pleaded in bar of the whole action generally need not commence with *actionem non*, nor praying judgment, applies to a plea answering the whole of one count, although there are other counts which it did not answer. *Bird v. Higginson*, 2 Adol. & Ellis, 697; 4 Nev. & M. 505; 1 Har. & Woll. 61. 1628

The expression "the whole action generally," in Reg. Gen. H. T. 4 Will. 4, No. 9, means only



the whole case contained in the count to which the plea is pleaded. *Id.*

To a declaration upon money had, and also upon an account stated, the defendant may in his plea allege that the several sums mentioned in the two counts are the same debt and not distinct debts, and then plead over to the debt so consolidated. *Mee v. Tomlinson*, 5 Nev. & M. 624. 1628

But where the plaintiff declares, first, for work and labor; secondly, for money paid; and thirdly, on the account stated; a plea alleging that 20*l.* parcel of the sum mentioned in the third count, and 20*l.* parcel of the several sums demanded in the first and second counts, are one and the same debt of 20*l.*, and not distinct debts of 20*l.*, was held bad, on special demurrer, for not showing how much of the 20*l.*, admitted to be due on the first two counts, is admitted to be so due on each of those two counts separately. *Id.*

Whether a plea, directly and expressly denying the facts alleged in one count of the declaration, and wholly inapplicable to the other causes of action stated in the declaration, but without any introductory statement professedly limiting its application to the first count, is to be considered as a plea to that count only, or as an informal answer to the whole declaration, *quere*? *Worley v. Harrison*, 5 Nev. & M. 173; 1 Har. & Woll. 426. 1628

To a declaration containing the common counts, the defendant pleaded as to part, that he was not indebted; as to the residue, that he paid it before the commencement of the action, and concluded to the country. Upon special demurrer to the last plea:—Held bad. *Mack v. Rust*, 4 Dowl. P. C. 206. 1628

A plea to an action of debt for goods sold and delivered, and on an account stated, that the defendant was discharged by order of the insolvent debtors' court, "of and from the said several debts and causes of action, if any," is bad on special demurrer, for hypothetically and not directly confessing the cause of action sought to be avoided. *Gould v. Lasbury*, 1 C. M. & R. 254; 2 Dowl. P. C. 707; 4 Tyr. 863. 1628

Semble, "supposed" only amounts to "alleged." *Id.*

The new rules of pleading do not apply to replications. *Brown v. Daubney*, 4 Dowl. P. C. 565. 1628

A replication is bad, although it follows the very words of the plea, if it does not answer it in substance. *Moore v. Bolcott*, 3 Dowl. P. C. 145. 1628

Debt for money lent and paid. The plea first alleged, that the sums so lent and paid were lent for the purpose of paying, and were paid to J. R., the master of a ship then in a foreign port, for the repairs of such ship, and not on the security or liability of the defendant; and then went on to state an agreement made in such foreign port between the plaintiff and J. R. for the defendant for bottomry, and a bottomry bond given by J. R. to the plaintiff in pursuance of such agreement; by means of which it was alleged that the plaintiff desired to obtain exorbitant interest for his advances. The replication alleged, first, that the

money was lent and paid on the security and liability of the defendant; secondly, that there was no such agreement; and, thirdly, that there was no such bond as was stated in the plea:—Held, on special demurrer, that the replication was bad, for tendering issues on several matters, having by the first allegation put in issue the whole substantial matter of defence. *Regil v. Green*, 1 Mees. & Wels. 328. 1628

*Quere*, whether, in an action of assumpsit, where the plaintiff does not reply *de injuria* generally to the facts stated in a plea, the circumstances of his only taking issue on one of them entitles the jury to treat the facts alleged in the plea, and not denied in the replication, as admitted. *Noel v. Boyd*, 4 Dowl. P. C. 415. 1628

*Several Pleas.*—A summons to plead several matters, is a stay of proceedings if it is returnable at the time the judgment office opens on the day after the time for pleading expires. *Wells v. Secret*, 2 Dowl. P. C. 447. 1630

Since the statute 1 Will. 4, c. 21, several pleas may be pleaded to an action in prohibition. *Hull v. Manle*, 5 Nev. & M. 455; 1 Har. & Woll. 583. 1630

It is no objection to pleas that they are inconsistent. *Wilkinson v. Small*, 3 Dowl. P. C. 564; 1 Har. & Woll. 214. 1630

Inconsistent pleas may be pleaded under the new rules, if intended *bona fide* to support different substantial grounds of defence. *Duer v. Triebner*, 3 Dowl. P. C. 133. 1630

A defendant may, notwithstanding the new rules of pleading, plead the general issue, and another plea apparently inconsistent, if he has reasonable grounds for supposing both are necessary to meet the exigencies of the case. *Hart v. Bell*, 1 Hodges, 6. 1630

To a declaration on a bill of exchange with the common counts, the defendant pleaded that the bill of exchange in the first count mentioned was paid when due; and also, as to the first count, that he did not promise; and, as to the other counts, that he puts himself upon the country:—Held, that the plaintiff was justified in treating each as a separate plea, though the second was declared inadmissible by the new rules, and the last put nothing in issue; and that he was therefore justified in signing judgment, there being no signature to the pleas, or rule to plead double. *Hockley v. Sutton*, 2 Dowl. P. C. 700. 1630

A defendant may plead to the same demand, first, the general issue; and, secondly, that the demand accrued for carrying into effect illegal wagers. *Triebner v. Duerr*, 1 Scott, 102; 1 Bing. N. R. 266. 1630

Motion for leave to plead several matters; first, non-assumpsit; secondly, payment as to part; thirdly, as to part, that the goods were warranted like the sample; fourthly, as to part, that the goods were warranted to be of good merchantable quality; fifthly, that they were warranted to be one ton weight of black lead:—First and fourth disallowed. *Steel v. Sterry*, 1 Scott, 101. 1630



The court refused to allow a plea that the defendant had probable cause, together with a plea of not guilty, in an action for a malicious prosecution. *Cotton v. Brown*, 1 Har. & Woll. 419. 1630

In such an action the plea of not guilty puts in issue the want of probable cause. *Id.*

A plea, that the defendant was not detained in custody, as alleged in the declaration, was held not to be such a vexatious and frivolous plea as to deprive the defendant of his right to add the general issue, there being an affidavit of merits. *Rex v. Kingston*, 3 Dowl. P. C. 159. 1630

In assumpsit, the defendant pleaded, as to 14s. parcel, &c., that, before the commencement of the suit, he paid the same to the plaintiff; and, as to the residue of the said monies, that he did not promise, as in the declaration is alleged, and of this he puts himself upon the country. The plaintiff, having specially demurred, alleging duplicity, and the want of a proper conclusion with a verification, the court held the plea bad, and that judgment for the plaintiff must be upon the whole plea. *Ansell v. Smith*, 3 Dowl. P. C. 193. 1630

To a declaration in trover, the defendant was allowed to plead a right of lien by agreement, a right of lien by usage, and the same usage in two other pleas, but with reference to a delivery of the goods by two different parties. *Leuckhart v. Cooper*, 3 Dowl. P. C. 415. 1630

Pleas of non-assumpsit and part payment will not be allowed together, nor a plea of a warranty with sample, and a plea founded on the warranty implied in law. *Steele v. Sturry*, 3 Dowl. P. C. 133. 1630

To a declaration of two counts, one on a bill of exchange, the other on an account stated, defendant, without a rule to plead several matters, pleaded, "that he did not accept the bill; and for a further plea, that he did not account."—Held, that the informality of omitting to confine each plea to the count to which it applied, did not authorize plaintiff to sign judgment. *Vere v. Goldsborough*, 1 Scott, 255; 1 Bing. N. R. 353. 1630

Where, to debt on simple contract in an inferior court, not of record, the defendant pleaded both the general issue and set-off, and the plaintiff treated the latter plea as a nullity, replied only to the first, and obtained a verdict and judgment:—Held, on a writ of false judgment, that, as the defendant could not plead double, and the first plea was complete in itself, the second was surplusage, and the plaintiff was justified in taking no notice of it; and the judgment was affirmed. *Chitty v. Dendy*, 4 Nov. & M. 842; 3 Adol. & Ellis, 319; 1 Har. & Woll. 169. 1630

A court of error will take judicial notice that a county court cannot give leave to plead double. *Id.*

The rule, that duplicity in pleading must be taken advantage of by special demurrer, does not apply to the case of two distinct pleas, pleaded without leave. *Id.*

Where, by any statute made before 3 & 4 Will. VOL. IV.

4, c. 42, a defendant had a right to give special matter in evidence under the general issue, that right is reserved to him by section 1 of the last-mentioned act; but since Reg. Gen. H. T. 4 Will. 4, he cannot plead the general issue, and also a special plea of justification. *Neale v. Mackenzie*, 1 C. M. & R. 61; 2 Dowl. P. C. 702; 4 Tyr. 670. 1630

Seem, that the general issue, with power to give the special matter in evidence, is abolished in all cases whatever, except where specially allowed by statute. *Barnett v. Glossop*, 3 Dowl. P. C. 625. 1630

The mere fact of a plea being clearly insufficient in point of law, is not a ground for signing judgment as for want of a plea. *Cowper v. Jones*, 4 Dowl. P. C. 591. 1631

The court will not, upon affidavit, set aside a plea upon which issue may be taken. *La Forrest v. Langan*, 4 Dowl. P. C. 642. 1631

Where, on issues of nul tiel record, the plaintiff draws up the record for the defendant, a four-day rule to produce the record must be served on the defendant. *Begbie v. Grenville*, 3 Dowl. P. C. 502; 5 Tyr. 485. 1633

Upon an issue of nul tiel record, the plaintiff gave notice to the defendant to produce the record; and upon his neglect to do so, moved for judgment:—The court held the notice to be irregular, and refused the rule. *Id.*

The plaintiff issued two writs; one out of this court, which was never served, the other out of the Exchequer, on which he proceeded to declare. The defendant pleaded to the action in the Exchequer, another action pending for the same cause in this court. The plaintiff replied nul tiel record, and served the defendant with a rule to produce. The defendant made up a roll from the præcipe on the file of this court:—The court ordered it to be cancelled, with costs. *Kirby v. Siggers*, 4 M. & Scott, 481. 1633

The court rescinded a rule for judgment on a false plea of nul tiel record, to a sci. fa., on the ground that four days had not been suffered to intervene between the delivery of the issue and the rule to produce the record. *Wood v. Frost*, 4 M. & Scott, 746. 1633

*Signing.*—The old rule of practice in Common Pleas, requiring pleas to be signed by a serjeant, is virtually repealed by his Majesty's warrant of 24th April, 1834, throwing open that court. *Power v. Fry*, 3 Dowl. P. C. 140; S. C. nom. *Power v. Izod*, 1 Scott, 119; 1 Bing. N. R. 304. 1634

A plea of the statute of limitations requires to be signed by counsel. *Macher v. Billing*, 1 C. M. & R. 577; 3 Dowl. P. C. 246; 4 Tyr. 812. 1634

The general issue being pleaded to part of a declaration, and the statute of limitations to the remainder, without the signature of counsel:—Held, that the whole plea was a nullity. *Id.*

A demurrer on the part of the crown, in a revenue cause, must be signed by the attorney-



general. *Rex v. Woollett*, 2 C. M. & R. 256; 3 Dowl. P. C. 694; 1 Gale, 157. 1634

The rule of H. T. 4 Will. 4, requiring pleading subsequent to the declaration to be delivered between the parties, does not apply to actions of ejectment, which are left to the old practice. *Doe d. Williams v. Williams*, 4 Nev. & M. 259; 2 Adol. & Ellis, 381. 1634

### IX. DEMURRERS.

**Form and Cause.**—A defendant, who is under terms to "rejoin gratis," is not bound to join in demurrer gratis. *Jones v. Key*, 2 C. & M. 340; 2 Dowl. P. C. 265; 4 Tyr. 238. 1636

Where a defendant, on the last day for joining in demurrer, obtained a rule nisi for setting aside the plaintiff's proceedings, with a stay of proceedings in the meantime, which rule was afterwards discharged with costs:—Held, that the defendant was in time to join in demurrer at any time in the day that the rule was disposed of, and that a judgment previously signed by the plaintiff was irregular. *Vernon v. Hodgins*, 4 Dowl. P. C. 665. 1636

If a demurrer be pleaded to the whole of a declaration, consisting of several counts, and any one count is good, the demurrer is too large, and the plaintiff is entitled to judgment. *Ferguson v. Mitchell*, 2 C. M. & R. 687; 4 Dowl. P. C. 513; *S. P. Spyer v. Thelwell*, 2 C. M. & R. 692; 4 Dowl. P. C. 509. 1636

A demurrer to the whole of a declaration, on which several breaches are assigned, on the ground that one of the breaches is ill assigned, is too large, if it appear that any one breach is well assigned, and the plaintiff is entitled to judgment. *Price v. Williams*, 1 Mees. & Wels. 6. 1636

A statement in the margin of a demurrer to a plea, that the matters disclosed in the plea contain no answer to the declaration:—Held, insufficient, within the meaning of R. G. 2 H. T. 4 Will. 4. *Ross v. Robinson* or *Robison*, 3 Dowl. P. C. 779; 1 Gale, 102. 1636

A defendant, after having had time to plead, demurred to the declaration, which was in debt on a bill of exchange, with the common counts in this form. The defendant by his attorney says, "that the declaration is not sufficient in law; and also, that an action of debt will not lie, and that the bill should have been stated to be for value received:"—Held, that the plaintiff was not justified in signing judgment as upon a sham demurrer. *Lyons v. Cohen*, 3 Dowl. P. C. 243. 1636

It is not a sufficient objection to a demurrer being argued, that the point intended to be raised is not stated in the margin of the demurrer. The rule only enables the opposite party to set aside the demurrer. *Lacy v. Umbers*, 3 Dowl. P. C. 732. 1636

The rule of Hil. Term, 4 Will. 4, which requires the grounds of the demurrer to be stated in the margin, does not extend to revenue cases, in which the three courts have not a concurrent jurisdiction. *Rex v. Woollett*, 2 C. M. & R. 256; 3 Dowl. P. C. 694; 1 Gale, 157. 1636

**Frivolous.**—If the ground of demurrer stated, pursuant to 2 Reg. Gen. H. T. 4 Will. 4, (Practice Rules), in the margin, appears sufficient, the court will not set the demurrer aside as frivolous. *Tyndall v. Ulleshorpe*, 3 Dowl. P. C. 2. 1636

Where a demurrer is frivolous, and a motion is made to set it aside, the court will grant "a rule for that purpose to be absolute, unless cause is shown on a particular day." *Kinnear v. Keane*, 3 Dowl. P. C. 154. 1636

A rule obtained on Reg. Gen. Hil. 4 Will. 4, No. 2, for setting aside a demurrer as frivolous, must be drawn up on reading the pleadings demurred to with the demurrer and marginal statement, or will be discharged. *Howarth v. Hubbersty*, 3 Dowl. P. C. 455; 5 Tyr. 391. 1636

A declaration in one count stated a promise to the plaintiff, and H. in his lifetime, now deceased. In another count, it stated that in the lifetime of the said H. the defendant was indebted to the plaintiff and the said H., and promised the plaintiff and the said H. in his lifetime to pay, without stating that H. was since dead. Defendant pleaded to the first count, and demurred to the second, for not averring the death of H. The demurrer was set aside as frivolous, under Reg. Gen. H. 4 Will. 4, No. 2. *Undershall v. Fuller*, 5 Tyr. 392. 1636

**Paper Books and Argument.**—Argument of demurrers. *Wilson v. Tucker*, 3 Tyr. 938. 1638

Where the concilium is served so late that the opposite party has not time to prepare and deliver the demurrer books two days before the day for argument, the court will not allow the demurrer to be argued, though it is stated to be a plea pleaded for delay; and the defendant will be entitled to his costs for appearing to make the objection. *Britten v. Britten*, 2 Dowl. P. C. 239. 1638

Where one party has omitted to leave demurrer books with the judges, and the other has delivered them on his default, and objects to his being heard till he shall have paid the costs of such delivery, pursuant to Reg. Gen. Hil. 4 Will. 4, s. 7, notice must be given to such party before the objection is made in court. It will not be entertained on an ex parte application. *Sandell v. Bennett*, 4 Nev. & M. 89; 1 Adol. & Ellis, 204. 1638

If a party seeks to make his opponent pay the costs of copies of demurrer books, pursuant to 7 Reg. Gen. H. 4 Will. 4, he must deliver them on the day after the time for his opponent's delivering them expires. *Fisher v. Snow*, 3 Dowl. P. C. 27. 1638

If one side neglects to deliver his demurrer books to the judge, the other side should do so for him, and then he will be entitled to judgment; but otherwise the case will be struck out. *Abramham v. Cook*, 3 Dowl. P. C. 215. 1638

Where the defendant has neglected to deliver his demurrer books, and does not appear at the argument to support his pleadings, but has offered to give a cognovit, the court will give judg-



ment for the plaintiff without requiring the delivery of the defendant's demurrer books. *Scott v. Robson*, 2 C. M. & R. 29. 1638

A cause was entered in the paper for argument. A defendant having demurred to a replication, the plaintiff got the case put into the paper as for argument, and the defendant came prepared to argue the point: but it appeared that the plaintiff had not joined in demurrer, and of course no proper books were delivered to the judges:—Held, that the defendant was not entitled to his costs of appearing for argument. *Howarth v. Hubbersty*, 3 Dowl. P. C. 457; 5 Tyr. 391. 1638

Proposed rule as to demurrer not intended for argument. *Harvey v. King*, 3 Dowl. P. C. 730. 1638

*Judgment.*]—After argument and judgment for the plaintiff on a special demurrer, the court will not allow the defendant to withdraw his demurrer, and plead or rejoin issuably, without an affidavit distinctly exhibiting a defence upon the merits. *Bramah v. Roberts*, 1 Scott, 364. 1639

Where a defendant pleaded a frivolous demurrer so late in the term that there was not sufficient time to set it down for argument, and a motion was made to set it aside, the court would only let the defendant in to plead on an affidavit of merits, pleading instant, and paying the costs of the demurrer and the application. *Underhill v. Hurney*, 3 Dowl. P. C. 495. 1639

Where there are two pleas to the whole action, upon one of which issue is joined to the country, and upon the other judgment is given for the defendant upon demurrer, the court will allow the defendant to strike out the general issue. *Young v. Beck*, 3 Dowl. P. C. 804. 1639

Where a defendant became bankrupt after a cause was set down for argument on demurrer, the court refused to strike it out of the paper at the suggestion of the plaintiff, although the assignees refused to give security for costs. *Flight v. Glossop*, 4 Dowl. P. C. 135; 1 Hodges, 222. 1639

#### X. ISSUE.

If the issue is now made up with the memorandum formerly introduced, that the plaintiff has brought his bill into court, &c., it is irregular, and the court will compel the plaintiff to set it right. *Hart v. Dally*, 2 Dowl. P. C. 257. 1639

The form of issue directed by Reg. Gen. Hil. 4 Will. 4, form No. 1, should contain the dates of the pleadings, but not the form of action. *Ball v. Hamlett*, 1 C. M. & R. 575; 3 Dowl. P. C. 188; 5 Tyr. 201. 1639

The declaration was delivered in Michaelmas vacation, as of Mich. T., and the plea entitled on 11th January, was delivered as of that day, (being the first day of H. Term.) The issue was made up and delivered as of Mich. T. The court refused a motion to set it aside, for not being made up of H. T., as the plea might have

been delivered before the sitting of the court on 11th January, and no damages appeared from the issue being entered in Mich. T. *Dickenson v. Reynolds*, 2 C. & M. 474; 4 Tyr. 374. 1639

If a replication conclude to the country, with an " &c.," and no similiter be added, the judge will try the cause, as the " &c." is sufficient. *Clark v. Nicholson*, 6 C. & P. 712—Parke. 1639

#### XIII. OYER.

*Oyer.*]—Oyer is demandable at any period before the time for pleading is out, though it has been extended by a judge's order on terms; unless the order expressly except the right to demand oyer. *Goodricke v. Turley*, 2 C. M. & R. 694; 4 Dowl. P. C. 431; 1 Tyr. & G. 149. 1642

And the right is not waived by pleading, unless the plea be to the bond or other instrument of which oyer is demanded. *Id.*

In an action of debt upon a bail-bond, the defendant having demanded oyer, which the plaintiff refused to grant, pleaded that the bond had not been assigned to the plaintiffs for the purpose of preventing the plaintiffs from signing judgment for want of a plea:—Held, that the defendant, by pleading such plea, had not thereby waived his right to have an inspection of the bond. *Id.*

A party has not a right to have his demand of oyer entered of record, unless it was regularly made according to the practice of the court. *Id.*

Where a declaration in covenant sets out the deed, according to its legal effect, and the defendant sets it out on oyer in *hæc verba*, he cannot demur to the declaration on the mere ground of variance; because the deed, as set out on oyer, becomes part of the declaration. *Paine v. Emery*, 2 C. M. & R. 304. 1642

#### XV. AIDER BY VERDICT.

The statute of 32 Hen. 8, c. 30, providing that a discontinuance shall be cured by verdict, applies only to courts of record. *Chitty v. Dendy*, 4 Nev. & M. 842; 3 Adol. & Ellis, 319; 1 Har. & Woll. 169. 1643

To a declaration on a bill of exchange for 65*l.* with the other common counts, concluding to the plaintiff's damage of 200*l.*, the defendant pleaded as to 35*l.*, part of the bill, that it was an accommodation bill, concluding with a verification; as to 40*l.* parcel, &c., payment into court, concluding with a verification; and as to the residue, non-assumpsit. The replication denied that the bill was an accommodation bill, and on the non-assumpsit joined issue, but said nothing as to the payment into court:—Held, after verdict, that there was no discontinuance on the record, or that, if there was, it was cured by verdict, or that a *nolle prosequi* might be entered as to the 40*l.* *Fallows v. Bird*, 2 C. M. & R. 457; 1 Gale, 246. 1643

To an action on a bill of exchange against an indorser, the defendant pleaded that he had no notice of presentment, and concluded his plea to



the country. The plaintiff omitted to add the similiter; and after a verdict for the plaintiff, the defendant moved for a new trial, because there was no issue joined; but as the plea concluded with an "&c.:"—Held, that, after verdict, the "&c." might be considered to include the similiter, and that the record was sufficient. *Swain v. Lewis*, 3 Dowl. P. C. 700. 1643

A party cannot take advantage of an ambiguity in a traverse, after having taken an issue upon it, and gone to trial. *Bradley v. Milnes*, 1 Scott, 626; 1 Bing. N. R. 644; 1 Hodges, 158. 1643

### POOR.

*Overseers.*—If a private act of parliament direct that overseers shall be appointed "for the term of three years then next ensuing," semble, that an appointment "for the space of three years next ensuing the date hereof, or until other overseers shall be appointed," is bad. *Bristol (Governors, &c. of Poor) v. Wait*, 6 C. & P. 591—*Alderson*. 1649

It is not the imperative duty of an overseer to endeavor to prevent the spread of small-pox amongst the poor, by furnishing the means of vaccination; the court refused an application for a criminal information against an overseer, as for a breach of duty, in a case where he had in the first instance agreed to the vaccination, but afterwards refused to furnish the means of doing it. *Anon.* 5 Nev. & M. 12; 1 Har. & Woll. 315. 1649

By 59 Geo. 3, c. 12, s. 17, the parish property is vested in the churchwardens and overseers for the time being. *Doe d. Higgs v. Terry*, 5 Nev. & M. 556; 1 Har. & Woll. 547. 1649

Evidence of payment of rent to the churchwardens in respect of premises in the parish, and that leases have been made by the churchwardens, in one of which the property is described as parcel of the lands of the parish church, is *prima facie* evidence that the premises were parish property. *Id.*

A person holding under a lease granted by parish officers before the statute, is a tenant from year to year. *Id.*

Whether the ordering of goods by one overseer for the use of the parish, creates a contract binding upon a co-overseer, is a question of fact, depending upon the particular circumstances of each case. *Eaden v. Titchmarsh*, 3 Nev. & M. 712; 1 Adol. & Ellis, 691. 1649

If by the practice of a parish, the two overseers were always appointed once, but one of them acted solely for one of the two years, and another for another. The acting overseer for one year ordered coals, which were sent to him and distributed by him among the poor of the parish; the seller debited the parish with them, and afterwards sued both overseers. The acting overseer suffered judgment by default:—Held, that, upon these facts, the jury were properly told to con-

sider whether the coals were supplied for the parish, by whom they were ordered, and whether credit was given to the acting overseer only, or to both as overseers; and to find for the defendant, (the overseer who had not acted), if the plaintiffs relied solely on the responsibility of the acting overseer, but otherwise for the plaintiff. And the jury having found for the plaintiff, saying that the coals were supplied to the parish, and the overseers were jointly liable as such, the court refused to disturb the verdict. *Id.*

In an action against five defendants, as churchwardens and overseers, for goods furnished to the poor by their joint order, it is sufficient for the plaintiff to prove that they all acted as churchwardens and overseers, and signed orders for the delivery of the articles furnished, although one of them be only an assistant overseer. *Kirby v. Bannister*, 3 Nev. & M. 119; 5 B. & Adol. 1069. 1649

Money advanced to the poor by the direction of an overseer may be recovered as money lent to such overseer. *Id.*

An overseer cannot charge the parish with a sum bona fide paid by him to other persons for making a poor rate. *Rex v. Gwyer*, 4 Nev. & M. 156; 1 Adol. & Ellis, 216. 1649

Nor can he charge a sum so paid for making two divisions of the same. *Id.*

Nor a sum paid for making a copy for collectors. *Id.*

Nor a sum paid to an accountant for examining, making up, and entering the accounts of the year, and list of defaulters. *Id.*

Nor a poundage paid to persons employed in collecting the rates, although it is found at the sessions that the charges are fair and reasonable, and that the overseers require assistance. *Id.*

Nor can a vestry, even though all the then rated inhabitants be present, authorize the overseers to charge the parish with such expenses. *Id.*

Averment that plaintiff had been appointed and was assistant overseer; that he had passed certain accounts of him as such overseer, and had verified them on oath:—Held, sufficiently proved by evidence that he had acted as assistant overseer under a warrant of appointment signed by magistrates; that he had kept the accounts of the parish in a book headed "Overseers' Accounts;" and that he had verified those accounts on oath. *Cannell v. Curtis*, 2 Bing. N. R. 228; 2 Scott, 379; 1 Hodges, 342. 1651

Where magistrates, acting under the 50 Geo. 3, c. 49, examine overseers' accounts, declare a balance, and make an order for the payment of that balance, and then issue a warrant to levy the amount by distress, they cannot, merely on the ground of a doubt whether they have correctly ascertained the balance, withdraw the warrant, and so render the constable liable as a trespasser. *Barrons v. Luscombe*, 5 Nev. & M. 330; 1 Har. & Woll. 457. 1651

In such a case, there must be a demand of the



copy of the warrant before any action brought against the constable. *Id.*

In moving for a mandamus to an overseer to deliver up books, &c. belonging to the parish, on account of his having been convicted under 4 & 5 Will. 4, c. 76, s. 97, a copy of the conviction ought to be annexed to the affidavits on which the rule is moved. *Rex v. Simms*, 4 Dowl. P. C. 294; 1 Har. & Woll. 514. 1651

The prohibition in 55 Geo. 3, c. 147, s. 6, of the supplying of goods, materials, or provisions, for the use of any workhouse, or otherwise for the support and maintenance of the poor, by the churchwardens or overseers, does not extend to materials supplied for the repair of the workhouse. *Barber v. Wait*, 3 Nev. & M. 611; 1 Adol. & Ellis, 514. 1650

The protection applies only to cases of goods, &c. supplied to the poor people. *Id.*

Seemle, also, that the section does not apply to contracts for work and labor, but only to cases where the action would be for goods sold and delivered. *Id.*

Expenses of illness. *Paynter v. Williams*, 3 Tyr. 894. 1655

*Rats.*—*Quære*, whether the owner of a farm composed partly of grass land, who, upon the determination of a lease, takes possession of the farm by a servant, who occupies it for the purposes of protection, but without dealing with the land, is liable to be rated to the poor as a party beneficially occupying. *Rex v. Buckinghamshire (Justices)*, 3 Nev. & M. 68; S. C. nom. *Rex v. Morgan*, 2 Adol. & Ellis, 616. 1657

Where a poor rate was made for a parish, and the name of a party who occupied lands for which he was rated in another parish, was inserted after the rate was made, the court refused to grant a mandamus to magistrates to issue a summons and grant a distress warrant for non-payment of the rates. *Rex v. Cardiganshire (Justices)*, 1 Har. & Woll. 274. 1657

The rule nisi was discharged with costs. *Id.*

Seemle, that a defect in the enumeration of some of the property in a poor rate, is no ground for refusing a mandamus to justices to issue a distress warrant. *Rex v. Wilson*, 5 Nev. & M. 119; 1 Har. & Woll. 507. 1657

Such a defect is ground of appeal. *Id.*

*Quære*, whether a confirmation by the sessions of overseers' accounts, which have been objected to on the ground that the overseers have omitted to collect any assessment from a party who, it is alleged, is liable to be rated, is any answer to an application for a mandamus to justices to enforce a rate on the parties? *Id.*

Where, after a rule nisi for a mandamus to justices to issue a distress warrant for a poor rate had been obtained, a tender of the amount was made by a third party to the overseers and refused:—Held, that it was no ground for discharging the rule. *Id.*

On the application for a summons for non-payment of a poor rate, the overseer engaged before the justices to procure evidence of a beneficial occupation. On the hearing, he failed to do so, and the justices, deciding against the validity of the rate on that ground, refused to issue a distress warrant:—Held, that without a further application, after stating that the occupation need not be beneficial, a mandamus could not be granted. *Id.*

Seemle, that an occupier of land within a parish, to whom, on behalf of himself and the other tithe-payers of the parish, a lease of the tithes of the whole parish is granted by the vicar, at an annual rent, the amount of which is apportioned, is liable to poor rate in respect to the tithes, though he personally has no beneficial occupation. *Id.*

Corn-rents substituted for tithes are in general liable to parochial burthens. *Rex v. Nockolds*, 3 Nev. & M. 334. 1662

*Quære*, whether they would be so liable, where the commissioner, being directed by the act to deem the tithes equal to a fixed proportion of the net annual value of lands, in making the calculation makes a deduction from the gross value of the land for the parochial burthens? *Id.*

An act of parliament enacted that the tithes of a parish should be held in fee by A., who was owner of part of the lands in the parish, and that all A.'s lands in the parish should be charged with an annuity payable to the vicar for the time being, who had previously enjoyed the small tithes, and who, by an agreement recited in the act, was to receive such annuity in lieu of all his vicarial dues:—Held, that the vicar was not rateable to the poor in respect of such annuity, for that the tithes were not extinguished. *Rex v. Great Hambleton*, 1 Adol. & Ellis, 145. 1662

Tithes, for which compositions have been entered into by the respective occupiers, may be rated in the hands of the rector in one entire sum. *Rex v. Sussex (Justices)*, 3 Nev. & M. 263. 1662

Upon the refusal of the rector to pay such rate, the justices are bound upon the application of the overseers to issue their warrant for levying it, although such mode of rating be inconvenient to the rector and contrary to former practice. *Id.*

Where, on a question as to the rateability of a free-stone work, the sessions in a case called it a quarry, but stated all the facts respecting the mode of working for the opinion of the court, without determining the question whether it was a mine or not, the court sent the case back to be reheard at the sessions, saying that the question of mine or no mine is a question of pure fact, which the sessions ought to determine. *Rex v. Dunstford*, 4 Nev. & M. 349; 2 Adol. & Ellis, 568; 1 Har. & Woll. 93. 1662

The method of working, and not the nature of the substance obtained, is the criterion to determine the question of mine or no mine, so as to exempt from poor rates. *Id.*



By an act incorporating certain persons for the purpose of erecting an exchange in L., it is enacted that the company shall provide two rooms to be used as public rooms for the purpose of transacting such commercial business as the company shall think proper; such rooms to be provided out of the yearly profits of the undertaking, with such articles as the company shall direct, to be open to the proprietors, and not to be alienable. The company make and furnish a news-room, which they provide with newspapers, &c., in which public notice is given of commercial and nautical information, by a servant of the company employed to collect it, and to which non-proprietors are admitted upon payment of a certain sum annually. Stock in trade, profits, and other personal property are not rateable in L., but property is there rated according to its fair annual value to let. *Rex v. Liverpool (Exchange Proprietors)*, 3 Nev. & M. 550; 1 Adol. & Ellis, 465. 1664

The company are rateable for the room at its annual value to let, with reference not only to its situation, size, and accommodations as a news-room, but also to its attendant revenue from the annual subscriptions. *Id.*

But they are not rateable in respect of the value of the privilege of the proprietors attending free of charge, although, by a regulation of the company, proprietors not attending are entitled to receive the same sum in respect of their share that is paid by ordinary subscribers. *Id.*

Any advantages attendant upon a building, which would enable the owner to let it at a higher rent, may be taken into the account in estimating its rateable value. *Id.*

By a clause in a canal act, tolls were not to be rated, and the company were to be rated from time to time for and in respect of the lands taken, and the warehouses and other buildings to be erected by the company, "In the same proportions as, but not at any higher value or improved rent than other lands, grounds, and buildings lying near or adjacent thereto, are or shall for the time being be rated, and as the lands, warehouses, and other buildings so taken and erected would have been rateable in case the same had been continued in their former state, and not been used for the purpose of the said navigation:—Held, 1st, that the proper mode of laying a poor's rate on the company was according to the fluctuating value of adjacent lands and buildings, and not according to their value at the time of the formation of the canal; and, 2ndly, that the increased value is to be taken for the time being, from whatever source it may arise, and not that the increase arising from the canal itself is to be omitted. *Rex v. Monmouthshire Canal Navigation Company*, 5 Nev. & M. 68; 1 Har. & Woll. 464. 1666

A coal mine lying in several parishes is rateable to the relief of the poor in each of those parishes, although the adit and the machinery be in one parish only. *Rex v. Foleshill*, 4 Nev. & M. 360; 2 Adol. & Ellis, 593; 1 Har. & Woll. 71. 1668

By an inclosure act it was declared, that all the allotments to be set out to the several persons having right of common upon a moor should be deemed to be situate within the same townships and places respectively wherein the land lays, in respect of which such allotments should be made; and it was provided that nothing in the act should affect the right of W. P. to certain coal mines under the said moor:—Held, that the first clause affected only those portions of the soil which were allotted to the commissioners, and not the coal mines under those allotments, and therefore, that such coal mines were rateable to the relief of the poor in the parish in which they were actually situate, as they were before the act passed, though the allotments became rateable elsewhere. *Rex v. Pitt*, 5 B. & Adol. 565. 1668

It is not necessary, in order to create a statutory exemption from poor rates, that the act should, in express terms, exempt from such particular rates; but it is sufficient, if by fair construction of the words of the act, the exemption clearly appears. *Rex v. Barnby Dun*, 4 Nev. & M. 436; 2 Adol. & Ellis, 551; 1 Har. & Woll. 89. 1668

Therefore, where in a local act (by which a company are empowered to make the river D. navigable, and to make new cuts through the adjoining lands), it is enacted, that the company "shall not be taxed or assessed for the navigation, or the profits thereof, at any place except the towns of A. and B.," where account books are directed to be kept:—The court held, that an exemption from poor rates in respect of lands taken for the purpose of the act, elsewhere than in A. or B., was created, and this, although no part of the navigation is within the town of A. *Id.*

And where, by a subsequent local act, after reciting that it would be advantageous to abandon the existing navigation in certain parts, and to make new cuts in lieu thereof, and empowering the company to make certain new cuts, and to receive additional tolls in consequence thereof, it was enacted, that the cuts should, when made, be considered and taken as part of the navigation of the river D., and that all the provisions, directions, restrictions, penalties and forfeitures, in and by the former acts, respecting the boatmen employed on the said river, the owners, commanders, &c. of boats, &c. or other persons employed thereon, or passing the locks of the said river, or making obstructions thereon, or in any other respect relating to or for the benefit or protection of the said navigation, and all other powers and authorities therein contained, should extend and be applicable to the said cuts, &c., as fully in every respect as if the said cuts, &c. had originally been part of the river D. navigation, and had been inserted in the several acts:—Held, that the company were exempt from poor rates in respect of land not in A. or B., taken by them under the powers of this act, and used for cuts in lieu of parts of the old navigation. *Id.*

The words "shall, when made, be considered



and taken as part of the navigation of the river D." are alone sufficient to extend to the new cuts the exemption from assessment which had previously existed in respect of the navigation generally. *Id.*

The proprietors of a river navigation formed under an act of parliament, are rateable to the relief of the poor in every parish through which it passes, in proportion to the profits derived from the navigation in such parish. *Rex v. Woking*, 5 Nev. & M. 395; 1 Har. & Woll. 539. 1668

The proprietors of a river navigation running through several parishes were entitled to claim a toll of 4s. The trustees fixed the tolls at 4s. for the whole distance, and at different decreased rates for fixed portions only of the whole distance:—Held, that in calculating the sum at which the proprietors were to be rated in any one parish, the proportion was to be ascertained on a mileage calculation with respect to the whole distance as regards the thorough trade; and on a mileage calculation with respect to the distance gone over as regards the short trade, excluding in the latter case all trade in parts in which the particular parish was not situated. *Id.*

In calculating the amount of profit, a deduction for the necessary repairs and expenses must be made, the proportion of the particular parish being ascertained where the repairs are equal throughout the whole distance, by a mileage calculation. *Id.*

So a reasonable sum must be deducted for tenants' profits. In this case 10l. per cent. was allowed, that being found by the case to be a reasonable sum. *Id.*

No deduction is to be made in respect of sums payable by the act of parliament, as compensation to persons injured by the navigation, out of the profits of the undertaking; such sums being only in the nature of rent charges, and not affecting the value of the occupation. *Id.*

A parishioner rated only in one of the three rates, made during a particular year, but afterwards continuing to be a regular rated inhabitant, is entitled to appeal against the accounts of the overseers for the whole of that year, and may object to the allowance of charges for the making and collecting of those rates to which he himself was not assessed. *Rex v. Gwyer*, 4 Nev. & M. 158; 1 Adol. & Ellis, 216. 1671

In a declaration against an overseer, &c. for the penalty imposed by 17 Geo. 2, c. 3, for refusing inspection of a poor rate, it is sufficient for the plaintiff to describe himself as an inhabitant of the parish, without stating that he is a rated inhabitant. *Batchelor v. Hodges*, 6 Nev. & M. 75. 1673

In such a declaration against an assistant overseer, it is sufficient to charge, that the defendant had the rate in his possession as such assistant overseer, without expressly stating that the defendant was such an assistant overseer as made it his duty to produce it, *semble*. *Id.*

At all events, the omission of such statement

could only be taken advantage of on demurrer. *Id.*

To such a declaration it is no plea that the rate, at the time of the demand on inspection, was not a subsisting rate. *Id.*

Still less that it was an old rate unappealed against, and the time for appealing against which had expired. *Id.*

*Levy, Distress, and Replevin.*—A distress for the arrears of tithe composition cannot be made upon lands held by the officers of ordnance for ordnance purposes in trust for the crown. *Meade v. Warburton*, 1 Alcock & Napier, 287. (Irish). 1669

On a distress for arrears of a poor-rate, under the 50 Geo. 3, c. 45, s. 3:—Held, that, although the warrant made no mention of the costs of the previous summons, the reasonable costs of such summons might be levied under it, and that one shilling was a reasonable sum in that behalf. *Clarke v. Pedley*, 4 M. & Scott, 321. 1669

Where, by a local act of parliament, power is given to two justices to relieve an applicant aggrieved by a poor-rate, they have power to relieve in an individual case by reducing the amount in which the party was assessed, although the ground upon which they consider him entitled to relief is, that the whole rate is made according to an erroneous principle. *Rex v. St. James, Westminster*, 4 Nev. & M. 252; 2 Adol. & Ellis, 241. 1669

By a local act it is provided, that if any person shall find himself aggrieved by any rate made under the authority of that act, he shall first apply to two justices, and if not relieved, he shall be obliged to pay such rate, and may appeal to the quarter sessions:—Held, that a power in the two justices to relieve upon application made to them, is necessarily implied. *Id.*

The court will not issue a mandamus to compel magistrates to issue a distress warrant to enforce the payment of poor-rates, where it is doubtful whether the warrant would be legal, and the rates are recoverable by another mode of proceeding. *Rex v. Hall*, 4 Nev. & M. 546; S. C. nom. *Rex v. Dyer*, 2 Adol. & Ellis, 606. 1669

Where, by a local act for the government of a parish, collectors of the rents of houses, &c. within the parish, the yearly assessment or valuation whereof respectively shall be less than 30l., are made liable to be rated, and compellable to pay the rates in respect of such houses, &c. *Semble*, that the liability of the collector would extend only to cases in which the real and not the assessed value of the houses respectively, &c. is under 30l. *Id.*

Where a party is rated to the poor in respect of property not in his occupation, he is not bound to appeal, but may replevy any distress taken for such poor-rate. *Bristol (Overseers of Poor) v. Wait*, 3 Nev. & M. 359; 1 Adol. & Ellis, 264. 1670



So, if part of the premises included in the rate be not occupied by him. *Id.*

But if one distress be taken under a warrant to levy the amount of a poor-rate, void by reason of such non-occupation, and also under a separate warrant to levy another good rate, the validity of such distress cannot be questioned in an action of trespass or replevin. *Id.*

Where, therefore, to an avowry for several poor-rates, the plaintiff pleaded in bar that one of the rates was in respect of property not occupied by him, a replication stating that such distress was made under several warrants for the several rates was (upon a demurrer to a frivolous rejoinder) held to be good. *Id.*

If more goods were seized than would be a reasonable distress for the good rate, the remedy of the distrainee is case for an excessive distress. *Id.*

Parish officers cannot abandon a poor-rate duly made, allowed, and published. Therefore, where an appeal had been entered against a poor-rate, and the parish officers served the appellant and clerk of the peace with notice that the rate was abandoned, and before the sessions tendered to the appellant the amount of his assessment, which he had paid, and the sessions therefore refused to hear the appeal, the court granted a mandamus to enter continuances, and hear the appeal. But the court refused to give costs, against the parish officers, of the application for a mandamus, and of the writ. *Rex v. Cambridge (Justices)*, 2 *Adol. & Ellis*, 370; 4 *Nev. & M.* 238. 1670

On the 15th of August, 1828, an increased poor-rate was assessed on certain premises, against which an appeal was entered at the October sessions, and respited to the following sessions in January. On the 15th of December, 1828, the overseers distrained for the increased rate; but, to prevent a sale, the amount was paid under protest, and the distress relinquished. The rate was subsequently reduced, in consequence of the decision of the court of K. B. on a case sent up by the justices on the hearing of the appeal. It did not appear that any notice in writing of the appeal had been given to the overseers, pursuant to the 41 Geo. 3 (U. K.) c. 23, s. 2, before the levy. In an action brought by the party on whom the increased rates was made, against the defendant, one of the overseers, at the time of the levy, to recover back the excess above the last effective rate, as money had and received to his use.—Held, that, as no notice of appeal had been given to the overseers, pursuant to the second section of the statute, the action could not be maintained. *Priestly v. Watson*, 2 *C. & M.* 691; 4 *Tyr.* 916. 1670

*Settlement by Birth and Parentage.*—Proof that A. and B. were married in the parish of Dale, and that their children C., D., E., and F. were baptized there, is not evidence from which the justices are bound to infer that E. was born there. *Rex v. Lubbenham*, 3 *Nev. & M.* 37; 5 *B. & Adol.* 968. 1674

Quære, whether they would be justified in drawing such inference from the evidence? *Id.*

A daughter of full age, in 1829, hired herself, with the consent of her father, with whom up to that time she had lived, to a farmer, at weekly wages, to work for him during harvest. She remained with the farmer three weeks, and then returned to her father. In the following year, the daughter hired herself again to the same farmer to assist in the harvest, and the father on this occasion received the wages from his daughter on her return. On both occasions, a returning home, as soon as harvest should be over, was intended by the daughter and expected by the father.—Held, that the daughter was emancipated.—*Per Denman, C. J., Taunton, J., and Paterson, J. (Littledale, J., diss.) Rex v. Oulton*, 3 *Nev. & M.* 62; 5 *B. & Adol.* 958. 1675

Seemle, when a child is of age, emancipation is to be *prima facie* presumed; the contrary where the child is under age. *Id.*

A fraudulent removal of an unmarried pregnant woman settled in A., to an extra-parochial place, by the putative father, does not make a birth in the extra-parochial place to be in contemplation of law a birth in A., so as to entitle that parish to relief under 18 *Eliz. c. 3, s. 2.* *Rex v. Wilson*, 4 *Nev. & M.* 243. 1676

So, where the removal is to another parish. *Id.*

To do away with a birth settlement by proof of the mother's settlement, it is not necessary to show previously that the father's settlement cannot be found. *Rex v. St. Mary, Leicester*, 5 *Nev. & M.* 215; 1 *Har. & Woll.* 330. 1676

*Settlement by Hiring and Service.*—A settlement is gained by a private, who, whilst on the permanent staff of the local militia, is hired and serves for a year. *Rex v. St. Mary, Colchester*, 3 *Nev. & M.* 113; 5 *B. & Adol.* 1023. 1678

An effective member of a volunteer corps, inrolled under the 44 Geo. 3, c. 54, was not *suis juris*, so as to be competent to make a valid contract of hiring, to give him a settlement by hiring and service. *Rex v. Winesham*, 2 *Adol. & Ellis*, 648; 4 *Nev. & M.* 447; 1 *Har. & Woll.* 43. 1678

And it made no difference that the party never took the oath of allegiance, as directed by sect. 20 of the act. *Id.*

By the regulations of a county bridewell, the keeper may appoint turnkeys, subject to the approbation and confirmation of the visiting justices; the keeper may suspend such turnkeys for disobedience and improper behavior, but must make a report within three days, and must not make new permanent appointments until the visiting justices have made inquiry; the turnkey is to be paid by the county treasurer, but is to be in all other respects under the immediate orders and control of the keeper: any turnkey convicted of drunkenness may be dismissed by the justices.—Held, that a turnkey appointed in pursuance of such regulations, and at an annual salary, is not a servant either to the justices or the keeper,



so as to be able to acquire a settlement by hiring and service. *Rex v. Sparsholt*, 6 Nev. & M. 8. 1678

A hiring under which the servant is to work ten hours a day, from five in the morning to six in the evening, and to leave off in the middle of the day on Saturday, so as to make up the ten hours a day, is an "exceptive hiring." *Rex v. Norton-Bavant*, 4 Nev. & M. 687; 3 Adol. & Ellis, 161; 1 Har. & Woll. 149. 1681

A question arising at sessions, as to an alleged settlement by hiring and service in a third parish, the sessions quashed the order of removal, subject to a case in which the contract of hiring was out, and the question for this court stated to be, whether the pauper gained a settlement by hiring in the third parish:—Held, that this left the question whether the contract was exceptive or not open to this court. *Id.*

It is a question of fact for the sessions to determine, whether an agreement to serve is a contract of hiring, or of apprenticeship. *Rex v. Great Wishford*, 5 Nev. & M. 540; 1 Har. & Woll. 489. 1684

And, where upon a case for the opinion of this court, the sessions state the facts and draw their conclusion, this court will not disturb the finding, unless it appear that the evidence was contrary to the finding, or that there was no evidence to support it. *Id.*

The true test, whether an agreement was a contract of hiring or of apprenticeship, is the apparent object of the parties; and if that object is for one party to teach, and the other to learn, the agreement is a contract of apprenticeship. *Id.*

It is not necessary that the precise words to teach or to learn should occur in the agreement, to constitute it a contract of apprenticeship. *Id.*

A pauper's mother applied to a carpet weaver to take the pauper into his employment. The master agreed with her to take him for two years on trial, after which, if the pauper and master agreed, the pauper was to be apprenticed. He was to be found in board and lodging by the master, but was to have no wages, except what the master pleased to give him as pocket money. He was to draw. At the sessions, it was stated by a magistrate, and assented to, that every carpet weaver is taught the art of drawing as a draw boy. The chairman left it to the opinion of the court, whether the contract was an imperfect contract of apprenticeship, or of hiring and service; and the court found that it was an imperfect contract of apprenticeship:—Held, on a case stating the above facts, that the sessions were right. *Id.*

J. S. agreed with a flannel manufacturer for twelve months to learn the art of weaving flannel, he receiving one-half of what he earned, and finding himself in meat, drink, and lodging, and the master to have the other half for teaching him:—Held, a defective contract of apprenticeship, and not a contract of hiring and service. *Rex v. Newton*, 3 Nev. & M. 306; 1 Adol. & Ellis, 238. 1685

A., for two successive years, was hired by B. as a farm servant, from a few days after Michaelmas-day following, at a certain amount of wages for the whole time. A few days after the Michaelmas-day on which the second hiring expired, B. paid A. the wages agreed upon, and asked him if he chose to go on with him, to which A. replied "Yes:."—Held, that this conversation was not evidence of a yearly hiring, so that a service under it might be connected with the antecedent service. *Rex v. Ardington*, 3 Nev. & M. 304; 1 Adol. & Ellis, 260. 1686

A servant, by accompanying his master into a foreign country during a portion of the year for which he had contracted to serve, (the service abroad being referable to the yearly hiring), is not thereby disabled from acquiring a settlement by service in England. *Rex v. Buckingham*, 3 Nev. & M. 72; 5 B. & Adol. 953. 1687

*Settlement by Apprenticeship.*—A parish apprentice left his master, and went to live with his father in another parish, working with his father in the same trade at which he had lately worked with his master. The master, having claimed the apprentice, agreed with the father, in May, to deliver up the indenture, upon payment of four guineas in August. The apprentice continued with his father working at the same trade until August, when the indenture was delivered up and the money paid:—Held, that there was at all events no dissolution of the apprenticeship until August, (if then), and that the service by the apprentice with the father was referable to the indenture, and that the apprentice gained a settlement in the parish in which he resided with his father. *Rex v. Gwinear*, 3 Nev. & M. 297; 1 Adol. & Ellis, 152. 1695

A., by indenture executed by himself and the parish officers, is bound apprentice in husbandry to B. in respect of an estate rented by B. of C. A. never serves B. (who is not shown to be cognizant of the binding), but is taken by the overseers to C., and serves him in his trade of a stocking maker. A. gains no settlement by the service, either as under an original binding to C., or as under an assignment from B. to C. *Rex v. St. Cuthbert, Wells*, 3 Nev. & M. 100; 5 B. & Adol. 939. 1696

A pauper was bound apprentice to J. M. & W. M., two partners in Exeter, who afterwards dissolved partnership, and W. M. never afterwards interfered with the pauper, who continued with J. M. and a new partner in the business at Exeter, but resided at Tiverton, where they also carried on business; immediately after the death of J. M., the pauper returned to Exeter, and continued in the business there, until he afterwards entered into an arrangement with the new partner:—Held, that the service in Exeter, after the death of J. M., was not a service under the indenture, with the consent of W. M., the surviving partner, so as to confer a settlement in Exeter. *Rex v. St. Martin's, Exeter*, 4 Nev. & M. 385; 2 Adol. & Ellis, 655; 1 Har. & Woll. 69. 1695



*Settlement by renting a Tenement.*—Between the passing of 59 Geo. 3, c. 50, and 6 Geo. 4, c. 57, A. rented for a year, of B. a dwelling-house, and of C. a stable, at the respective rents of 8*l.* and 6*l.* 6*s.*, both in the same parish, but unconnected. A. occupied and paid the year's rent for both:—Held, that A. gained a settlement by such occupation. *Rex v. Gosforth*, 3 Nev. & M. 303; 1 Adol. & Ellis, 226. 1701

Under 6 Geo. 4, c. 57, a party gained a settlement, who rented two dwelling-houses in different parts of the same parish, for a year, at a yearly rent of less than 10*l.* each, but together exceeding that amount, although he only occupied one himself, and underlet the other. *Rex v. Wootton*, 3 Nev. & M. 312; 1 Adol. & Ellis, 232. 1701

The words "separate and distinct," in 59 Geo. 3, c. 50, 6 Geo. 4, c. 57, and 1 Will. 4, c. 18, operate to exclude an occupation of one tenement jointly with another person, and not with another house, &c. *Id.*

Payment of rent by a trustee, out of the produce of effects assigned to him by the tenant, in trust for the payment of the rent and taxes, and other charges and expenses in respect of the land occupied by the tenant, and of debts, is not a payment by the tenant within 1 Will. 4, c. 18, for the purpose of gaining a settlement. *Rex v. Pakefield*, 6 Nev. & M. 16. 1703

A curate, licensed by the bishop at a yearly salary, according to the 57 Geo. 3, c. 99, resided in the rectory-house which was assigned to him pursuant to the same statute, and was above the value of 10*l.* a year, for more than forty days before the passing of 59 Geo. 3, c. 50:—Held, that this was a coming to settle within the stat. 13 & 14 Car. 2, c. 12, and that a settlement was gained thereby. *Rex v. St. Mary, Newington*, 5 B. & Adol. 540. 1706

In order to constitute a "coming to settle" within 13 & 14 Car. 2, c. 12, the party must have come into the parish *animo morandi* or *residenti*; but it is not necessary that he should have come with an intention to reside permanently. *Rex v. Woolpit*, 5 Nev. & M. 526; 1 Har. & Woll. 483. 1706

The residence intended need not be for such a time and under such circumstances as would at the time of passing of 13 & 14 Car. 2, c. 12, have conferred a settlement—Per Patteson, J., and Williams, J. *Id.*

*Secus semble*—Per Coleridge, J. *Id.*

But whether a party came to settle within the meaning of 13 & 14 Car. 2, c. 12, is a question of fact, to be decided by the sessions alone. *Id.*

And whether, upon a case stating the facts, the sessions find in the negative, this court will not interfere with that finding, unless they see that upon the facts stated the finding is necessarily wrong? *Id.*

The sessions found that A. hired and paid for lodgings for the pauper in Dale; that the pauper came to Dale and resided in the lodgings for a week, married, and continued afterwards to reside in the lodgings until his removal under the

order appealed against:—Held, per Patteson, J., and Williams, J., (dissentiente Coleridge, J.), that a finding by the sessions that the pauper did not come to settle in Dale, within the meaning of 13 & 14 Car. 2, c. 2, was repugnant to the facts found, and was therefore necessarily wrong. *Id.*

A residence under an order of suspension cannot be taken into the account, in the computation of the period of occupation, in order to gain a settlement by renting a tenement. *Rex v. St. John, Hackney*, 4 Nev. & M. 336; 2 Adol. & Ellis, 548; 1 Har. & Woll. 39. 1707

The pauper rented a house at a rent above 10*l.*, from Michaelmas, 1832, to Michaelmas, 1833. He occupied it for the whole year; and in July paid a half-year's rent. He continued to occupy the house until 6th December, 1833, without paying any more rent. On that day he was removed by an order to another parish. On the 8th December, 1833, he returned to the house, and remained there until 27th January, 1834. The order of removal was appealed against and confirmed on the 1st January, 1834. On the 11th December, during the pendency of the appeal, the pauper paid the half-year's rent due at Michaelmas:—Held, that the pauper gained a settlement by renting a tenement, notwithstanding the order of removal. *Rex v. Willoughby*, 5 Nev. & M. 457; 1 Har. & Woll. 493. 1707

Pauper went into the service of B., for whom he was to make and burn pots, and, to do so, he was to have the use of yards, and of a kiln and sheds, which belonged to and were to be repaired by B., who also was to find and cart the clay for the pots, and provide certain other necessary materials. A quarter of the produce of the sale of the pots was to be paid to pauper, a quarter to B., a quarter was to find materials, and the other quarter to be paid to shopkeepers selling the pots. Afterwards, B., being dissatisfied with pauper's work, put an end to the agreement; and the parties made a second agreement, under which pauper was to pay a sum to B., after each time that he burned a kiln, (calculated so as to produce to B. about as much as the quarter under the first agreement,) for the use of the yards and of the kiln and sheds, which B. was to repair, and to find articles as before, pauper digging the clay, and making an allowance to B. for the articles found by him. Pauper was to have the pots. The kiln, sheds, and land on which they stood, without the clay, together with a tenement rented in the same parish by the pauper, were worth more than 10*l.* per annum:—Held, that under the second agreement the pauper rented a tenement of 10*l.* annual value, and gained a settlement under 13 & 14 Car. 2, c. 12. *Rex v. Iken*, 2 Adol. & Ellis, 147; 4 Nev. & M. 117. 1707

Where the hirer of a tenement, consisting of a house and land, sells the growing crops before the expiration of the year, and retains possession of the house only, he is not the occupier of the tenement during the whole year, so as to gain a settlement under 1 Will. 4, c. 18. *Rex v. Pakefield*, 6 Nev. & M. 16. 1707

A., hiring a house in the parish of D., before the end of the year leaves the parish, with his



goods, and with that part of his family who resided with him. A son of A., who had previously resided with A., by the direction of A., sleeps in the house till the end of the year, boarding with his master in another part of the parish. This is not a continuance of occupation in A. for the purpose of gaining a settlement. *Id.*

So, although A. leaves in the house a portion of his goods, which cannot be conveniently removed. *Id.*

No settlement can be gained, since 1 Will. 4, c. 18, by renting a tenement in which rooms are underlet by the year. *Rex v. St. Nicholas, Rochester*, 3 Nev. & M. 21; 5 B. & Adol. 219. 1707

So, if they are underlet for a shorter period, *semble. Id.*

Since 1 Will. 4, c. 18, there must be an actual occupation of the whole tenement by the party hiring it, in order to confer a settlement by renting a tenement. Where a pauper took a messuage, consisting of two tenements, at a rent of 60*l.*, payable half-yearly, and during the year's occupation underlet three rooms to a person who had the exclusive occupation of them for three weeks, for which he paid 8*l.*, and a front shop to another person, who had the exclusive occupation of it for a week:—Held, that the pauper did not gain a settlement. *Rex v. St. Nicholas, Colchester*, 4 Nev. & M. 422; 2 Adol. & Ellis, 599; 1 Har. & Woll. 47. 1707

Quære, whether a payment of rent by means of a distress on the goods of the party hiring the tenement, is sufficient to satisfy the 1 Will. 4, c. 18? *Id.*

*Semble*, that a letting of rooms by an innkeeper to his guest is not such an underletting as would defeat the settlement. *Id.*

The 1st section of 1 Will. 4, c. 18, (though prospective only), applies to cases in which the occupation had commenced, but was not complete at the time of the passing of the act. *Id.*

A settlement may be gained under 1 Will. 4, c. 18, by a party hiring a house and residing in it for a year, notwithstanding that he is in the habit of taking in persons to sleep in some of the rooms; sometimes letting a bed and sometimes half a bed, generally by the night only, but occasionally by the week; such persons having no right to the rooms during the day, and he retaining the keys of all the rooms, and having constant access to and control over the whole house. *Rex v. St. Giles in the Fields*, 6 Nev. & M. 5. 1707

A. demised by deed to B. and C. jointly, at 16*l.* a year. B. occupied and paid the rent and the rates:—Held, that B. did not gain a settlement either by renting a tenement or by being rated and paying the rates. *Rex v. Great Wakering*, 3 Nev. & M. 47; 5 B. & Adol. 971. 1707

*Semble*, that evidence was inadmissible to show that it was intended that B. should be the sole tenant, and that C. was merely a surety. *Id.*

Under stat. 1 Will. 4, c. 18, no settlement is gained by occupying the same tenement for a

continuous year, the occupation during part of the year being under one hiring, and during the remainder under another hiring for a year. *Rex v. Banbury*, 1 Adol. & Ellis, 136; 3 Nev. & M. 292. 1707

A. lets a house for a year, at 20*l.*, to B. B. underlets for a year at the same rent to C., who occupies during the whole year. In the middle of the year, B. surrenders to A., who accepts C. for his immediate tenant, upon a new demise, from year to year, from A. to C. C. gains no settlement under 1 Will. 4, c. 18. *Id.*

*Semble*, that payment of rent by A., the vendee of the goods of B., to prevent a distress for rent due from B., is a good payment of rent by B. within 1 Will. 4, c. 18. *Id.*

A settlement was gained, under 6 Geo. 4, c. 57, by renting two distinct dwelling-houses, although only one was actually occupied by the party himself. *Rex v. Iver*, 3 Nev. & M. 28; 1 Adol. & Ellis, 228. 1707

A person rented two houses under one continuous roof, having distinct outer doors, and no internal communication; he took the whole at one hiring, but paid distinct rents for them at 6*l.* per annum, occupied one himself, and allowed his son exclusive possession of the other:—Held, that, by such renting and occupation for a year, he acquired a settlement under 6 Geo. 4, c. 57, s. 2. *Id.*

*Settlement by Estate.*—A surrenderee gains a settlement by a residence of forty days upon a copyhold, to which he is afterwards admitted. *Rex v. Thruscross*, 3 Nev. & M. 284; 1 Adol. & Ellis, 126. 1710

*Semble*, that the settlement is complete without the admittance. *Id.*

A devisee of a copyhold was admitted after he had resided more than forty days on the copyhold. His son became emancipated after the expiration of the forty days, and before admittance:—Held, by Denman, C. J., Littledale, and Patteson, Js., (Parke, J., diss.), that the father, by such residence, gained a settlement, which was communicated to the son. *Id.*

Where a man, having a leasehold interest, died intestate, leaving the pauper and three other sons; and one of the sons having taken out letters of administration, the four brothers joined in mortgaging the estate, and afterwards the pauper, by verbal agreement only, parted with his interest in the equity of redemption to one of his brothers, for a consideration paid, and subsequently joined with his other brothers in an assignment to him:—Held, that the pauper parted with his interest in the equity of redemption by the verbal agreement, and therefore could gain no settlement by estate, by virtue of a residence after the verbal agreement, but before the assignment. *Rex v. Cregrina*, 2 Adol. & Ellis, 536; 4 Nev. & M. 455; 1 Har. & Woll. 53. 1710

A woman, being yearly tenant at 50*s.* a year, marries. Her husband, by forty days' residence on the premises, gains a settlement by estate.



Rex v. Barnard Castle (Inhabitants), 4 Nev. & M. 128; 1 Adol. & Ellis, 108. 1710

But when a man, being yearly tenant, dies, and his wife occupies and pays rent as one of the next of kin, but without taking out letters of administration, the wife neither gains a settlement herself, nor is a settlement gained by a second husband, by reason of his marriage with her during such occupation, and of forty days' residence. *Id.*

Whether the widow of a yearly tenant, who, without taking out letters of administration, continues the occupation and pays rent, is to be considered as holding in her own right, or as next of kin, with an incomplete representative character, is a question of fact, to be found by the sessions as a fact. *Id.*

Semble, but the court will not send back a case of this nature to be re-stated, except in case of urgent necessity. *Id.*

A settlement by estate was claimed for H., under the following circumstances:—Premises were demised for three lives, which expired in 1784; and a lease for other lives was then granted to a new tenant, who paid rent under it during all the time after mentioned. At the time of the execution of the lease, W. was in possession, and claimed to hold, on the ground that one of the lives in the first lease was still in existence. He continued to hold for twenty-six years, and then died, more than twenty years before the settlement came into question. His widow retained possession for sixteen years, in the last of which she devised the premises to her daughter, the wife of H., in fee, and appointed her executrix and residuary legatee; at the same time expressing a doubt whether the premises did not belong to the party who became lessee in 1784. She left other sons and daughters. On her death, H. and his wife, who had been living with the mother on the premises, retained possession for three years, at the end of which H. conveyed them to a purchaser, by feoffment and livery of seisin. No probate of the mother's will was obtained. Neither W. nor the parties holding after him ever paid any rent. The lives in the second lease had not expired when the settlement came into dispute:—Held, that H. did not acquire a settlement by residence on the premises after the death of his wife's mother, there having been no adverse possession for twenty years by W., or those who succeeded him, and H.'s wife not having taken any interest which could give a settlement as executrix of her mother. *Rex v. Axbridge*, 2 Adol. & Ellis, 520. 1710

*Settlement by serving an Office.*—No settlement is gained by the execution of an office (e. g. that of pinder) for a town, to which a party is appointed at a court held within and for a manor, which manor does not extend over the whole town, and there being no special custom warranting such appointment. *Rex v. St. Mary, Newmarket*, 4 Nev. & M. 603; 3 Adol. & Ellis, 151; 1 Har. & Woll. 154. 1714

The parish of F. and the town of F. were co-extensive, and more extensive than the manor of F. B., which was within them, as well as four

other manors; but there was no paramount manor. There were two pounds in the parish; one in the manor of F. B., and the other in one of the other manors. The pauper, residing under a certificate in the parish of F., was appointed to the office of pinder for the town of F. by the homage at a court baron of the baron of the manor of F. B., and was duly sworn to execute the office, which he did for two years:—Held, that he was not legally placed in the office so as to acquire a settlement by serving an office. *Id.*

Quære, whether the office of pinder of a manor be a public annual office sufficient to confer a settlement? *Id.*

In a parish governed by a select vestry, public notice was given that the vestry should meet to elect an organist for a newly erected chapel. At the meeting, C. S. was elected, and it was entered in the minutes of the vestry that she was appointed organist at 60*l.* per annum. She performed the office for several years, receiving the salary half-yearly, and residing in the parish, till, on complaint made against her by the congregation, she was dismissed by an order of vestry:—Held, that the office of organist held by C. S. was not a public annual office by which a settlement could be gained under 3 W. & M. c. 11, s. 6. *Rex v. St. George, Hanover Square*, 5 B. & Adol. 571. 1714

An office in a parish, to which the officer may be appointed for any discretionary period, is not an annual office within 3 & 4 W. & M. c. 11, s. 6, and 9 & 10 Will. 3, c. 11. *Rex v. Middlewich*, 4 Nev. & M. 682; 3 Adol. & Ellis, 156; 1 Har. & Woll. 152. 1714

Therefore, a man in fact appointed to and serving such office for a year, and residing within the parish, cannot gain a settlement thereby. *Id.*

Where, in case of a general appointment to an office, such appointment will enure as an appointment for a year, the office is an annual office within those statutes. *Id.*

*Removal and Order.*—A house in the parish of W. was let to A., and B. his wife, for their joint lives, and the life of the survivor. A. and B. were ejected wrongfully from the house, but their furniture, and a person who had lodged with them, remained in the house. Afterwards A. assisted the lessor to destroy the lease:—Held, that, after these transactions, A. and B. continued irremovable from W., though they had become actually chargeable. *Rex v. Matlock*, 1 Adol. & Ellis, 124. 1723

An order of removal, directed to the overseers of a parish, which has no overseers qua parish, is bad. *Rex v. Cartmel*, 4 Nev. & M. 357; 2 Adol. & Ellis, 562. 1726

Therefore, where a pauper had gained a settlement by hiring and service on waste land within a parish, the remainder of which is divided into townships, having separate overseers and supporting their own poor, and which parish qua parish has no overseers or poor rate, a removal to the parish at large is bad, although it is not shown that the waste land belongs to any one of



the townships of the parish, and although by an award made under the authority of an act of parliament for inclosing the commons, &c. in the parish, it is directed that the said waste lands shall contribute in certain proportions to the rates (parochial or otherwise) of each of the several townships within the parish. *Id.*

The English-born and unemancipated daughter of Irish parents residing in England, but not having done any act to gain a settlement, cannot, upon becoming actually chargeable, be removed to the place of her birth. *Rex v. Mile End Old Town*, 5 Nev. & M. 581; 1 Har. & Woll. 551. 1725

But in such case the parents, together with all such of their children as have not acquired a settlement in their own right, may be passed to Ireland, under 3 & 4 Will. 4, c. 40. *Id.*

Relief given to a child of Irish parents above sixteen years of age, but residing with his father's family, renders the father actually chargeable, within the meaning of the 3 & 4 Will. 4, c. 40, notwithstanding sect. 56 of the Poor Law Amendment Act, 4 & 5 Will. 4, c. 76, which was held not to apply to Irish and Scotch paupers. *Id.*

Whether relief to a child of English parents above sixteen, but residing with his father, given since the passing of the Poor Law Amendment Act, renders the father chargeable, *quære?* *Id.*

Where the daughter of an Irish pauper is removed with her father to Ireland under 3 & 4 Will. 4, c. 40, her bastard child, born in England, cannot be removed with her, although within the age of nurture. *Id.*

By an order unappealed against, a pauper is removed from A. to the parish of B. in the county of S. B. at that time consists of two townships, C. and D., (jointly maintaining their own poor), in the county of S., and one township, E., (separately maintaining its own poor), in the county of W. This order is conclusive upon that part of B. which lies in the county of S., *semble*. *Rex v. Oldbury*, 5 Nev. & M. 547; 1 Har. & Woll. 554. 1728

After the removal, C. and D. being required by mandamus to elect separate overseers and maintain their poor separately, the same pauper is afterwards removed from A. to the township of C. C. is not estopped by the former removal. *Id.*

The 9 Geo. 1, c. 7, s. 8, only applies to the first sessions after executing the order of removal, and therefore the court will not interfere with the discretion of the magistrates at the second, as to adjournment, if it is in furtherance of a reasonable practice. *Rex v. Monmouthshire (Justices)*, 3 Dowl. P. C. 306. 1729

An order of sessions, quashing an order of removal generally, is conclusive evidence between the parties to that appeal, that when the order of removal was made, the appellant parish was not bound to receive the pauper, but it is only *prima facie* evidence that the pauper was not settled in that parish; and therefore, upon the trial of an appeal between the same parishes against a second order of removal of the same party, the re-

moving parish may show by parol evidence that the first order of removal was quashed on the ground that the pauper resided on a tenement of his own, which made him irremovable, though it did not confer a settlement, and that he afterwards sold the tenement and became removable. *Rex v. Wick St. Lawrence*, 5 B. & Adol. 526. 1729

The parish of B. W. consists of seven townships, separately maintaining their poor. One is called B. W., and another B. W. P. A pauper, whose settlement was in B. W. P., was removed to the parish of B. W. The pauper was taken with the order and delivered to the overseer of the township of B. W. P. He objected to take him, unless a demand for expenses was waived. This was refused, and the pauper was taken away. The churchwarden of the parish of B. W. was subsequently served with the order, and the pauper delivered to him. He carried the pauper to the workhouse of the township of B. W.:—Held, first, that service on one of the churchwardens of the parish of B. W. was insufficient, being service upon a mere stranger; secondly, that the sessions should have quashed the order; thirdly, by Denman, C. J. and Littledale, J., (Taunton and Patteson, Js., *dub.*), that the inhabitants of the township of B. W. might appeal against this order, although they were not bound to maintain the pauper under it. *Rex v. Bishop Wearmouth*, 3 Nev. & M. 77; 5 B. & Adol. 942. 1731

*Semble*, that the order could not be amended by substituting the word township for parish. *Id.*

The court of quarter sessions has no authority to make a rule of court requiring one calendar month's notice of the entry and respite of an appeal against an order of removal, in addition to the notice of appeal required by 9 Geo. 1, c. 7, s. 8; and if an appeal be dismissed for want of such notice, a mandamus may be issued requiring the sessions to hear it. *Rex v. Norfolk*, 3 Nev. & M. 55; 5 B. & Adol. 990. 1731

Under 79th section of the Poor Law Amendment Act, notice of appeal against an order of removal need not be given within twenty-one days from the time of sending the notice of chargeability, and the copies of the order on examination to the overseers of the parish charged by such order:—Held, that the practice as to notices of appeal not being expressly altered by the act, remains as before, although, by sect. 81, the statement of the grounds of appeal is required to be delivered with such notice, or at least fourteen days before the sessions; and therefore, where, by the practice of the sessions, eight days' notice is required, a notice of appeal given eight days before the sessions, is sufficient, provided such statements of the ground of appeal be delivered fourteen days before the sessions; at least where the delivery of such statement is accompanied with the service of a notice of appeal *de facto*, although such notice be erroneous, as purporting to be given for the borough instead of the county sessions. *Rex v. Suffolk (Justices)*, 5 Nev. & M. 503. 1731

An appellant is not bound by the provisions of the 4 & 5 Will. 4, c. 76, s. 79, to give notice of



appeal within twenty-one days after notice of the order of removal being made. *Rex v. Leicester (Justices)*, 4 Dowl. P. C. 633. 1732

An order of sessions quashing an order of removal "for informality," was confirmed by this court, although the order of removal appeared upon the face of it to be free from defect. *Rex v. Cottingham*, 4 Nev. & M. 215. 1732

The court will in such case intend, that the sessions used the word "informality" as expressive merely that their decision had proceeded upon grounds distinct from the merits of the appeal. *Id.*

The sessions have power to grant costs under 8 & 9 Will. 3, c. 30, s. 3, in all cases in which an appeal has been entered and determined, whether the determination be upon the merits or for defect of form. *Id.*

### POWER.

Power to grant leases. *Doe d. Williams v. Mathews*, 5 B. & Adol. 298. 1743

By a marriage settlement certain estates were settled in strict settlement, and a power was reserved to the persons being in the actual possession on the premises, by virtue of the limitations in the settlement, to lease any part of the lands thereby settled "for one, two, or three life or lives, or any term or number of years, not exceeding twenty-one years, so as upon all and every such lease or leases there should be reserved and continued payable during the respective continuance of such lease or leases, by half-yearly payments, the best and most improved yearly rents that could be reasonably had or obtained, without taking any sum or sums of money, or other thing, by way of fine or income for the same." By lease, dated the 11th January, 1783, a tenant for life of the estates demised a part of the settled estates to hold from the 4th of January preceding, for the lives of three persons therein named, yielding and paying yearly and every year during the said term the yearly rent or sum of 31*l.* 10*s.*, at or upon the two most usual feasts or days of payment in the year, viz. the feast of St. Philip and James the apostles, (1st May), and St. Michael the archangel, (29th September), by even and equal portions; the first payment to be made on the feast of St. Philip and James the apostles next ensuing the date of the lease:—Held, that the lease was not a due execution of the power, and that it was, therefore, invalid:—Held, also, that leases of other estates in the same part of the country were not admissible in evidence to show that the days on which the rent was reserved in the lease were the usual half-yearly days of payment of rent in that part of the country. *Doe d. Harris v. Morse*, 2 C. & M. 247; 4 Tyr. 185. 1743

Rent in leases. *Doe d. Rogers v. Rogers*, 5 B. & Adol. 755. 1743

A settled lands, of which he was seised in fee, to such uses as he should appoint by deed or will, and, in default of appointment, to the use of himself for life, with remainder over. Afterwards, A. devised all his real estates whatsoever

and wheresoever, and all his estate, right, title, and interest therein, and all leasehold premises whatsoever to which he might be at the time of his decease entitled, and all his household furniture, money, &c., and all other his real and personal estate, whatsoever and wheresoever, upon certain trusts. At the time of making the will, and also at the time of his death, A. was seised in fee of lands, besides those subject to the power:—Held, that the devise was not a good execution of the power. *Davis v. Williams*, 1 Adol. & Ellis, 588; 3 Nev. & M. 821. 1735

A., tenant for life, is empowered to make leases, provided "the ancient and accustomed reservations be thereby reserved," and provided "they be granted in the same manner and form, and with and under such and the like reservations, covenants, conditions, and agreements, as are usually and customarily contained in leases of the same kind in the respective parishes and places in which the premises are situate." Upon a question as to the validity of a lease granted by A., other leases of lands in the same parish are admissible in evidence for the purpose of showing whether the lease in question satisfies the second proviso. *Doe d. Douglas v. Lock*, 4 Nev. & M. 807; 2 Adol. & Ellis, 705. 1745

Semble, that the true criterion of a reservation of the ancient and accustomed rent under the first proviso, is the reservations contained in the lease made of the premises next preceding the creation of the power. *Id.*

Dubitatur, whether a quarterly reservation of rent, which had been previously reserved half-yearly, will vitiate the lease. *Id.*

It is no objection to such a lease, that in former leases a right of re-entry was reserved, in the event of there being no overt distress on the premises, and that in the lease under the power, the word "overt" is omitted. *Id.*

The omission to reserve a heriot, where a heriot had been accustomedly reserved, would vitiate the lease. *Id.*

But a reservation of a heriot of "the best good of the person or persons who for the time being shall be tenant or tenants in possession of the demised premises," is sufficient, though the reservation in former leases was "of the best good of A. B. (the cestui que vie and lessee), or such person as shall be in possession of the premises as tenant, by virtue of the lease." *Id.*

A clause, purporting to reserve and except to the lessor the power of hunting, &c. over the demised premises, enures as a grant from the lessee to the lessor of a right or privilege, and not as a reservation or exception. *Id.*

A clause in a lease purporting to reserve underwoods and under-ground produce, enures, not as a reservation but as an exception. *Id.*

Where former leases contained an exception of "all and all manner of timber trees, and trees likely to prove timber," a lease under such power, containing an exception of "all timber trees, bodies of pollard, and other trees whatsoever," granted at the same rent, was held to be void, on the ground that the subject-matter of



the demise is increased by the alteration in the exception, and that no further rent is reserved in respect of such addition to the subject-matter of the demise. *Id.*

### PRACTICE.

*Writ of Summons.*—An alias bill of Middlesex may be signed by the seal usually affixed to a writ of summons, since the Uniformity of Process Act. *Finney v. Montague*, 2 Nev. & M. 804; 5 B. & Adol. 877. 1752

The filacer need not sign a writ of summons if the seal of the court is impressed upon it. *Burt v. Jackson*, 2 Dowl. P. C. 747. 1752

The name of one county being substituted for another in a writ of summons without resealing, the proceedings were aside without costs, although the defendant had obtained an order to stay proceedings on payment of debt and costs. *Siggers v. Sansom*, 3 Dowl. P. C. 745. 1752

An alias or pluries need not, since 2 Will. 4, c. 39, be tested of the return day of the first writ, and their issuing is not confined by sec. 10 to any given period after the expiration of the first writ, except it issued to prevent the operation of the statute of limitations. *Nicholson v. Lemon*, 4 Tyr. 308. 1752

A writ of summons dated on a Sunday is a nullity, and the objection is not waived by lapse of time. *Hanson v. Shackelton*, 4 Dowl. P. C. 48; 1 Har. & Woll. 342. 1752

*Writ of Distringas*—A distringas will be granted for the purpose of enabling a plaintiff to proceed to outlawry in some cases, when the affidavits are not sufficient to ground a distringas to compel the defendant to enter an appearance. *Hewit v. Melton*, 3 Tyr. 822. 1753

In order to obtain a distringas, the person endeavoring to serve the summons must appoint the day and hour at which he will make his subsequent calls. *Wills v. Bowman*, 2 Dowl. P. C. 413. 1753

The attempts to serve a summons, in order to obtain a distringas, may be made on the same day, if it appear that the defendant is purposely keeping out of the way. *White v. Western*, 2 Dowl. P. C. 450. 1753

The court will not grant a distringas where the three calls have been made on the same day. *Cross v. Wilkins*, 4 Dowl. P. C. 279; 1 Har. & Woll. 516. 1753

Where it is clear that the defendant keeps out of the way to prevent being sued, the court will grant a distringas, although three calls and two appointments have not been made. *Hickman v. Dallimore*, 4 Dowl. P. C. 276; 1 Har. & Woll. 524. 1753

In order to obtain a distringas, it must be shown that the defendant is absent, or circumstances must be stated from which it can be inferred by the court that the defendant is avoiding the process of the court. *Houghton v. Howarth*, 4 Dowl. P. C. 749. 1755

A distringas will not be granted on an affidavit

merely stating the defendant to be absent in Ireland, without showing that he has gone there to avoid his creditors, although he may have a residence in town, at which unsuccessful attempts to serve him have been made. *Evans v. Fry*, 3 Dowl. P. C. 581; 1 Har. & Woll. 185. 1755

Quære, whether the court will set aside a writ of distringas, issued on a sufficient affidavit, on the ground that the defendant was abroad at the time it was attempted to serve the summons? *White v. Johnson*, 1 Gale, 108. 1755

The copy of a writ of summons must be left on the last of the three times of calling, which are required in order to obtain a distringas. *Mason v. Lee*, 5 Nev. & M. 240; S. C. nom. *Anon.* 1 Har. & Woll. 380. 1755

To entitle a plaintiff to a distringas upon a writ of summons not personally served, it is not sufficient to show that unsuccessful attempts were made to serve the defendant at his residence on three occasions, and that on the second a copy of the writ was left, and referred to on the third. *Id.*

To obtain a distringas, the copy of a writ of summons must be left at the defendant's supposed address, although the parties residing in the house state that they have no knowledge of him. *Hooker v. Tooke*, 1 Hodges, 315. 1755

A distringas was granted against a defendant, though he had not been served with the writ, it appearing that he had gone abroad to avoid his creditors, and had left servants at his house in town. *Moon v. Thynne*, 3 Dowl. P. C. 153. 1755

A distringas was refused where the writ of summons had been issued more than four months, and without being continued by an alias writ (See 2 Will. 4, c. 39, s. 10.) *Sewell v. Brown*, 1 Hodges, 317; S. F. *Lemon v. Lemon*, 2 Scott, 506. 1755

Before a distringas will be granted to compel an appearance, it must be positively sworn that the defendant has not appeared. *Hooker v. Townsend*, 1 Hodges, 204. 1755

In executing a distringas, it is sufficient that the sheriff should take all the property on the premises, although it amounts to less than 40s.; and on the sheriff's return, the plaintiff will be entitled to enter an appearance for the defendant. *Jones v. Dyer*, 2 Dowl. P. C. 445. 1756

*Writ of Capias*—If the warning in a capias is placed at the foot of the writ, it is only necessary in the body to introduce the words "hereunder written," and not "indorsed hereon" besides. *Bridgman v. Curgenvin*, 3 Dowl. P. C. 1. 1757

A writ of capias may be issued into a county different from that in which the writ itself describes the defendant as resident; and proceedings to outlawry founded on such a writ are irregular. *Morris v. Davies*, 4 Dowl. P. C. 317. 1757

The omission in the præcipe of the sum for which the defendant is to be held to bail, is no ground for setting aside a capias. *Usborne v. Pennell*, 2 Dowl. P. C. 801; 4 M. & Scott, 431. 1757



A plaintiff may issue a second *capias* before the return of one previously sued out. *Dunn v. Harding*, 2 Dowl. P. C. 803. 1757

*Form generally.*—A writ of *capias* directed to the "sheriff of London," instead of "sheriffs:"—Held bad on that account; and also because the words "indorsed hereon" were omitted in the writ, which purported to have been issued in an action on the case. *Barker v. Weedon*, 2 Dowl. P. C. 707; 1 C. M. & R. 396; 4 Tyr. 860. 1757

If a writ of *capias* be directed to the sheriffs of London, the subsequent insertion of the word *sheriff* in the singular will not vitiate it. *Irving v. Heaton*, 4 Dowl. P. C. 638. 1757

A writ of *capias* directed to the sheriffs of Middlesex is irregular. *Jackson v. Jackson*, 3 Dowl. P. C. 182; 1 C. M. & R. 438; 5 Tyr. 136. 1757

A writ of detainer directed "to the marshal of our prison of the Marshalsea," instead of "the marshal of the Marshalsea of our court before us:"—Held irregular, and the defendant was discharged out of custody. *Storr v. Mount*, 2 Dowl. P. C. 417. 1757

A writ directed to the coroner need not show upon the face of it the reason why it is so directed. *Bastard v. Gutch or Trutch*, 5 Nev. & M. 109; 1 Har. & Woll. 321. 1757

When in the copy of the writ served on the defendant the letter "s" was omitted in the word "she:"—Held, to be immaterial, as it could not mislead. *Sutton v. Burgess*, 1 C. M. & R. 770; 3 Dowl. P. C. 489; 5 Tyr. 320; 1 Gale, 17. 1757

The omission of immaterial particles in the writ of *capias*, is not an irregularity of which the court will take notice, if the omissions do not alter the meaning of the writ. *Forbes v. Mason*, 3 Dowl. P. C. 104; S. C. nom. *Pocock v. Mason*, 1 Bing. N. R. 245. 1757

Omission of the words "the" and "by" in the copy of the writ of *capias* prescribed by the sched. 2 Will. 4, c. 39:—Held, not to invalidate an arrest. *Id.*

Where, in the body of a writ of *capias*, the word Middlesex was by mistake written "Middesex:"—Held, that it was not a valid objection, and was no ground for ordering the defendant to be discharged out of custody on entering a common appearance. *Colston v. Berends or Berens*, 1 C. M. & R. 833; 3 Dowl. P. C. 253; 5 Tyr. 511. 1757

*Description of Action.*—The defendant having been held to bail on a *capias*, which described the action as an action of trespass on the case, and the arrest, as appeared by the indorsement on the writ, being for a debt of 1200*l.*, the court cancelled the bail-bond, on defendant's entering a common appearance. *Richards v. Stuart*, 10 Bing. 319; 3 M. & Scott, 778; 2 Dowl. P. C. 752. 1758

"Slander" is a sufficient description of the form of action in a writ of summons. *Davies v. Parker*, 2 Dowl. P. C. 537. 1758

"Libel" is a sufficient description of the form of action in a writ of summons. *Pell v. Jackson*, 2 Dowl. P. C. 445. 1758

A writ of summons, describing the action as "action promises" instead of "action on promises:"—Held sufficient. *Cooper v. Whealc*, 4 Dowl. P. C. 231; 1 Har. & Woll. 525. 1758

The omission of the words "on promises" in a writ of summons, is only a ground of setting aside the copy served, and not the writ itself. *Chalkley v. Carter*, 4 Dowl. P. C. 481. 1758

Bail cannot apply to set aside the *capias* against their principal, on the ground of the action being misdescribed therein as an action of trespass on the case upon promises. *Gurney v. Hopkinson*, 1 C. M. & R. 587; 3 Dowl. P. C. 189; 5 Tyr. 211. 1758

Such a mistake is irregular only, and not void. *Id.*

The mistake must be taken advantage of by application to set aside the writ for irregularity. *Id.*

The affidavit of debt was for money lent generally, and the indorsement on the *capias* stated the debt to be due on a promissory note:—Held, not to be a variance. *Patterson v. Habbershan*, 1 Hodges, 316. 1758

The *distringas* being "in a plea of trespass on the case on promises," will not be set aside, though the writ of summons was "in an action on promises." *Pybus v. Bryant*, 4 Tyr. 994; S. C. nom. *Tyser v. Bryan*, 2 Dowl. P. C. 640. 1758

*Defendant's Residence.*—Defendant's residence. *Price v. Huxley*, 4 Tyr. 68; *Webb v. Lawrence*, 3 Tyr. 906. 1759

No date is required to the indorsement. *Id.*

In bailable process, it is not necessary to give a particular description of the defendant's place of residence. A place at which he may be expected to be found is sufficient. *Welsh v. Langford*, 2 Dowl. P. C. 498. 1759

In a writ of *capias* it is not necessary that the plaintiff should describe the exact residence of the defendant, but he may give the best description he can of the place where he is to be found. *Buffle v. Jackson*, 2 Dowl. P. C. 505. 1759

The writ of *capias*, and writs which purport to be a continuance of it, must state the place where the defendant resides; and if that be unknown, the place where he is supposed to reside. *Roberts v. Wedderburne*, 4 M. & Scott, 488; 2 Dowl. P. C. 816; 1 Bing. N. R. 4. 1759

The actual or supposed place of the defendant's residence must be stated in that part of the body of the writ prescribed by schedule No. 4, 2 Will. 4, c. 39. *Lindrege v. Roe*, 1 Bing. N. R. 6. 1759

It is not sufficient to indorse it on the writ. *Id.*

The rule of court, H. T. 2 & 3 Geo. 4, requiring that on all bailable *meane process*, the defendant's place of abode and addition shall be indorsed, is in effect repealed by stat. 2 Will. 4, c. 39; and, therefore, the want of such indorsement is no objection to a *capias* issued under the statute. *It is*



sufficient that in the body of such writ the defendant is described as "G. P. of the city of London." *Bodfield v. Podmore*, 5 B. & Adol. 1095. 1759

"T. S., a clerk in the army pay-office, Somerset House, in the city of Westminster, and county of Middlesex."—Held, not to be a sufficient description of the defendant in a capias. The blank following the word "of" in the form given by the Uniformity of Process Act, must be filled up with the place of the defendant's actual or supposed residence, or, if the plaintiff have no knowledge of these, with the place where the defendant is supposed to be, in conforming with the directions given in sect. 1, as to the writ of summons. *Rolfe v. Swann*, 1 Mees. & Wels. 305. 1759

In a capias "of the gaol of Linton Peveril," is a sufficient description of a defendant. *Loveitt v. Hill*, 4 Dowl. P. C. 579. 1759

Tufon-street, in the county of Middlesex, is sufficient description of a defendant in a writ of summons. *Cooper v. Wheale*, 4 Dowl. P. C. 281; 1 Har. & Woll. 525. 1759

"Late of Devonshire-terrace," held to be a sufficient description in a writ of capias. *Hill v. Harvey*, 2 C. M. & R. 307; 4 Dowl. P. C. 163; 1 Gale, 185. 1759

Seem, that it is not necessary that a defendant should be described in a capias, by his place of residence, if he is otherwise sufficiently identified. *Id.*

Quere, whether it is necessary to state in a capias the county in which a defendant is supposed to reside? *Bosler or Border v. Levi*, 3 Dowl. P. C. 150; 1 Scott, 270; 1 Bing. N. R. 363. 1759

If the defendant's residence is sufficiently described in a capias, with the exception of the county, that defect is supplied by the direction to the sheriff. *Ferring v. Turner*, 3 Dowl. P. C. 15. 1759

"Yorkshire" is a good description of a defendant's residence, although he resides at the town of Kingston-upon-Hull, if he may be supposed to be resident in the former county. *Jelks v. Fry*, 3 Dowl. P. C. 37. 1759

Where an objection is made to a writ of summons, on the ground that the defendant's residence is improperly described, as being in one county instead of another which adjoins, the affidavit must be positive as to the fact, and ought to aver that there is no dispute about the boundaries. *Lewis v. Newton*, 4 Dowl. P. C. 355; 2 C. M. & R. 732; 1 Tyr. & G. 72; 1 Gale, 288. 1759

The addition of the defendant need not be inserted in writ of summons. It is sufficient to state his residence. *Morris v. Smith*, 2 C. M. & R. 120; 3 Dowl. P. C. 698; 5 Tyr. 523; 1 Gale, 103. 1759

**Indorsement of Amount.**—The provision of the Uniformity of Process Act, as to the indorsement on a writ of detainer of the amount for which the defendant is to be detained, is compulsory, and not merely directory. *Jones v. Price*, 2 Dowl. P. C. 410. 1759

It is no ground for setting aside a writ of capias, that the præcipe omits to state the amount of the debt sworn to. *Usborne v. Pennell*, 4 M. & Scott, 431; 2 Dowl. P. C. 801. 1759

A stack of hay was sold by the defendant to the plaintiff, with liberty to keep it on the defendant's premises for a certain time; the hay was seized as a distress before the expiration of that time.—Held, that it was not necessary to indorse on the writ of summons sued out for the above cause of action, the amount of debt and costs. *Perry v. Patchett*, 1 C. M. & R. 87; 2 Dowl. P. C. 667; 4 Tyr. 925. 1759

The proper indorsement on a writ of capias as to the payment of the debt, &c. is "within four days from the service," but a mistake in this respect may be amended on payment of costs. *Paget (Lord) v. Stockley*, 1 Hodges, 317. 1759

In an action on a bail-bond, or a replevin-bond, it is not necessary to indorse the amount of debt and costs, pursuant to 2 Reg. Gen. Hilary Term, 2 Will. 4, & 5 Reg. Gen. Michaelmas Term, 3 Will. 4. *Rowland v. Dakeyne*, 2 Dowl. P. C. 832. *S. P. Smart v. Lovick*, 3 Dowl. P. C. 34. 1759

A writ indorsed in this form—"the plaintiff claims 50l. for debt, with interest from the 25th of May last, and 2l. for costs."—Held, regular. *Sealey v. Hearne*, 3 Dowl. P. C. 196. 1759

The indorsement on a writ that the plaintiff claims a sum for debt, with interest thereon, from a certain day, is sufficiently certain. *Copello v. Brown*, 3 Dowl. P. C. 166; 1 C. M. & R. 575; 5 Tyr. 217. 1759

An irregularity in the indorsement on writs required by the rules of court, is no ground for setting aside the writ itself, or for cancelling the bail-bond, if the plaintiff, upon notice of the objection, amends the defect, on payment of costs; but the defendant is to be allowed four days further time after the amendment to pay the debt. *Cooper v. Waller*, 3 Dowl. P. C. 167; S. C. nom. *Hooper v. Waller or Walker*, 1 C. M. & R. 437; 5 Tyr. 130. 1759

The copy of a capias delivered to a defendant after his arrest, under 2 Will. 4, c. 39, s. 34, was thus indorsed:—"The plaintiff claims 75l. 10s. for debt, 4l. 4s. for costs, and if the amount thereof be paid to the plaintiff or his attorney within four days from the arrest hereon, proceedings will be stayed."—Held, that the copy was irregular in form, because varying from that provided by Reg. Gen. Hil. 2 Will. 4, by substituting "arrest hereon" for "service hereof;" but the court permitted the plaintiff to amend the indorsement on terms. *Id.*

Where, on the copy of the writ delivered, the indorsement was, "if the amount thereof be paid within four days from the arrest or service thereof."—Held sufficient; and that the words "arrest or" might be rejected as surplusage. *Sutton v. Burgess*, 1 C. M. & R. 770; 3 Dowl. P. C. 489; 5 Tyr. 320; 1 Gale, 17. 1759

Where the word "execution" was used instead of "service" in the indorsement on a writ of capias, the court refused to order the bail-bond to be cancelled, but allowed the writ to be amended on



payment of costs. *Shirley v. Jacobs*, 1 Scott, 67; 3 Dowl. P. C. 101. 1759

In the indorsement, pursuant to 2 Reg. Gen. H. T. 2 Will. 4, the word "service" and not "execution" must be used, although the defendant has been arrested. *Colls v. Morpeth*, 3 Dowl. P. C. 23. 1759

In the indorsement, pursuant to Reg. Gen. H. 2 Will. 4, if "execution" is substituted for "service," it is an irregularity, but which may be amended on terms. *Urquhart v. Dick*, 3 Dowl. P. C. 17. 1759

If a defendant is misled by the plaintiff's indorsing on the writ a larger sum than is due, and appears in consequence instead of paying the sum really owing with the costs of the writ as he would otherwise have done, the court or a judge will stay the proceedings on a like payment, if he applies promptly after service of a declaration, accompanied with particulars claiming the sum really due. *Ellison or Elliston v. Roberts or Robinson*, 2 C. & M. 343; 4 Tyr. 214. 1759

It is too late to object to the indorsement on a *capias*, for variance from the form given by the Uniformity of Process Act, 2 Will. 4, c. 39, sched. No. 4, where the writ might have been seen at the filacer's office on 4th June, but no application was made till late in Michaelmas Term to set aside an outlawry, to which the plaintiff had proceeded in the meantime, notwithstanding the defendant swore that the outlawry was not known till six weeks' before; for the irregularity in the writ, if any, should have been previously objected to on summons at chambers. *Lewis v. Davison* 5 Tyr. 198. 1759

*Attorney's Description.*—It is sufficient to describe an attorney plaintiff in the indorsement on a writ of summons, as "of" a particular place, without stating him to reside there. *Yardley v. Jones*, 4 Dowl. P. C. 45; 1 Har. & Woll. 332. 1759

An attorney plaintiff's place of business is the proper "residence" of which to describe him. Semble, that if he were described of his private house, where he did not carry on his business, it would be sufficient also. An alteration in the order of the words of the indorsement, or the addition of others, is immaterial, if the sense remains the same. *Id.*

A man having a house and office may describe himself of the office—Per Lord Lyndhurst, C. B. *Lewis v. Davison*, 5 Tyr. 138. 1759

A writ indorsed with the name of the firm of the attorney used in carrying on the business, satisfies the 12th section of the 2 Will. 4, c. 39, though only one of them is alive and an attorney. *Hartley v. Rodenhurst*, 4 Dowl. P. C. 748. 1759

The county in which the attorney by whom the process is issued resides, need not be stated in the indorsement, nor is it necessary that the indorsement should be dated. *Boeler or Border v. Levi*, 1 Scott, 270; 3 Dowl. P. C. 150; 1 Bing. N. R. 363. 1759

"No. 2, Clifford's-in-passage, Fleet-street, in the city of London," without mentioning the parish, is a sufficient indorsement of the attor-

ney's residence on a writ of summons: the parish need not be named, 2 Will. 4, c. 39, s. 12. *Arden v. Garry or Jones*, 2 Scott, 186; 4 Dowl. P. C. 120; 1 Hodges, 197. 1759

"Gray's-inn, London," is a good description. *Jelks v. Fry*, 3 Dowl. P. C. 37. 1759

"Southampton-buildings" is an insufficient description; but a lapse of more than two months from the time of the arrest is too great to enable a defendant to avail himself of the objection. *Rust v. Chine*, 3 Dowl. P. C. 565. 1759

If a plaintiff, living in a place "not within any city, town, parish, or hamlet," (e. g. Gray's-inn), and suing in person, describe himself as of the extra-parochial place, it is sufficient. *King v. Monkhouse*, 4 Tyr. 236. 1759

Where the indorsement on a writ of summons was, "This writ was issued by, &c., attorney for the said plaintiffs," instead of "attorney for the said A. B.:"—Held good. *Hennah v. Whyman*, 2 C. M. & R. 239; 3 Dowl. P. C. 673; 1 Gale, 105. 1759

A writ indorsed M. & Co. agents for S., without specifying the christian names:—Held sufficient. *Pickman v. Collis*, 3 Dowl. P. C. 429. 1759

*Defendant's Initials.*—Where reasonable diligence has been used to obtain the true christian name of a defendant, the plaintiff, upon a motion to set aside proceedings for irregularity, on the ground of misnomer, is protected by Reg. Gen. H. 2 Will. 4, c. 1, s. 32. *Rosset v. Hartley*, 5 Nev. & M. 415. 1760

But where the defendant was not conusant of the inquiries made respecting his name, a rule for setting aside the proceedings for irregularity, on the ground of misnomer was discharged without costs. *Id.*

*Copy of Writ.*—The writ being directed to the "sheriffs" of London, and the copy served upon the defendant to the "sheriff," the court discharged defendant out of custody upon entering a common appearance. *Nichol v. Boyn*, 10 Bing. 339; 2 Dowl. P. C. 761. 1764

A defendant, taken upon a *capias ad respondendum*, is entitled to be discharged, if between the writ and the copy served upon him there is a variance either in the sound or in the sense of any of the words. As where, in a *capias*, the address was to the sheriff of Middlesex, and in the copy to the sheriff of Middlesex. *Hodgkinson v. Hodgkinson*, 2 Dowl. P. C. 535; 1 Adol. & Ellis, 533; 3 Nev. & M. 564. 1764

The omission of the word "London," in the indorsement on the copy of the *capias*, held sufficient cause for setting aside the copy. *Smith v. Pennell*, 2 Dowl. P. C. 654. 1764

The court refused to set aside a *distringas* for irregularity, because, in the copy of the writ of summons which was left, the name of Andrew Bryan was put as the defendant's name instead of Andrews Bryan. *Tyser v. Bryan*, 2 Dowl. P. C. 640; S. C. nom. *Pybus v. Bryant*, 4 Tyr. 994. 1764



The court refused to set aside the copy of a writ, because the word "plaintiff" was used in the indorsement on the back of the writ instead of the plaintiff's name. *Hannab v. Wynan*, 3 Dowl. P. C. 673; 2 C. M. & R. 239; 1 Gale, 105. 1764

The omission of the day of the month in the teste of the copy of the writ, though the month itself is named, is fatal. *Perring v. Turner*, 3 Dowl. P. C. 15. 1764

If the copy of the writ served on the defendant is materially defective, it is a ground for discharging the defendant on common bail, though the writ itself is right. *Street v. Clarke*, 2 Dowl. P. C. 671. 1764

If the copy of a *capias* delivered to the defendant differs in its date from the original, the court will not allow it to be amended. *Byfield v. Street*, 2 Dowl. P. C. 739. 1764

Where the copy served is defective, the defendant may move to set aside the copy, whether the *capias* itself be right or wrong. *Bosler or Border v. Levi*, 1 Scott, 270; 3 Dowl. P. C. 150; 1 Bing. N. R. 363. 1764

The entry of an appearance by a plaintiff for a defendant does not operate as a waiver of an objection to the copy of the writ. *Chalkley v. Carter*, 4 Dowl. P. C. 481. 1764

**Execution of Writs.**—If a defendant seeks to set aside proceedings on the ground of not having been served with process, it must appear by his affidavit that he is the defendant in the cause. *Johnson v. Smallwood*, 2 Dowl. P. C. 588. 1765

Where a defendant, on being served with a writ of summons, took forcible possession of it after it had been refused to be shown to him, and then returned it to the person who served him:—Held, it was no ground for an attachment. *Weeks v. Whiteley*, 3 Dowl. P. C. 536; 1 Har. & Woll. 218. 1765

Though the service of process should be personal to entitle a plaintiff to enter a common appearance, the court will not set aside proceedings on an affidavit of defendant, that he had not been personally served, accompanied by an affidavit of his daughter, that she received and opened a letter, containing a copy of the writ. *Herbert v. Darley*, 4 Dowl. P. C. 726. 1765

Under particular circumstances, one man may be justified in laying hands upon another, for the purpose of serving him with process. *Harrison v. Hodgson*, 5 M. & R. 392. 1765

It is not sufficient ground for setting aside proceedings, that the service of the writ was not made directly and personally upon the defendant, and especially after a positive affidavit of personal service on the plaintiff's part; the defendant must go on further to show that neither the writ nor the copy came to his knowledge or possession. *Phillips v. Ensell*, 2 Dowl. P. C. 684; 4 Tyr. 814; 1 C. M. & R. 374. 1765

If a sheriff does not indorse on the *capias* the day of its execution, pursuant to 4 Reg. Gen. M. T. 3 Will. 4, the remedy is to require him to

amend his return, and make compensation to the plaintiff for damages accruing through his neglect. *Moore v. Thomas*, 2 Dowl. P. C. 760. 1766

The sixth rule of Michaelmas term, 3 Will. 4, does not prevent a plaintiff from issuing concurrent writs of *capias* into two or more counties. *Durne v. Harding*, 4 M. & Scott, 450. 1767

A lapse of six days held not too great to preclude a motion for setting aside the copy of a writ for irregularity. *Smith v. Pennell*, 2 Dowl. P. C. 654. 1767

**Appearance.**—If the defendant improperly gets possession of the writ of summons, the court will allow an appearance to be entered without any indorsement, and order the defendant to pay the costs. *Brooke v. Eldridge*, 2 Dowl. P. C. 647. 1769

Irregularity in appearing by a person who is not an attorney of the court, does not entitle the opposite party to sign judgment, but only to move to set aside the proceedings. *Bazley v. Thompson*, 4 Tyr. 965. 1769

A defendant appearing in person is bound by the same rules as he would have been if he had appeared by attorney. *Kerry v. Reynolds*, 4 Dowl. P. C. 234; S. C. not S. P. 2 C. M. & R. 310; 1 Gale, 268. 1769

Where a defendant does not enter an appearance, and the plaintiff omits to do it for him, the proceeding to judgment is a nullity, which is not waived either by delay in making an application to set aside the proceedings, or by the defendant taking a step in the cause. *Roberts v. Spurr*, 3 Dowl. P. C. 551; 1 Har. & Woll. 201. 1769

Where a bail-bond is cancelled, the plaintiff is not bound to accept an appearance by the defendant, though the entry of it was mentioned as a condition in the rule nisi. *Perring v. Turner*, 3 Dowl. P. C. 15. 1769

If a defendant enters an appearance in due time, which is irregular on account of a mistake in the name, the proper course for him to pursue is to apply to amend that appearance, and not to enter a new one. *Bate v. Bolton*, 4 Dowl. P. C. 161, 677; 2 C. M. & R. 365; 1 Tyr. & G. 148. 1769

Where a *distringas* is returned non est inventus and nulla bona, and defendant's residence is a furnished lodging, attempts to execute the warrant should be made, the copy of the *distringas* and warrant issued thereon should be left at the lodgings, and an affidavit made stating the facts, and also that inquiries have been made whether the defendant had goods elsewhere. If none can be discovered, the plaintiff will be suffered to enter an appearance for defendant, and proceed to judgment and execution under 2 Will. 4, c. 39, s. 3. *Cornish v. King*, 3 Tyr. 575. 1770

It cannot be made part of the above rule, that service of notice of declaration at the defendant's last known place of abode, and sticking up a declaration in the office, be deemed good service. *Id.*

The court refused to allow an appearance to be entered under the 2 Will. 4, c. 39, s. 3, after



a *distringas* on an affidavit, which merely stated generally, that diligent inquiry had been made to find the defendant without success. The affidavit should specify the places where, and the persons from whom the inquiries were made. *Copeland v. Nevill*, 5 Nev. & M. 172; 4 Dowl. P. C. 51; 1 Har. & Woll. 374. 1770

On a sheriff's return of *non est inventus* and *nulla bona* to a writ of *distringas*, if it appears that the defendant keeps out of the way to avoid his creditors, the court will allow an appearance to be entered for him; but will not, on the same motion, give leave to stick up notice of the declaration in the office. *Id.*

Where leave to issue a *distringas* has been obtained against the defendant for not entering an appearance, upon which the sheriff has returned that he has levied 40s., no rule is necessary previously to entering a common appearance. *Tucker v. Brand*, 4 Dowl. P. C. 411. 1770

In order to satisfy the court under 2 & 3 Will. 4, c. 39, s. 3, that proper means have been taken to serve a *distringas* on a defendant who was a clerk in the victualling office, in order to enter an appearance against him, it should be shown not only that his residence or property could not be discovered, but that attempts had been made to serve him at the victualling office. *Rounceill v. Bower*, 4 Tyr. 374; *S. C. Sanderson v. Bourne*, 2 C. & M. 515. 1770

The sheriff's return to a *distringas* of *non est inventus* and *nulla bona*, is not alone sufficient to entitle the plaintiff to enter an appearance for the defendant, and the court cannot listen to hearsay evidence of the efforts made to execute the writ. *Daniels v. Varity*, 3 Dowl. P. C. 26. 1770

Where the sheriff has levied 40s. under a *distringas*, and made a return that he has so levied, the plaintiff is entitled to enter an appearance, without an affidavit from the sheriff's bailiff, of the due execution of the writ. *Page v. Kemp*, 2 C. M. & R. 494; 4 Dowl. P. C. 203; 1 Gale, 186. 1770

*Nonpros.*—In an action against several defendants, a judgment of *nonpros* cannot be signed until all have appeared. *Palmer v. Feistel*, 2 Dowl. P. C. 507. 1770

The defendant entered an irregular appearance within the eight days; the plaintiff gave him notice of the irregularity, and he promised to examine and correct, but instead of doing so, entered a new appearance in the next term in a fresh book, and demanded a declaration; and the plaintiff not declaring in due time, the defendant signed judgment of *nonpros*. The court held, that the irregular appearance might have been corrected in the book, and set aside the judgment of *nonpros*, the costs to be costs in the cause. *Bate v. Bolton*, 2 C. M. & R. 365; 4 Dowl. P. C. 161, 677; 1 Tyr. & G. 148. 1770

*Particulars.*—Though a declaration be delivered without any particulars, the plaintiff may sign judgment if the defendant does not plead in

due time; and it makes no difference in the time for pleading, that particulars are afterwards delivered in lieu of those originally delivered, which were a nullity. *Jones v. Fowler*, 4 Dowl. P. C. 232; 1 Gale, 256. 1771

A declaration in *assumpsit*, indorsed to plead in four days, being delivered with particulars of demand annexed, the plaintiff two days afterwards finding that the particulars were wrongfully entitled, delivered a fresh particular entitled; and, for want of a plea within the four days, signed judgment:—Held, that the judgment was regular, the accepting the amended particulars being a waiver of the objection to the first. *Id.*

Where a plaintiff had not complied with the rule of court, in giving credit in his particulars of demand for sums admitted to have been paid on account; the court refused an application to deprive him of costs, after the case had been referred to arbitration, on the terms of the costs abiding the event, and an award had been made on the whole matter. *Smith v. Eldridge*, 5 Nev. & M. 408; 1 Har. & Woll. 527. 1771

The rule which requires the sum or balance claimed to be stated in a particular of demand, does not require the plaintiff to state the items in reduction of his demand; it is sufficient if he state the credit which he gives generally, so as to show the balance he claims. *Id.*

A variance between the description in the particulars of demand and the proof is immaterial, if it be not such as is likely to mislead the defendant. *Spencer v. Bates*, 1 Gale, 108. 1771

The court will not compel a plaintiff suing for the balance of an account, to furnish a statement of monies received by him from the defendant. *Penprase v. Crease*, 1 Mees. & Wels. 36; 4 Dowl. P. C. 711. 1771

A defendant being served with a writ of summons obtained an order for particulars before declaration; after waiting three months, the plaintiff refused to go on with the action, or to enter a *stet processus*; the court refused an application to compel him to do so. *Kirby v. Snowden*, 4 Dowl. P. C. 141. 1771

In *assumpsit*, the first count of the declaration was on an undertaking by the defendant to pay such costs, charges, and expenses, as the plaintiff (an attorney) should incur in an action to be brought by him against G. on a bill of exchange, drawn by the defendant only, which was lying due, and which the plaintiff had agreed to take up for the honor of the defendant. In the second count the plaintiff declared as indorsee of the bill; the third was for money paid; the fourth on an account stated. On the first count the defendant paid into court a sum covering the plaintiff's costs out of pocket. On the second count, the ultimate issue was, whether a bill subsequently given by the defendant to the plaintiff, was given in satisfaction of the first, or as a collateral security. The plaintiff first gave a particular of demand applicable only to the count on the bill of exchange. The defendant obtained an order of demand for particulars "of the bill of costs, charges, and expenses mentioned



tioned in the first count of the declaration;" and the plaintiff thereupon delivered a particular, containing a copy of his whole bill of costs in the action against G., and also the amount of the bill and interest. At the trial, the judge ruled that the costs out of pocket only could be recovered on the first count:—Held, that the particulars were sufficient to enable the plaintiff to recover the rest of the bill of costs under the account stated. *Fisher v. Wainwright*, 1 Mees. & Wels. 480. 1771

The defendant gave in evidence, for the purpose of proving that the second bill was given by way of satisfaction, an unsigned account of the plaintiff's claims, which had been delivered by him to the defendant, for the purpose of their being proved under G.'s bankruptcy, and one item of which was the amount of the bill of costs:—Held, that this was not such evidence of an account stated as would have enabled the plaintiff to recover the costs on the account stated, if his particulars had been insufficient for that purpose. *Id.*

A plaintiff being called upon for his place of residence, gave "Peel's Coffee-house, Fleet-street:—Held, not sufficient, and proceedings were stayed till he gave a better place of residence. *Hodson v. Gamble*, 3 Dowl. P. C. 174. 1774

An attorney who gives a false residence of his client, without using proper means to ascertain whether it is correct or not, subjects himself to the costs which may be occasioned by moving for an attachment against him; but he is not liable to pay the costs of the action, if he is bona fide unable, after proper inquiry, to give his client's residence. *Neale v. Holden*, 3 Dowl. P. C. 493. 1774

*Notice of Trial*].—Short notice. *Lawson v. Robinson*, 3 Tyr. 490. 1776

Continuance of notice of trial. *Wardle v. Ackland*, 3 Tyr. 819. 1776

A continuance of notice of trial on Friday for Monday is sufficient. *Stewart v. Abraham*, 2 Dowl. P. C. 709. 1776

By the practice of the court of K. B. the plaintiff, in a country cause, has the whole of the term ensuing that in which issue is joined, to give notice of trial. *Douglas v. Winn*, 4 Dowl. P. C. 559. 1776

A notice for trial on a day that was Easter Tuesday, held good. *Charnock v. Smith*, 3 Dowl. P. C. 607; 1 Har. & Woll. 217. 1776

The notice of trial by continuance must be given the same length of time before the notice of trial expires, as in the case of a notice of countermand. *Forbes v. Crow*, 1 Mees. & Wels. 465. 1776

If the issue be delivered with a notice of trial indorsed for one day, and with it a separate notice of trial for a different day, it is an irregularity. *Kerry v. Reynolds*, 2 C. M. & R. 310; 4 Dowl. P. C. 234; 1 Gale, 268. 1776

A defendant after being arrested in London on

a bill of exchange, and having accepted a declaration with notice to plead in four days without objection, went over to Ireland, and was there when notice of trial was given to his attorney in London. Upon an application for a new trial, upon the ground that, being resident in Ireland, he was entitled to fourteen day's notice, and not merely to eight days, which had been given, the court refused to interfere, the affidavit in support of the rule merely stating that the defendant's residence was then, and had been for some time past, in Cork; but it did not explain how he came to be in London at the time of the arrest, nor where his general place of residence was. *Lenham v. Gould*, 4 Dowl. P. C. 371. 1776

A defendant being under terms to plead issuably, rejoin gratis, and take short notice of trial, in a country cause for slander, pleaded on the 19th February a special justification; the replication was de injuria, and the issue was delivered at half past seven o'clock in the evening of the 27th, with notice of trial for the 3rd March. The cause was tried as an undefended cause, and a verdict was found for the plaintiff. The court made absolute a rule for a new trial, on the ground of irregularity, directing the costs to abide the event. *Pound v. Penfold*, 5 Nev. & M. 186; 1 Har. & Woll. 323. 1776

Countermand of notice of trial, in a country cause, may be given by the country attorney, although the agent in town is the attorney on the record. *Cheslyn v. Pearce*, 1 Mees. & Wels. 50; 4 Dowl. P. C. 693. 1776

*Putting off Trial*.]—The court will not delay the trial of an action until after the trial of an indictment for perjury, in a matter relating to the cause. *Johnson v. Wardle*, 3 Dowl. P. C. 550; 1 Har. & Woll. 219. 1776

A motion to postpone a trial, on account of the absence of a material witness, need not be supported by an affidavit of merits. *Hill v. Prosser*, 3 Dowl. P. C. 704. 1779

Semble, that on a writ of trial the trial cannot be postponed by the sheriff for absence of a material witness but that application should be made to a judge. *Packam v. Newman*, 1 C. M. & R. 584; 3 Dowl. P. C. 165; 5 Tyr. 215. 1779

Where application to put off a trial before the sheriff was made after the jury were sworn, on the ground of the absence of a material witness, and refused, the court would only grant a new trial on payment of costs. *Id.*

A trial will be put off, at the instance of defendant, from Easter till after Michaelmas Term, to enable him to obtain the evidence of a material witness. *Grierson v. Aird*, 1 Hodges, 76. 1779

Where a material witness for the plaintiff is prevented from attending by the fraud and practice of the defendant's attorney, the plaintiff ought to apply to the judge to put off the trial, or ought to withdraw the record. *Turquand v. Dawson*, 1 C. M. & R. 709; 5 Tyr. 488. 1779

If he proceeds to trial, and is nonsuited, the court will not grant a new trial. *Id.*



*Judgment as in case of a Nonsuit.*—If a plaintiff does not proceed to trial pursuant to notice, at the defendant's request, he is not entitled to judgment as in case of a nonsuit. *Doe v. Stephens v. Lord*, 2 Dowl. P. C. 419. 1781

If it appears that issue is not joined by adding the similiter, the rule for judgment as in case of a nonsuit will be discharged. *Gilmore v. Melton*, 2 Dowl. P. C. 632; *S. P. Browne v. Kennedy*, 2 Dowl. P. C. 639. 1781

Where a defendant has given a cognovit for the debt sought to be recovered in an action by the plaintiff, and the plaintiff does not proceed to trial, and the defendant obtains a rule for judgment as in case of a nonsuit, that rule will be discharged with costs. *Smith v. Joy*, 2 Dowl. P. C. 410. 1781

If a defendant unnecessarily rules a plaintiff to enter the issue, he is not thereby deprived of his right to obtain judgment as in case of a nonsuit. *Sarjeant v. Jones*, 2 Dowl. P. C. 420. 1781

After notice of trial. *Preedy v. Macfarlane*, 4 Tyr. 93. 1784

Countermand of notice of trial does not prevent the defendant from having judgment as in case of a nonsuit. *Dennehey v. Richardson*, 4 Dowl. P. C. 13; 1 Har. & Woll. 367. 1781

After having obtained a rule for the costs of the day for not proceeding to trial, the defendant cannot, by Reg. Gen. 69, H. T. 2 Will. 4, have judgment as in case of a nonsuit, though no further proceeding has been taken in the case for four terms. *Falgrave v. Justin*, 1 Har. & Woll. 368. 1781

It is no objection to an application for judgment as in case of a nonsuit, that issue was joined seven years previous. *Cromer v. Brown*, 4 Dowl. P. C. 266. 1781

Though a rule absolute for judgment as in case of a nonsuit has been obtained for not proceeding to trial pursuant to a peremptory undertaking, yet, if it appears to have been through mistake that notice of trial was not given in time, and no inconvenience has been sustained by the defendant in consequence, the court will discharge the rule on payment of costs. *Charrington v. Meatherringham*, 4 Dowl. P. C. 479. 1781

Where there were several pleas, on some of which issue was joined, and as to one a demurrer, upon which judgment was given for the defendant four days before the end of Easter Term, the court refused to allow the defendant to sign judgment as in case of a nonsuit in Trinity Term, on the ground of the want of a notice of trial for the adjournment day of the sittings after Easter Term. *Leslie v. Young*, 2 Scott, 331. 1781

Where a plaintiff has served a rule to discontinue, and the costs are taxed, but not paid, the defendant is not entitled to judgment as in case of a nonsuit. *Cooper v. Holloway*, 1 Hodges, 76. 1781

If a defendant by negotiation prevents a plaintiff from proceeding to trial in due time after issue joined, he cannot obtain judgment as in case

of a nonsuit, on account of such delay. *Watkins v. Giles*, 4 Dowl. P. C. 14. 1781

In answer to a rule for judgment as in case of a nonsuit, the plaintiff's attorney swore that he had not added the similiter, nor had it been added to his knowledge or belief:—Held, a sufficient answer. *Martin v. Martin*, 2 Scott, 389; 2 Bing. N. R. 240. 1781

The court will discharge the rule for judgment as in case of a nonsuit, though the defendant swears the cause is at issue, if the plaintiff swears that the similiter has not been added. *Seabrook v. Cave*, 2 Dowl. P. C. 691. 1781

Where a plaintiff was nonsuited, and the nonsuit was afterwards set aside on payment of costs:—Held, that defendant could not afterwards move for judgment as in case of a nonsuit, but must take the cause down by proviso. *Ashley v. Flaxman*, 2 Dowl. P. C. 697. 1781

*Trial before Sheriff.*—A defendant may obtain judgment as in case of a nonsuit, where notice of trial has been given before the sheriff, pursuant to 3 & 4 Will. 4, c. 42, s. 17. *Walls v. Redmayne*, 2 Dowl. P. C. 508. 1781

If a plaintiff does not proceed within two terms after issue is joined, which issue is directed to be tried before the sheriff, under the 3 & 4 Will. 4, c. 42, s. 17, the defendant is entitled to judgment as in case of a nonsuit, as in ordinary cases. *Horwood v. Roberts*, 2 Dowl. P. C. 534. 1781

Where a plaintiff obtains an order under the 3 & 4 Will. 4, c. 42, s. 17, for the trial of an issue before the sheriff, the court will compel him to proceed within a reasonable time. *Mullins v. Bishop*, 2 Dowl. P. C. 557. 1781

Where a trial is ordered to take place in the Sheriffs' Court, under the Writ of Trial Act, and the plaintiff does not proceed to try according to the course and practice of the Sheriffs' Court, the defendant may apply for judgment as in case of a nonsuit. *Maddeley v. Batty*, 3 Dowl. P. C. 205. 1781

Where a plaintiff does not proceed to trial of an issue before the under-sheriff, pursuant to notice, the time at which he would be compelled to proceed by the court will be regulated by the times at which the sheriff sits. *Banks v. Wright*, 3 Dowl. P. C. 14. 1781

Issue having been joined on 22nd July, the defendant took out a summons, calling on plaintiff to try before a sheriff in a fortnight, and a judge granted an order accordingly. The plaintiff took out a summons to rescind that order, and another order was obtained to try at the next court day:—Held, first, that the judge had no power to make such an order; secondly, that a motion for judgment as in case of a nonsuit in Michaelmas T. was premature; and lastly, that that motion having been made on the faith of a judge's order, which was overturned by the decision of the court, the rule for judgment as in case of a nonsuit should be discharged without costs. *Wright v. Skinner*, 1 C. M. & R. 746; 1 Tyr. & G. 69. 1781



Semble, that judgment as in case of a nonsuit cannot be moved against a plaintiff who has once taken his cause down to trial, though it took place before the sheriff, under the Writ of Trial Act, and that the proper course is to get a judge's order for trying the cause by proviso. *Day v Day*, 4 Dowl. P. C. 740; 1 Mees. & Wels. 39. 1761

The circumstance that an order to try before the sheriff has been obtained, makes no difference in the time within which judgment as in case of a nonsuit may be moved for, no notice of trial having been given. *Harle v. Wilson*, 3 Dowl. P. C. 658; 1 Gale, 139. 1718

The issue in a country cause, ordered to be tried before the sheriff, was joined on the 9th of August, but the plaintiff did not give notice of trial; a motion for judgment as in case of a nonsuit, in the Hilary Term following, was held to be premature. *Id.*

In a country cause, ordered to be tried before the sheriff, the plaintiff has the same period of time for proceeding as if no order had been made. *Butterworth v. Crabtree*, 1 C. M. & R. 519; 3 Dowl. P. C. 189; 5 Tyr. 149. 1781

Where issue was joined in a country cause before the sheriff in June, and no notice of trial was given:—Held, that a motion for judgment as in case of a nonsuit in Michaelmas Term was too early, though two court days had passed. *Id.*

*Excuse.*—Where a peremptory undertaking had been given to try, but the plaintiff neglected to go to trial in time, because it was found that the declaration required amendment, and a proposal to refer was going on:—Held, that that was no excuse, and that the defendant was entitled to judgment as in case of a nonsuit. *Haines v. Taylor*, 2 Dowl. P. C. 644. 1762

*Excuse.* *Monck v. Bonham*, 2 C. & M. 430; 4 Tyr. 312. 1782

It is a good excuse for not proceeding to trial according to a peremptory undertaking, that, owing to the press of business in the court, another cause which was in the new trial paper, and would have decided the dispute, had not yet been argued, and which it was expected it would have been when the undertaking was given. *De Rutzen v. Richards*, 1 Har. & Woll. 210. 1762

Where, on a motion for judgment as in case of a nonsuit, it appeared that the action was commenced and carried on in the plaintiff's name without authority or knowledge, and that the attorney could not be found after diligent inquiry:—Held, that there was no answer to the motion, and that the plaintiff's only remedy was against the attorney; but the court, under the circumstances, enlarged the rule to give the plaintiff time to find the attorney, and granted a rule to show cause why the attorney should not pay the defendant's costs. *Mudry or Muday v. Newman*, 1 C. M. & R. 402; 2 Dowl. P. C. 655; 4 Tyr. 1023. 1762

It is not an answer to a motion for judgment as in case of a nonsuit, in an ejectment where the landlord defends, that the tenants in possession

have given up possession of the premises to an agent of the lessor of the plaintiff. *Doe d. Draycott or Draper v. Dyos*, 2 C. M. & R. 60; 3 Dowl. P. C. 686; 1 Gale, 160. 1762

It is a sufficient excuse in showing cause against a rule for judgment as in case of a nonsuit, for not proceeding to trial pursuant to notice, that the cause was withdrawn, in order to obtain a special jury. *Webber v. Roe*, 3 Dowl. P. C. 589. 1782

On discharging a rule for judgment as in case of a nonsuit, where the plaintiff had become insolvent, and made an assignment of his property to trustees; the court required not only a good peremptory undertaking, but also that security should be found for the costs. *Nicholson v. Milne*, 1 Har. & Woll. 211. 1782

In an action for a malicious arrest, the court discharged a rule for judgment as in case of a nonsuit, with costs, where the plaintiff showed that he only forbore proceeding to trial because the defendant had instituted criminal proceedings against him on the charge for which the arrest was made. *Grey v. Hutchins*, 3 Dowl. P. C. 414; S. C. nom. *Long v. Hutchins*, 1 Scott, 400. 1782

Quere, whether an affidavit that the suit has been determined by agreement is an answer to a motion for judgment as in case of a nonsuit? *Greenslade v. Nunn*, 1 Gale, 46. 1762

It is no answer to a rule for judgment as in case of a nonsuit, that the plaintiff is poor, and has neglected to furnish his attorney with money to conduct the suit. *Cleasby v. Poole*, 1 C. M. & R. 521; 3 Dowl. P. C. 162; 5 Tyr. 146. 1782

The poverty of a defendant is not a sufficient excuse for not proceeding to trial, unless it appears that the knowledge of that poverty reached the plaintiff after the commencement of the suit. *Fielder v. Crow*, 4 Dowl. P. C. 50. 1782

The insolvency of the plaintiff, after the commencement of the action, is not an answer to a motion for judgment as in case of a nonsuit. *Frodsham v. Rust*, 4 Dowl. P. C. 90. 1782

*Motion for Judgment.*—On a motion for judgment as in case of a nonsuit, the court only takes notice of the last default. *Jee v. Potter*, 4 Dowl. P. C. 724. 1783

Where issue was joined in a town cause, early in the vacation after T. T., and no notice of trial was given:—Held, that the practice was not affected by the Uniformity of Process Act, 2 Will. 4, c. 34, and that it was premature to move for judgment as in case of a nonsuit, in H. T., or before the third term. *Wingrove v. Hodgson*, 4 Tyr. 325. 1783

Issue was joined in vacation, and in the following term notice was given to try before the sheriff within the same term:—Held, that after default by plaintiff, the defendant could not in the same term move for judgment as in case of



a nonsuit. *Linley v. Poulton*, 1 Gale, 158: S. C. nom. *Lenney v. Poulter*, 3 Dowl. P. C. 630. 1783

Where issue was joined on the 24th November in a country cause, and the plaintiff did not give notice of trial:—Held, that judgment as in case of a nonsuit might be moved for after one assize had passed. *Smith v. Rigby*, 3 Dowl. P. C. 705. 1783

Unless the similiter is added, issue cannot be said to be joined for the purpose of such a motion. *Id.*

Where issue was joined on the 20th June, and notice given for trial at the Sheriff's Court on the 18th July, which the plaintiff countermanded:—Held, that a motion in the term next following for judgment as in the case of a nonsuit was not too early. *Maddeley v. Batty*, 3 Dowl. P. C. 206. 1783

In a country cause, where issue is joined in Easter vacation, the defendant may move in Michaelmas Term for judgment as in case of a nonsuit. *Williams v. Edwards*, 1 C. M. & R. 583; 3 Dowl. P. C. 183; 5 Tyr 177. 1783

Where a cause was called on whilst the plaintiff's attorney's clerk was absent from the court, in consequence of an application made to amend, and the record was therefore withdrawn; but the cause was set down again immediately for trial, and afterwards the defendant obtained a rule nisi for judgment as in case of a nonsuit, whilst the cause was still in the paper; the court discharged the rule with costs. *Wolsey v. Edwards*, 4 Dowl. P. C. 236. 1783

The issue cannot be looked at on a motion for judgment as in case of a nonsuit, unless it is referred to in the affidavit. *Meredith v. Stocker*, 4 Dowl. P. C. 499; 1 Tyr. & G. 76; 1 Gale, 320. 1783

The lapse of eight years between the joining of issue and the application for judgment as in case of a nonsuit, is no ground for discharging the rule. *Curtis v. Tabram*, 4 Dowl. P. C. 600. 1783

Where the plaintiff has made several defaults in proceeding to trial pursuant to his peremptory undertaking, the court may make the payment of the costs of the last default a condition precedent to enlarging his last undertaking. *Dennehaye v. Richardson*, 4 Dowl. P. C. 564. 1787

Where the trial of a cause came on unexpectedly, and one of the plaintiff's witnesses and both the defendant's counsel were absent, in consequence of which the cause was struck out, the court enlarged a peremptory undertaking which the plaintiff had given to try the cause, but on the terms of the payment of the costs of the day and of the application. *Saxon v. Swabey*, Dowl. P. C. 105; 1 Har. & Woll. 345. 1787

*Peremptory Undertaking.*—In support of a rule to enlarge a peremptory undertaking, where the plaintiff has made only one default, in consequence of the absence of a material witness, the

affidavit need not state the name of that witness. *Montfort v. Bond*, 2 Dowl. P. C. 403. 1786

Where a plaintiff has given a peremptory undertaking (but not by rule), the rule for judgment as in case of a nonsuit, for not fulfilling that undertaking, is nisi in the first instance. *Vokius v. Snell*, 2 Dowl. P. C. 411: S. P. *Whalley v. Followes*, 1 Hodges, 77. 1786

Payment of the debt and costs, after a peremptory undertaking given, is a ground for having it discharged, but the plaintiff cannot be compelled to enter a stet processus. *Shrimpton v. Carter*, 3 Dowl. P. C. 648. 1786

Where a rule nisi for a judgment as in case of a nonsuit was discharged on a peremptory undertaking to try at the next assizes, and afterwards an order for trial at the sheriff's court was obtained, and the plaintiff neglected to try at the next sheriff's court:—Held, that the defendant was entitled to a rule absolute for judgment as in case of a nonsuit. *Williams v. Edwards*, 3 Dowl. P. C. 660. 1786

*Trial at Bar.*—A trial at bar will be granted on the ex officio application of the attorney-general, where the interests of the King as Duke of Lancaster may come into question. *Brown v. Grenville (Lord)*, 1 Har. & Woll. 270. 1787

*Writ of Trial.*—An action for unliquidated damages, e. g. in running down plaintiff's boat, cannot be tried before the sheriff under a writ of trial. *Watson v. Abbott*, 4 Tyr. 64. 1787

The writ of trial, under 3 & 4 Will. 4, c. 42, s. 17, is to be directed to the judge of the court of record in those places in which there is a court of record, and to the sheriff where there is no such court. *Clarke v. Marner*, 4 M. & Scott, 171; 2 Dowl. P. C. 774. 1787

A writ of trial was directed to the mayor of Colchester, and the cause was tried by his deputy; the court refused to set aside the proceedings on a suggestion that the cause ought to have been tried by the mayor himself, it not appearing that that officer was without authority to appoint a deputy. *Id.*

The writ of trial, under the rule of H. T. 4 Will. 4, is conclusive as to the date of the writ of summons stated in it, and evidence is not admissible to contradict it. But where a wrong date is inserted in it, the court will set aside the trial, and order the writ of trial to be amended. *Whipple v. Manley*, 1 Mees. & Wels. 432. 1787

Where an order was obtained under the Writ of Trial Act, for a trial before the sheriff, and the sum indorsed upon the writ was 58*l.*:—Held, that the verdict must be set aside, though both parties had gone to trial before the sheriff without making any objection. *Edge v. Shaw*, 2 C. M. & R. 415; 4 Dowl. P. C. 189. 1787

Where a cause is proper to be tried by the sheriff under the Writ of Trial Act, but by mistake a larger sum is indorsed on the writ than the plaintiff claims, and then is allowed by the



act, the court will allow the writ to be amended. 1d.

The Writ of Trial Act was only intended to apply to very plain questions, and after a judge at chambers has refused to make an order; sem- ble, that the court will not entertain a motion for reviewing his decision; not, at least, unless all the facts of the case, with what took place before the judge are brought specially before the court. *Davis v. Lloyd*, 4 Dowl. P. C. 478; 1 Tyr. & G. 28. 1787

If the sum indorsed on a writ of summons exceeds 20*l.*, the cause cannot be tried before the sheriff; but the court, on motion at the instance of the plaintiff, will amend the indorsement by substituting a less sum, being the amount due upon the balance, so as to obtain a writ of trial. *Frodsam v. Round*, 4 Dowl. P. C. 569. 1787

It is no ground of objection to an issue being tried before the sheriff, that the defendant will endeavor to avail himself of the Gloucester court of Requests Act. *Croad v. Harris*, 4 Dowl. P. C. 616. 1787

The court or a judge has no power to reduce the amount indorsed upon a writ of summons, so as to make the cause triable by the sheriff. *Trotter v. Bass*, 1 Scott, 403; 3 Dowl. P. C. 407; 2 Bing. N. R. 516; 1 Hodges, 23. 1787

That a notice of trial before the sheriff is given for a day not fixed for trying issues, is no ground for moving to set it aside. *Arden v. Garry*, 2 Scott, 188. 1787

In causes to be tried before the sheriff, the issue must be delivered as in other cases. 1d.

Semble, that if, on a writ of trial, pursuant to 3 & 4 Will. 4, c. 42, s. 17, a verdict was given for 20*l.*, and for a sum of 10*l.*s. for interest, a judgment entered up for both sums would be irregular. *Burleigh v. Kingdon*, 2 C. & M. 476; 4 Tyr. 369. 1787

Where the defendant obtains an order to try before the sheriff, the judge has no authority to impose terms on the plaintiff as to the time of trying, without his consent. *Wright v. Skinner*, 2 C. M. & R. 746; 4 Dowl. P. C. 727; 1 Tyr. & G. 69. 1787

*Trial.*—In ejectment, the defendant's counsel has no right to the general reply, unless he admits the whole prima facie case of the lessor of the plaintiff; therefore, where the counsel for the defendant only admitted the pedigree of the lessor of the plaintiff, and his counsel proved the seisin of the ancestor by receipt of rent, which case was answered by setting up a will, the validity of which was disputed by evidence on the part of the lessor of the plaintiff, it was held that the defendant's counsel was not entitled to the general reply. *Doe d. Pile v. Wilson*, 6 C. & P. 301; 1 M. & Rob. 323—Denman. 1788

The plaintiff is entitled to begin, where damages of an unascertained amount are the object of the action, though the affirmative of the issues on the record be with the defendant. *Carter v. Jones*, 1 M. & Rob. 281—Tindal. 1788

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Where a defendant in replevin pleads property in a third person, and issue is taken thereon, he is entitled to begin. *Coleston v. Hescolbs*, 1 M. & Rob. 301—Alderson. 1788

Where real damages are not the object of the action, the party on whom the affirmative issues lie is entitled to begin. Quere, whether a new trial can be obtained on the ground that a party has been improperly deprived of his right to begin? *Burrell v. Nicholson*, 1 M. & Rob. 304—Denman. 1788

In ejectment by lessors, claiming under several descents from a particular ancestor, when the defendant admits all the descents except the first, and claims under a will of this ancestor, the defendant is entitled to begin. *Doe d. Wollaston v. Barnes*, 1 M. & Rob. 386—Denman. 1788

To a mandamus to a rector to restore a parish clerk, the rector returned, that the clerk was guilty of acts of intoxication, and therefore he dismissed him. The clerk brought an action for a false return, and in his declaration recited the return, and negatived the allegations contained in it. The rector by his plea repeated the charges contained in the return:—Held that, on these pleadings, the defendant had the right to begin. *Bowles v. Neale*, 7 C. & P. 262—Denman. 1788

In an action on a bill of exchange by the indorsee against the acceptor, the defendant pleaded that it was an accommodation bill, and that a blank acceptance had been filled up, and applied in discharge of this and other bills; the plaintiff replied, that the defendant broke his promise without such cause as in that plea alleged:—Held, that on these pleadings the defendant was entitled to begin. *Faith v. McIntyre*, 7 C. & P. 44—Parke. 1788

A defendant in assumpsit pleaded as to 20*l.* payment, and as to the residue, a set-off:—Held, that on these pleadings the defendant must begin. *Coxhead v. Huish*, 7 C. & P. 63—Parke. 1788

A party gave a check for the amount of a deposit on a sale by auction, which sale was void. In an action on the check, he pleaded that there was no consideration for the check; and the plaintiff replied, that there was consideration:—Held, that on this issue the defendant must begin. *Mills v. Oddy*, 6 C. & P. 728—Parke. 1788

In assumpsit, the declaration stated that the defendant agreed to build houses according to a specification. Breach, that he did not build according to the specification. Plea, that the defendant did build according to the specification:—Held, that on this issue the plaintiff must begin, and prove that the defendant had not built according to the specification. *Smith v. Davies*, 7 C. & P. 307—Alderson. 1788

Trover by the assignees of a bankrupt against the sheriff for goods. Plea, that R. J. sued out a writ of fi. fa. against the bankrupt, and that was delivered to the sheriff before the bankruptcy, and that the sheriff seized and sold the goods; and



that no docket had been struck against the bankrupt, neither had the sheriff notice of any act of bankruptcy. Replication, that the judgment was obtained against the bankrupt by cognovit in an action commenced by collusion, and that the fiat issued within two months after the seizure. Rejoinder, that the action was commenced adversely:—Held, that on these pleadings the plaintiff must begin. *Scott v. Lewis*, 7 C. & P. 347—Coleridge. 1788

Assumpsit on a bill of exchange by indorsee against acceptor. The only plea was, that the bill had been altered after acceptance:—Held, that the defendant's counsel had the right to begin, and that, upon his calling for the bill, the plaintiff's counsel ought to produce it without notice. *Barker v. Malcolm*, 7 C. & P. 101—Tindal. 1788

If, in an action of covenant for non-repair, &c., the defendant plead affirmative pleas, which are denied by the replication, the defendant is entitled to begin. *Lewis v. Wells*, 7 C. & P. 221—Coleridge. 1788

The new rule of practice made by the judges as to the right to begin, does not extend to actions of contract. *Id.*

In assumpsit for work and labor, the defendant pleaded that the "promise was made to the plaintiff and J. S., and not to the plaintiff alone." Replication, that the promise was made to the plaintiff alone, and not to the plaintiff and J. S.:—Held, that on this issue the plaintiff ought to begin. *Davies v. Evans*, 6 C. & P. 619—Parke. 1788

In an action by the indorsee of a bill of exchange against the acceptor, the defendant pleaded, first, that the bill was accepted for a debt from which he was discharged under the Insolvent Debtors' Act, of which the plaintiff at the time of the indorsement had notice; and, second, that the bill was accepted to induce the drawer not to oppose the discharge of the defendant under that act, of which, at the time of the indorsement, the plaintiff also had notice: the plaintiff, in his replication, denied the notice stated in each of the pleas:—Held, that on these issues the defendant must begin, and that the onus of proving that the plaintiff had notice was on the defendant. *Warner v. Haines*, 6 C. & P. 666—Denman. 1788

In an action for false imprisonment, if the defendant plead, as a justification, that the plaintiff stole feathers, and that he was therefore imprisoned, and the plaintiff reply de injuria, the plaintiff is entitled to begin, although this is no plea of the general issue, and the affirmative is on the defendant. *Atkinson v. Warner*, 6 C. & P. 687—Gurney. 1788

If in assumpsit on bills of exchange, with a count upon an account stated, the defendant plead payment to the counts on the bills, and non assumpsit to the account stated:—Held, that the defendant is entitled to begin, unless the plaintiff's counsel have some evidence to give on the count upon an account stated. *Smart v. Rayner*, 6 C. & P. 721—Parke. 1788

In covenant to recover damages for the non-performance of an agreement under seal, if the defendant plead only that the deed was obtained by fraud and covin, the affirmative of the issue being upon him, his counsel has a right to begin, although the damages are uncertain, and evidence is requisite to guide the jury in forming their estimate of them. *Reeve v. Underhill*, 6 C. & P. 773—Tindal. 1788

Where the defendant, who had begun and had closed his case, and the plaintiff's counsel had after that, in his address to the jury, read a letter, which he caused one of defendant's witnesses to prove, but neither gave it in evidence nor adduced any evidence at all, the judge would not allow the defendant's counsel to reply, but suggested that the plaintiff's counsel should have the letter read, and that the defendant's counsel should reply. *Faith v. M'Intyre*, 7 C. & P. 44—Parke. 1789

Where a declaration contains several counts, founded on the same transaction, the plaintiff cannot, at the close of his case, be called upon to state on which count he relies. *Swinburne v. Jones*, 1 M. & Rob. 322—Denman. 1790

Where the plaintiff offers no evidence against one of several defendants, such defendant is entitled to be acquitted at the close of the plaintiff's case. *Child v. Chamberlain*, 1 M. & Rob. 318—Parke. 1790

Seemle, that the sittings in term are not regarded as one sitting in law, so that a trial at any sitting day would have relation to the first day of the sittings. *Johnson v. Budge*, 3 Dowl. P. C. 207; 5 Tyr. 197. 1790

Where several defendants appear by different attorneys and counsel, the latter are entitled to cross-examine the witnesses, and address the jury separately. *Ridgway v. Philip*, 1 C. M. & R. 415; 3 Dowl. P. C. 154; 5 Tyr. 131. 1790

Where at the trial of an action the judge suggests the withdrawal of a juror, and the plaintiff acts on the suggestion, the court will stay the proceedings in a second action commenced by the same plaintiff for the same cause, even where on the first occasion he conducted the case in person. *Moscati v. Lawson*, 1 Har. & Woll. 572. 1790

A defendant's counsel, in addressing the jury, has no right to say to the jury that he shall call witnesses, unless they inform him that they are satisfied that the defendant is entitled to a verdict as the case stands; he must either call his witnesses, or close his case without saying anything about them. *Moriarty v. Brooks*, 6 C. & P. 684—Lyndhurst. 1791

The counsel for a defendant has no right to open facts which he is not in a condition to prove; therefore, where a witness has given evidence of a conversation between the defendant and himself, at which no one else was present, the defendant's counsel has no right to make a statement of that which his client has given him as an account of the transaction. *Stevens v. Webb*, 7 C. & P. 60—Parke. 1791



If in trespass for seizing and detaining a dog, the defendant refuse to produce the dog (under notice) during the examination of the plaintiff's witnesses, he will not be allowed to produce it afterwards for the purpose of invalidating the testimony of those witnesses. *Lewis v. Hartley*, 7 C. & P. 405—Abinger. 1791

If the counsel for a defendant, in his address to the jury, cite a case, but call no witness, the plaintiff's counsel has a right to observe on the case cited. *Power v. Barham*, 7 C. & P. 356—Coleridge. 1791

**Verdict and Damages.**—When the jury have returned a verdict, the judge will not hear the reasons on which they founded their verdict, though the jury may desire to state their reasons. *Horne v. Watson*, 6 C. & P. 680—Gurney. 1791

Where a verdict was found in trespass against one only of several defendants, the evidence applying to all, but no leave was given at the trial for leave to enter a verdict against the other defendants:—Held, that a verdict could not be entered against them. *Starling v. Cozens*, 3 Dowl. P. C. 790. 1791

Where a verdict was taken on all the counts by consent, with liberty to move to enter a nonsuit, the court refused, after that motion had been discharged, to allow the defendant to confine the verdict to any particular counts. *Martin v. Coleman*, 1 Har. & Woll. 86. 1791

A defendant pleaded a right of way for the inhabitant householders of M., to carry goods and fetch water. The jury found, that they had a right of way to fetch water and to water horses, but negatived the right of way to carry goods:—Held, that, as to the right of way for fetching water, a verdict should, under the rule of H. T. 4 Will. 4, No. 5, be entered for the defendant; and as to the carrying of goods, for the plaintiff; and that, as to the watering of horses, the verdict was inoperative. *Knight v. Moore*, 7 C. & P. 258—Williams. 1791

**Nonsuit.**—A sheriff or other judge presiding at the trial of an issue under a writ of trial, pursuant to 3 & 4 Will. 4, c. 42, s. 17, has the same power to nonsuit as a judge at Nisi Prius. *Watson v. Abbott*, 4 Tyr. 64. 1792

Submitting to a nonsuit in deference to the opinion of the judge at the trial, which opinion is incorrect, does not estop the plaintiff from moving to set aside such nonsuit. *Alexander v. Barker*, 2 C. & J. 133; 1 Price's P. C. 157; 2 Tyr. 140. 1793

A plaintiff cannot be nonsuit but by his own consent. *Dewar v. Purday*, 4 Nev. & M. 633; 3 Adol. & Ellis, 166; 1 Har. & Woll. 227. 1793

Where at a trial leave was given to move to enter a nonsuit, and the trial proceeded, and the jury after long consideration disagreed upon their verdict:—Held, that the judge could not in the absence of the plaintiff and his counsel direct a nonsuit. *Id.*

Where a jury cannot agree in their verdict, they may be discharged, if circumstances render it improper that they should continue to deliberate; but the judge cannot nonsuit the plaintiff without his assent. *Id.*

Where liberty is reserved to enter a nonsuit, such reservation proceeds upon the assent, express or implied, of both parties, to such reservation. *Id.*

Where a plaintiff was nonsuited through the neglect of the attorney's clerk to attend in court, the court refused to set aside the nonsuit, except upon the terms of the plaintiff's attorney paying the costs occasioned by the defendant's attending to try. *White v. Sandell*, 3 Dowl. P. C. 798. 1793

A motion for entering a nonsuit cannot be made, unless leave has been reserved for that purpose by the judge trying the cause. *Ricketts v. Burman*, 4 Dowl. P. C. 578; *S. P. Tippetts v. Heane*, 4 Tyr. 772. 1793

Where the plaintiff's counsel, after a judge has begun to sum up, proposes to be nonsuited, he cannot move to set aside the nonsuit, notwithstanding the judge may have expressed a strong opinion as to the effect of the plaintiff's evidence. *Simpson v. Clayton*, 2 Bing. N. R. 467. 1793

If the counsel for a defendant has addressed the jury and examined witnesses, he has no right then to address the judge for a nonsuit. *Roberts v. Croft*, 7 C. & P. 376—Denman. 1793

**Postea.**—If a plaintiff recovers on any part of the record, he is entitled to the postea. *Smith v. Edwards*, 4 Dowl. P. C. 621; 1 Har. & Woll. 497. 1793

**Judgment.**—Since the stat. 1 & 2 Will. 4, c. 58, s. 7, the court has no power to give effect to a judgment, previously to the true time at which it is entered. *Lambirth v. Barrington*, 2 Bing. N. R. 149. 1794

Where a final judgment is signed in vacation; semble, a suggestion may be entered after it is so signed. *Godson v. Lloyd*, 1 Gale, 244. 1794

Final judgment is not complete until costs have been taxed, and their amount inserted in the allocatur. *Id.*

On 23rd May, the plaintiff had a verdict in a cause tried before a sheriff, on a writ of trial issued under 3 & 4 Will. 4, c. 42, s. 17. He did not sign judgment till the 27th, after taxing costs on that day:—Held, that the judgment was signed regular, and in time within the term "forthwith" in sect. 18. *Nicolls v. Chambers*, 1 C. M. & R. 385; 4 Tyr. 836. 1794

A rule for entering up judgment in a writ of false judgment having been made absolute, costs were taxed, and the prothonotary's allocatur indorsed on the back of the rule. The plaintiff then issued execution without further entering or signing judgment:—Held irregular. *Finch v. Brooke*, 2 Bing. N. R. 710. 1794



Where costs are taxed upon a judgment, such taxation is to be considered as the period at which final judgment is pronounced, *semble*. *Salter v. Slade*, 3 Nev. & M. 717. 1794

Issue was entered in a cause, and docketed according to the practice of the office of judgments. The plaintiff in 1828 recovered damages and costs, and entered final judgment on the roll, but the judgment, according to a practice said to have prevailed for 100 years, was not docketed as required by 4 & 5 W. & M. c. 20, s. 2. On application to the court in 1836, to order the judgment to be docketed *nunc pro tunc*:—Held, that the court had no power to make such order. *Hopwood v. Watts*, 5 B. & Adol. 1056. 1794

Where a judgment has been satisfied, and the plaintiff is out of the country, so that the usual warrant to enter up satisfaction on the roll cannot be obtained, the defendant must clearly prove that the judgment is satisfied before satisfaction can be entered. *De Bastos v. Willmott*, 1 Hodges, 15. 1794

*Arrest of Judgment.*—The provisions of the 1 Will. 4, c. 7, ss. 2, 4, being extended to proceedings before the sheriff, under the 3 & 4 Will. 4, c. 42, s. 17, the court will, in the next term, entertain a motion to vacate and arrest a judgment signed in vacation. *Pyke v. Glendinning*, 2 Dowl. P. C. 611. 1794

A motion in arrest of judgment on a cause tried out of term, must be made within the first four days of the term ensuing the trial. *Weston v. Foster*, 2 Bing. N. R. 701. 1794

A defendant cannot move to enter a verdict non obstante where an issue is found against him, which he has himself taken. *Rand v. Vaughan*, 1 Hodges, 173. 1794

*Special Cases.*—Only one counsel on each side will be heard on a case reserved for the opinion of the court of Exchequer, by the judge sitting alone on the equity side. *Smith v. Smith*, 4 Tyr. 2. 1796

Where a rule to set aside an award is made into a special case, the counsel who objects to the award ought to begin and have the reply. *Dipins v. Anglesea* (Marquis), 2 Dowl. P. C. 647. 1796

Entering judgment on special case heard pursuant to 3 & 4 Will. 4, c. 42, s. 25. *Shepherd v. Kealley*, 4 Tyr. 571. 1796

The court will not, under any circumstances, dispense with the signature of counsel to a special case. *Mostyn v. Champneys*, 1 Scott, 57: S. C. nom. *Roy v. Champneys*, 3 Dowl. P. C. 105. 1796

Neither will the court grant a rule calling upon an attorney to show cause why he refuses to obtain such signature to a case settled by a master in Chancery, in pursuance of an order of the Vice Chancellor. *Id.*

Where the Vice Chancellor directed the opinion of the court to be taken on a special case, the

court would not permit it to be entered for argument with the signature of a master in Chancery, who had settled it, instead of the signature of counsel. *Id.*

*Irregularity.*—A motion to set aside proceedings for irregularity was held too late after a lapse of seven days. *Fynn or Fyson v. Kemp*, 2 Dowl. P. C. 620; 4 Tyr. 990. 1796

In the King's Bench, a rule nisi for setting aside proceedings for irregularity may be drawn up with a stay of proceedings, although notice of motion has not been given. *Stratton v. Regan*, 2 Dowl. P. C. 585. 1797

Where an arrest was on the 29th of January, and on the 10th of March the defendant made application to be discharged out of custody, on account of irregularity in the *capias*:—Held, it was not within a reasonable time, as required by the rule of court, 33 H. T. 2 Will. 4. *Footes v. Dick*, 1 Har. & Woll. 207. 1797

A prisoner must move to set aside proceedings for irregularity in a reasonable time, though the plaintiff has taken no step since the arrest. *Primrose v. Baddeley*, 2 C. & M. 468; 4 Tyr. 370. 1797

A prisoner may however apply after the term, when other motions for irregularity must be made. *Rock v. Johnson*, 4 Dowl. P. C. 405; 1 Tyr. & G. 43. 1797

The court refused to set aside an interlocutory judgment (which had been irregularly signed three years ago) upon payment of costs, though proceedings by *sci. fa.* had been lately commenced. *Lewis v. Browne*, 3 Dowl. P. C. 700. 1797

An application to set aside an interlocutory judgment for irregularity, after notice to execute a writ of inquiry on the 4th of November, was held to be too late on the 12th. *Scott v. Cogger*, 3 Dowl. P. C. 212. 1797

The court will not permit an irregularity to pass uncorrected if brought under its notice, although the opposite party appears by his silence to have waived it. *Sywood and Dogherly's Bail*, 3 Dowl. P. C. 116. 1797

Judgment signed in November, 1833: plaintiff took no further step till January, 1835, when he gave a term's notice of executing a writ of inquiry. In April, notice of executing it for the 25th of May was served on the defendant in person. On the 27th of May, the defendant took out a summons to set aside the judgment, for having been irregularly signed after plea delivered, returnable the next day at three o'clock, but it was not attended by the plaintiff's attorney. At four o'clock the writ of inquiry was executed. On the same day a second summons was taken out, returnable the next day, which was attended and dismissed; and an application was then made to the court to set aside the judgment and subsequent proceedings for irregularity:—Held, that the defendant was too late, and that the summons to set aside the judgment was not, under the circumstances, sufficient to stay



the trial of the writ of inquiry. *Roberts v. Cuttill*, 4 Dowl. P. C. 204. 1797

If a copy of a writ is served in vacation, objection to it for irregularity must be taken in vacation, if there is time for that purpose. *Hinton v. Stevens*, 4 Dowl. P. C. 283. 1797

The illness of a witness to whom a commission of the court might be sent to take his affidavit, is no excuse for delay in making an application to rescind an order for setting aside a writ of summons, on the ground of irregularity. *Orton v. France*, 4 Dowl. P. C. 598. 1797

If a defendant seeks to set aside the service of a writ of distringas, on the ground of defective indorsements and variance from the summons, his application is too late after a lapse of eighteen days. *Wright v. Warren*, 2 Dowl. P. C. 724. 1797

The court will not entertain objections to the regularity of proceedings, where the party has neglected to avail himself of opportunities to urge them at an earlier period, even though they amount to error on the face of the record. *Graves v. Walter*, 1 Scott, 310. 1797

An application to set aside a judgment and execution for irregularity, will not be granted, with a stay of proceedings, unless notice of the application has been given to the plaintiff. *Rolfe v. Brown*, 1 Hodges, 27. 1797

Where there appears to have been a delay of more than eight days before moving to set aside proceedings for irregularity, the defendant must clearly explain the delay, otherwise the presumption will be against him. *Herbert v. Darley*, 4 Dowl. P. C. 726. 1797

After notice of an irregularity in declaring, which was denied by the other side, a summons to set aside proceedings was taken out, but a judge at chambers refused to make an order, or to allow time till the term to move; and the defendant's attorney, to prevent judgment, applied frequently for time to plead, which was consented to:—Held, that it was not too late in the next term to move to set aside the proceedings with costs for the same irregularity for which the summons was taken out. *Woodcock v. Kilby*, 4 Dowl. P. C. 730. 1797

Where a motion is made to discharge a prisoner out of custody, on the ground of irregularity in the process, it must be positively alleged in the affidavit that the party was taken into custody upon the process. *Green v. Rohan*, 4 Dowl. P. C. 659. 1797

A motion to set aside proceedings for irregularity, must be made within a reasonable time after the party has the means of knowledge of the irregularity. Thus, when he is arrested on a ca. sa. without an indorsement of his abode and addition, he must move within a reasonable time after the arrest. *Tarber v. French*, 5 Nev. & M. 658. 1797

*Staying and setting aside Proceedings.*—A judge at chambers cannot, in making an order

for staying proceedings on payment of debt and costs, direct that the defendant shall have a longer time to pay than he would otherwise have if the cause proceeded. *Kirby v. Ellier*, 2 C. & M. 315; 4 Tyr. 239. 1798

A defendant who moves to stay proceedings on payment of debt and costs, is not entitled to a rule for that purpose as a matter of right, but must submit to such reasonable terms as the court in its discretion may think proper to grant. *Jones v. Shepherd*, 3 Dowl. P. C. 421. 1778

Where a defendant was sued for the price of goods after he had received a letter from the plaintiff, who was abroad, not to pay except to his written order, the court, on the application of the defendant, ordered proceedings to be stayed on the money being brought into court, although the defendant had pleaded the facts by way of defence. *Newton v. Matthews*, 4 Dowl. P. C. 237. 1798

An application to stay proceedings on payment of debt and costs, must be made within four days after service of process. *Bowbridge or Bowditch v. Slaney*, 2 Scott, 197; 2 Bing. N. R. 142; 4 Dowl. P. C. 140; 1 Hodges, 224. 1798

If a defendant neglect to pay the debt and costs indorsed on a writ within four days from the service (R. Hil. T. 2 Will 4, II.), the plaintiff may state a further claim in his declaration. *Id.*

Plaintiff, who had delivered to A., as B.'s attorney, a bill in which he made B. his debtor, afterwards obtained the bill surreptitiously from A., and delivering a new bill for the same charges, in which he made A. his debtor, sued A. for the amount. The court stayed proceedings till plaintiff should deliver to A. a copy of the paper surreptitiously obtained from him: the copy to be evidence in the cause. *Edginton v. Nixon*, 2 Scott, 507; 2 Bing. N. R. 316. 1798

Where the plaintiff is suing as a trustee, and there are circumstances of suspicion in the case, the court will stay proceedings on payment of the debt into court, and of payment of costs; leaving the plaintiff to apply to the court to have his extra costs out of the fund in court. *Jones v. Bramwell*, 3 Dowl. P. C. 488. 1798

Though after the recovery of a verdict, the effect will be only to make the plaintiff a trustee for another person for half the amount recovered, the court will not stay the proceedings in an action against him on the payment of the half of the sum sought to be recovered, but will leave the defendant to his remedy in equity. *Barlow v. Leeds*, 5 Nev. & M. 426; 1 Har. & Woll. 479. 1798

A promissory note was given by a brother to his two sisters jointly for 100l., each of them having separately lent him 50l. One of the sisters married, and the other died; and the brother took out administration to the effects of the deceased sister. An action was brought against him for the whole amount by the surviving sister and her husband:—Held, that the court could not, in the exercise of an equitable



jurisdiction, stay the proceedings upon payment into court of 50*l*. *Id*. 1799

Where a judgment irregularly signed by the plaintiff is set aside with costs, it is competent to a judge to stay the proceedings until such costs are paid. *Wenham v. Downes*, 5 Nev. & M. 244; 3 Adol. & Ellis, 450; 1 Har. & Woll. 324. 1798

And it is no ground for rescinding such order, that the defendant has since issued an attachment for such costs. *Id*. 1799

But, *semble*, that if the plaintiff were actually taken upon such attachment, the court would relieve him from the stay of proceedings. *Id*. 1799

Affidavits in support of a rule to set aside proceedings must show a clear case for relief; and, therefore, where it was moved to set aside a judgment, on the ground that the accounts between the parties had been investigated, and found to be incorrect, and that the plaintiff had agreed that any error should be rectified:—*Held*, that the affidavits were insufficient in not stating that the error was in the amount. *Preedy v. Lovell*, 4 Dowl. P. C. 671. 1799

Where a defendant obtains a rule which stays the plaintiff's proceedings, he is entitled to the whole of the day on which such rule is disposed of for taking the next step. *Vernon v. Hodgins*, 1 Mees. & Wels. 151. 1799

Notice to stay proceedings in the Exchequer is a two days' notice. *Hannah v. Wyman*, 3 Dowl. P. C. 673. 1799

The court will not grant a rule for staying proceedings on the last day of term. *Doe d. Smith v. Hardy*, 4 Dowl. P. C. 356. 1799

*Incidental Proceedings.*—Where six actions of trover had been brought against the same defendant by different plaintiffs employing the same attorney, the court refused to order the proceedings in five of them to be stayed to abide the result of one, it being sworn that the causes of action were different in all of them. *Nicholls v. Lefevre*, 3 Dowl. P. C. 135. 1799

Where a plaintiff brings several actions upon the same policy of assurance against several underwriters, the court will not, without the consent of the plaintiff, make a consolidation rule upon the terms of both plaintiff and defendant being bound in all the actions by the event of one. *Doyle v. Anderson*, 1 Adol. & Ellis, 635; 4 Nev. & M. 873. 1799

On a motion to compound a penal action, it must appear that the defendant has pleaded. *Rex v. Collier*, 2 Dowl. P. C. 581. 1800

Leave of the court for compounding a penal action, where the crown is entitled to a portion of the penalty, cannot be obtained without the consent of the attorney-general. *Rex v. Gibbs*, 3 Dowl. P. C. 335. 1800

Rule to discontinue on payment of costs is a mere nullity, till the attorney of the party obtaining the rule has the costs taxed and paid.

Until that is done the action continues. *Lyon v. Moylan*, 1 Alcock & Napier, 112. (*Irish*). 1801

Where the defence is carried on in the name of a person, not an attorney of the court in which the action is brought, the plaintiff may discontinue, on payment of the sums advanced by the defendant to his attorney, and without costs, if none have been advanced. *Paterson v. Powell*, 2 Dowl. P. C. 738. 1801

A discontinuance of the suit where that is the only step taken is a discontinuance of the cause. *Richards v. Stuart*, 2 Dowl. P. C. 754. 1801

After a general verdict for the defendant, the plaintiff cannot discontinue. *Goodenough v. Butler*, 2 C. M. & R. 240; 3 Dowl. P. C. 751; 1 Gale, 163. 1801

*Semble*, that he may, by leave of the court, if a point has been reserved. *Id*. 1801

A cause was referred, and the arbitrator stated the facts specially on his award for the opinion of the court. On the matter coming on for argument, the plaintiffs being advised that one of the defendants was improperly joined in the action, the court permitted them to discontinue, on payment of the costs of the cause (no provision being made for the costs of the reference and award), and of the motion, and undertaking not to bring any joint action against the two defendants, nor any separate action against the defendant so improperly joined. *Turner v. Ison*, 2 Scott, 596. 1801

A declaration for a penalty (consisting of one count only) concluded to the damage of the plaintiff of 100*l*. The defendant demurred specially, assigning for cause this and another ground. The plaintiff entered a *nolle prosequi* as to the damages. A judge at chambers ordered the *nolle prosequi* to be set aside; the court supported the order. *Butler v. Mapp*, 4 M. & Scott, 258. 1801

The rule requiring a term's notice prior to proceedings being taken, where the cause has been at issue more than four terms, does not apply to proceedings taken on the part of the defendant. *Shinfield v. Laxton*, 4 M. & Scott, 187; 2 Dowl. P. C. 778. 1802

A defendant may move for judgment as in case of a nonsuit, without giving a term's notice of proceeding, although the cause has been at issue more than four terms. *Id*. 1802

A term's notice of proceeding is not necessary after the lapse of four terms, if the delay has taken place at the defendant's request. *Evans v. Davies*, 3 Dowl. P. C. 786. 1802

Appearing to oppose a rule does not waive an objection to the affidavit on which the rule was obtained. *Barham v. Lee*, 4 M. & Scott, 327; 2 Dowl. P. C. 779; *S. P. Clothier v. Els*, 3 M. & Scott, 216; 2 Dowl. P. C. 731. 1803

Where the party against whom a rule nisi for an attachment was obtained, appeared, and objected that the rule nisi had not been personally served, the court, notwithstanding, made the rule absolute. *Levy v. Duncombe*, 3 Dowl. P. C.



447; 1 C. M. & R. 737; 5 Tyr. 490; 1 Gale, 60.  
1803

A rule drawn up in one term to show in another, is put into the peremptory paper, and parties ought to be prepared to show cause on the day for which the rule is drawn up, and not on the following day, as is usual in other cases. Warner v. Wood, 3 Dowl. P. C. 262. 1803

If a rule is drawn up to show cause in one term, it cannot be absolute in the next term, without enlarging; but it may be revived. Smith v. Collier, 3 Dowl. P. C. 100. 1803

Cause may be shown in the first instance in the Exchequer. Quin v. King, 4 Dowl. P. C. 736. 1803

On a motion against which cause is shown in the first instance, the counsel making the motion has the right to reply as in ordinary case. Gibson v. Winter, 1 Har. & Woll. 436. 1803

The practice of requiring that a party obtaining a rule nisi, is bound to take office copies of the affidavits of the other party on showing cause, is not adhered to. Pitt v. Coombs, 4 Nev. & M. 535; 1 Har. & Woll. 13. 1803

A party may make a second application to the court on the same subject, though he has not paid the costs of a former rule nisi which had been discharged. Wilton v. Chambers, 1 Har. & Woll. 116. 1803

Affidavits in answer to a rule enlarged from one term to another, which requires the affidavits to be filed a certain time before the term, must in all cases, notwithstanding a contrary practice has prevailed, be filed within the time prescribed, unless the party is prevented from filing them by inevitable accident. Turner v. Unwin, 4 Dowl. P. C. 16. 1803

Where long affidavits are filed in support of a motion, a great part of which is unnecessary, the court will refer them to the master, and make the party applying pay the costs of the unnecessary affidavits. Lewis v. Woolrych, 3 Dowl. P. C. 692. 1803

If a rule is moved without affidavits, none can be used in answer to it. Atkins v. Meredith, 4 Dowl. P. C. 658. 1803

Where a rule has been discharged in the bail court, that fact is an answer to a similar application in the full court, though there may be new facts stated in the affidavits, if they might have been brought before the court on the first occasion. Rosset v. Hartley, 5 Nev. & M. 415; 1 Har. & Woll. 581. 1803

Upon a statement of counsel that he had moved for a rule to set aside an award, under a mistaken supposition that an affidavit deposing to certain facts had been sworn, the court, on the day after granting a rule nisi, gave leave for the rule to be drawn up as upon reading such affidavit, on condition that it should be sworn on that same evening. Perring v. Kymer, 4 Nev. & M. 477; 1 Har. & Woll. 20. 1803

A party who has obtained a rule nisi on an affidavit which is defective, on account of the jurat not stating the names of the deponents,

cannot, on cause being shown, support his rule by a fresh affidavit; but the court will enlarge the rule in order to allow time for a fresh affidavit to be filed. Goodricke v. Turley, 2 C. M. & R. 637; 4 Dowl. P. C. 392; 1 Tyr. & G. 146. 1803

Mistakes in the terms of rules may be attended to on a motion to open them within the same term, or perhaps that following; but where more time has elapsed, the affidavits which were used on the occasion of making the first rule absolute, cannot be referred to in order to open it, unless the new motion is made, and the new rule drawn up on reading them. Lord v. Hope, 5 Tyr. 487. 1803

The crown has a right to reply on a motion for a new trial, after verdict for the crown. Attorney-General v. Tomsett, 2 C. M. & R. 170; 5 Tyr. 514; 1 Gale, 147. 1803

On showing cause against a rule, when an objection is taken to the insufficiency of the affidavits in support of the rule, the counsel showing cause must at once elect whether he will use his affidavits in answer to the rule or not. Preedy v. Lovell, 4 Dowl. P. C. 671. 1803

Place of service of rules and pleadings. Blackburn v. Peat, 4 Tyr. 38. 1803

Where regular service of a rule is endeavored to be dispensed with, on the ground of absence or otherwise, the affidavit must show what efforts have been made to serve the party before secondary service will be allowed. Mudie v. Newman, 2 Dowl. P. C. 639. 1803

Where, on account of the defendant's residence being unknown, the court gives leave to serve him in a particular manner, they will not make a prospective rule, that service of future rules, &c. may be affected in the same manner. Martin v. Colvill, 2 Dowl. P. C. 694. 1803

Service of a rule by sticking it up in the office, will not be allowed upon an affidavit that the attorney's residence is unknown, unless it is also sworn that the party's residence is unknown. Wright v. Gardiner, 3 Dowl. P. C. 657. 1803

Where a rule is served by leaving a copy with a servant, an inquiry should be subsequently made of the servant whether the master has received the copy. Panter v. Seaman, 5 Nev. & M. 679. 1803

An affidavit of service, by leaving a rule at the defendant's chambers with a female servant there:—Held insufficient. Alanson v. Walker, 3 Dowl. P. C. 258. 1803

An affidavit of the service of a rule nisi at the chambers of an attorney, by leaving it with a laundress there:—Held insufficient, because it did not state that the deponent believed her to be the defendant's servant. Kent v. Jones, 3 Dowl. P. C. 210. 1803

A summons is no stay of proceedings, unless followed up. Knowles v. Vallance, 1 Gale, 16. 1805

A judge's order granted in vacation must not be drawn up as of the preceding term. Rex v. Price, 4 Tyr. 60. 1805



Where upon a summons attended at chambers, the judge indorses a minute of an order, it is at the option of the party by whom the summons was taken out, to have an order drawn up in pursuance of such minute or not. *Macdougall v. Nicholls*, 5 Nev. & M. 366; 1 Har. & Woll. 462. 1805

If the party summoned considers that the order pronounced is in his favor, he should take out a cross summons for the purpose of obtaining a similar order. *Id.*

If parties, being before a judge at chambers, go by consent into matter not within the summons, and the judge makes a minute of an order, the party in whose favor such minute is made, is entitled to draw up an order accordingly, *semble*. *Id.*

If an affidavit, made in support of an application to set aside a judge's order, state the substance of that order, it is sufficient. *Shirley v. Jacobs*, 3 Dowl. P. C. 101. 1805

The word "peremptory" was put upon a summons to attend at chambers, without the authority of the judge, and the court inflicted the payment of costs upon the attorney. *Finnerty v. Smith*, 1 Scott, 743; 1 Hodges, 158. 1805

The plaintiff signed an irregular judgment, and on the defendant taking out a summons to set it aside, he was informed that the judgment was withdrawn:—Held, that the defendant had no right to get an order drawn up for setting aside the judgment, and that therefore he was liable to pay the expense of it. *Hargrave v. Holden*, 3 Dowl. P. C. 176. 1805

After an order of a judge at chambers has been made a rule of court, it is too late to object, in answer to a rule calling upon the party to pay money in pursuance of such order, that the judge had no power to make it. *Wilson v. Northrop*, 4 Dowl. P. C. 441; 2 C. M. & R. 326. 1805

A rule absolute may be drawn up during term, on an order of a judge dated in vacation. *Swaine v. Stone*, 4 M. & Scott, 584. 1805

In order to rescind a judge's order, the proper course is to apply to the court: therefore, where a writ of detainer issued under a judge's order, and was lodged at the prison on the 22nd of October, and on the 30th a summons was taken out at chambers, returnable on the following day, to discharge the defendant out of custody, on account of the insufficiency of the affidavit to hold to bail, which summons was dismissed; it was held not too late to apply to the court, on the first day of term, to rescind the judge's order and discharge the defendant out of custody, on account of the insufficiency of the affidavit, and irregularity in the writ. *Johnson v. Kennedy*, 4 Dowl. P. C. 345. 1805

After a judge has made an order at chambers, an application to the court to set aside that order may be made upon the same affidavits as were used before the judge at chambers. *Pickford v. Ewington*, 4 Dowl. P. C. 453; 1 Tyr. & G. 29. 1805

If an application made at chambers be referred

to the court, an affidavit sworn in answer to the application at chambers may be used on showing cause before the court. *Worthington v. —*, 2 C. M. & R. 315. 1805

A party who applies to a judge for indulgence, and obtains it on certain terms, may draw it up or not as he thinks proper; and the opposite party by drawing it up himself, without the consent of the party applying, does not thereby make it operative against him. *Wright v. Skinner*, 4 Dowl. P. C. 727; S. C. not S. P. 2 C. M. & R. 746; 1 Tyr. & G. 69. 1805

In an information under the excise laws, the court will admit a defendant to defend in forma pauperis, on the common affidavit that he is not worth 5*l.* over and above his wearing apparel. *Att. Gen. v. Dummie or Duffy*, 2 C. & M. 393; 4 Tyr. 284. 1806

A pauper defendant having applied to the court that he might be allowed a copy of the information gratis, the court held that they could not grant a copy of the information, and that the defendant was only entitled to have the information read over to him by the officer, and that he might either plead *instantur* or at a future day. *Id.*

Where a plaintiff sues in forma pauperis, and recovers only a farthing damages, he is entitled to have his costs taxed in the usual way, and is not merely entitled to costs out of pocket. *Gougenheim v. Lane*, 1 Mees. & Wels. 136. 1806

On the trial of an action brought in forma pauperis, a king's counsel or sergeant may appear for the plaintiff alone without a junior. Where a plaintiff suing in forma pauperis has a verdict in his favor for 5*l.* or more; *semble*, that the officers of the court are entitled to their fees. *James v. Harris*, 7 C. & P. 257—Williams. 1806

## PRINTER AND ENGRAVER.

A., the proprietor of a newspaper, prevailed on B. to make and deliver at the stamp office an affidavit that he, B., was the proprietor of the paper; B. afterwards agreed to sell the paper to D. A. having become insolvent, his assignees filed a bill to set aside the sale for fraud:—Held, that as B. had, at A.'s instance, violated the 38 Geo. 3, which requires the true names of the proprietors of newspapers to be inserted in the affidavit, his assignees were not entitled to the relief asked. *Harmer v. Westmacott*, 6 Simon, 284. 1807

Where a printer has been employed to print a work, of which the impression is to be a certain number of copies, if a fire break out and consume the premises before the whole number have been worked off, the printer cannot recover any thing, although a part have actually been delivered. *Adlard v. Booth*, 7 C. & P. 108—Tindal. 1807

The proprietor of a newspaper cannot recover for the non-performance of a contract for printing such newspaper, before filing the affidavit required by the stat. 38 Geo. 3, c. 78, s. 1. *Houstoun v. Mills*, 1 M. & Rob. 325—Denman. 1807



## PRISONER AND INSOLVENT.

*Prison.*—Under the rule of Hil. T. 3 Geo. 2, the warden of the Fleet is authorized to confine in the strong room of the prison, a prisoner for a debt who has been charged with a felony. *Ex parte Angle*, 2 Bing. N. R. 318; 1 Hodges, 366; S. C. nom. *Osborne v. Angle*, 2 Scott, 500; 4 Dowl. P. C. 342. 1809

In an action against the sheriff of Surrey and the keeper of the county prison for causing a debtor to be confined in a cell on the felons' side of the gaol, it appeared that the defendants had so done in consequence of an anonymous communication said to have been made to one of the turnkeys, that the plaintiff meditated an escape, and that the matter had been known to the visiting magistrates, who declined to interfere: but it did not appear that any investigation had been made as to the source whence the information was obtained:—Held, that there was no sufficient proof of reasonable or probable cause on the part of the defendants to justify the course they adopted. *Furnival v. Stringer*, 4 M. & Scott, 563. 1809

By s. 75 of the statute 4 Geo. 4, c. 60, for the regulation of prisons, &c., all actions brought in respect of any thing done in pursuance of the act, are directed to be laid and tried in the county where the facts were committed. In an action on the case against the sheriff of Surrey and the keeper of the county prison, for having, without reasonable or probable cause, confined the plaintiff, a debtor, in a felon's cell; the defendants not having acted in obedience to the 6th regulation in the 10th section of the act, which requires the keeper to obtain the sanction of the visiting magistrates for any deviation from the classification of prisoners thereby prescribed. *Quære*, whether they were entitled to the benefit of the 75th section? But, it appearing that the venue had originally been laid in London; that a rule nisi (never made absolute) had been obtained by the defendants for changing it to Surrey, and that the plaintiff had made a rule absolute (unopposed) for bringing it back on special circumstances:—Held, that the objection that the cause was not tried in the proper county could not afterwards be urged. *Id.*

Pleas in false imprisonment, justifying a detention in the King's Bench prison for chamber rent and for fees separately, are not either of them supported by evidence allowing the detention to have been for chamber rent and fees together; and such defence requires a joint plea. The master of the King's Bench prison has a right to detain a crown prisoner for chamber rent, whether a prisoner under sentence should be discharged at midnight or kept till the morning. *Stockdale v. Chapman*, 7 C. & P. 363—Denman. 1809

*Proceedings against Prisoners.*—If a plaintiff gives notice of trial, and sets down his cause in the third term inclusive after declaration, he has complied sufficiently with 1 Reg. Gen. H. T. 2

Will. 4, s. 85, and the defendant is not supersedeable. *Myers v. Cooper*, 2 Dowl. P. C. 423. 1813

If a trial takes place in vacation, and the defendant surrenders after it, and before the following term, he ought to be charged in execution in that term, or he will be supersedeable under 1 Reg. Gen. H. T. & Will. 4, s. 85. *Borer v. Baker*, 2 Dowl. P. C. 608. 1813

The rule of court, E. T. 41 Geo. 3, as to filing and entering of record, the committitur on a judgment, only applies to persons already in custody at the suit of other persons. *Deemer v. Brooker*, 3 Dowl. P. C. 576; 4 Dowl. P. C. 9; 1 Har. & Woll. 206. 1813

Where a defendant has been taken in execution on a ca. sa., and he afterwards removes himself into the custody of the marshal, the plaintiff is neither obliged to carry in the roll, nor to charge him in execution. *Id.*

If a writ of execution, on which a defendant is charged in custody, is a nullity, the lapse of time does not waive his right to apply for his discharge. *Mortimer v. Piggott*, 2 Dowl. P. C. 615. 1814

Where, in consequence of the death of the marshal of the King's Bench prison, there was no one at the gaol who would receive a prisoner charged in execution, the court enlarged the time. *Harris v. Davies*, 2 Dowl. P. C. 624. 1814

After a lapse of ten years, it is too late to object that a hab. corp. ad satisf., on which the defendant is charged in execution, was not indorsed with the number roll. *Wilson v. Bacon*, 2 Dowl. P. C. 450. 1815

Sections 87 and 88 of the first general rule of Hilary Term, 2 Will. 4, relating to the discharge of prisoners in the custody of the marshal of the King's Bench and warden of the Fleet, who are supersedeable, apply only to persons within the walls of the respective prisons. *Siggers v. Brett*, 5 B. & Adol. 455. 1816

*Charging in Execution.*—A prisoner in custody of the marshal, if detained on process from the Common Pleas, need not now be removed into the custody of the warden, in order to be charged with a declaration. *Millard v. Millman*, 2 Dowl. P. C. 723. 1813

A defendant in custody of the marshal cannot be charged in execution by a plaintiff in another suit, by a side bar rule to the marshal to acknowledge him in custody. *Smith v. Sandys*, 5 Nev. & M. 59; 1 Har. & Woll. 377. 1813

A proceeding to charge a defendant in custody, by a side bar rule, where he is not in custody in the particular suit, is not merely irregular, but is wholly void and inoperative, and is not waived by lapse of time. *Id.*

A defendant so charged in execution is estopped from saying that he was not properly charged in execution by writ of habeas corpus, although the record of commitment alleged that he was brought up and charged in execution in the particular suit; and the form of the record is the same



whether the defendant is charged in execution by *habeas corpus*, or by side bar rule. *Id.*

The defendant is sufficiently charged in execution, if in custody at the time at the suit of another person, by the writ indorsed by the coroner being lodged with the county gaoler at the gaol. *Bastard or Barston v. Trutch or Gutch*, 4 Dowl. P. C. 6; 5 Nev. & M. 109; 1 Har. & Woll. 321; 3 Adol. & Ellis, 451. 1813

A writ of *ca. sa.* against a defendant, by a plaintiff who is, in fact, sheriff of the county into which the process issues, should be directed to the coroners, but the fact of the plaintiff being sheriff need not appear on the face of the writ. Semble, that upon the record of the proceedings, the ground of so directing the writ should be surmised. But where a prisoner is charged in execution under such writ, it is no objection that the proceedings have not been entered of record. A party being detained for debt in the gaol of the county of D., a writ of *ca. sa.*, at the suit of the sheriff of D., issues directed to the coroners of D., and is lodged with the gaoler of the county gaol of D. These matters being returned to a writ of *habeas corpus cum causa*, together with a certificate signed "A. B., one of the coroners of D.," that the copy of the writ of *ca. sa.* set out in the return was a true copy:—Held, that it must be taken that the writ came to the gaoler through the coroner in proper course. *Id.*

Judgment was issued in Michaelmas vacation; on the last day of Hil. term a warrant to take the defendant on a *ca. sa.* was delivered to the deputy, in London, of the sheriff of Denbighshire:—Held, that the defendant was charged in execution in due time. *Williams v. Waring*, 2 C. M. & R. 354; 4 Dowl. P. C. 200; 1 Gale, 263. 1813

*Discharge under Lords' Act.*—Application to Insolvent Court. *Perrott v. Dean*, 2 C. & M. 318; 4 Tyr. 319. 1819

Quære, whether the Lords' Act, extends to the case of a prisoner who is in execution for debts under 300*l.*, and also for debts above 300*l.*? *Grove v. Parker*, 2 Dowl. P. C. 626. 1820

The motion for bringing up a prisoner under the compulsory clauses of the Lords' Act, must be supported by an express affidavit that all the creditors have been served with notice. *Id.*

Practice. The service of the notices required to be given by a creditor who seeks to bring up a debtor under the compulsory clause in the Lords' Act, 32 Geo. 2, c. 28, s. 16, may be proved by a witness, *viva voce*, and need not be proved by affidavit. *Ex parte Rolph*, 6 C. & P. 406—*Denman*. 1820

Secus, with respect to the notices to be given by the prisoner. *Id.*

The compulsory clause (s. 3) of the Lords' Act, 32 Geo. 3, c. 5, can be enforced only where the sum for which the party is in execution amounts to no more than 300*l.*, costs included. *Robins v. Cresswell*, 2 Adol. & Ellis, 23; 4 Nev. & M. 307. 1818

A judgment creditor, under a warrant of attorney, took out execution for 253*l.*, consisting of 250*l.* debt, and 3*l.* costs, and also for interest on 250*l.* from a day named till the day of payment. The defendant was taken in execution, and detained till the debt and interest, with the addition of costs (but not without) exceeded 300*l.*: Held, that the compulsory clause could not be enforced. *Id.*

Service of notice under the Lords' Act, on the landlady of a house where a creditor lodged, is not sufficient. *Wood v. Gompertz*, 4 Dowl. P. C. 276; 1 Har. & Woll. 524. 1818

Under the compulsory clauses of the Lords' Act, the twenty days' notice must expire before the first day of the term in which the defendant is to appear, or at any rate before taking out the rule for his appearance. *Hayward v. Priest*, 2 Dowl. P. C. 737. 1818

The twenty days' notice given to a prisoner to deliver an account of his estate under the compulsory clauses of the Lords' Act, must expire before the first day of the term in which he is brought up. *Buxton v. Spires or Squires*, 2 C. M. & R. 601; 4 Dowl. P. C. 365; 1 Gale, 322. 1818

In computing the twenty days, the day on which the notice was given must be excluded. *Id.*

If the twenty days' notice, required by s. 16 of the Lords' Act, expires after the seven first days of term, the insolvent cannot be brought up till the next term. *Rogers v. Peckham*, 3 Dowl. P. C. 142; 1 Scott, 121. 1818

Where a defendant has been discharged under the Lords' Act, for five years, it is too late at the end of that period to apply to set aside the order for his discharge. *Hawkins v. Pring*, 2 Dowl. P. C. 401. 1821

In ejectment by an assignee, under the compulsory clause of the Lords' Act, it is sufficient for the plaintiff to produce the assignment by the prisoner, without proving the previous notices; at all events, it is sufficient if the rule for the prisoner's discharge be also produced. *Doe d. Milburn v. Edgar*, 2 Scott, 581; 2 Bing. N. R. 391. 1822

The assignment is not rendered invalid by an inaccuracy in the declaration of trust. *Id.*

And the general words will pass land of the prisoner not particularly described in his schedule. *Id.*

The title of an assignee, under the compulsory clause of the Lords' Act, 32 Geo. 3, c. 28, s. 16, only commences from the time when the insolvent was brought up and discharged. *Moore v. Eddowes*, 7 C. & P. 203—*Coleridge*. 1823

A person had by his marriage settlement covenanted to pay 1000*l.* to his children at any time during the coverture, or within a month after his wife's death. After her death he went to prison for debt; and while in prison he gave an authority to his son, and to his daughter's husband, to sell all his property towards paying that sum. He did so, and received 346*l.* After that, the



person was brought up, under the compulsory clause of the Lords' Act, and executed an assignment:—Held, that on these facts the assignees under the Lords' Act could not recover this sum of 346*l.*; and that, in an action for money had and received, brought against the defendant's husband, the defendant might go into this defence under the general issue, and need not plead specially. *Id.*

*Discharge under 48 Geo. 3.*—The stat. 48 Geo. 3, c. 123, for the discharge of persons in execution upon any judgment for any debt or damages not exceeding 20*l.*, applies to persons in execution for damages in actions of assault. *Wintler v. Elliott*, 1 *Adol. & Ellis*, 24; 3 *Nev. & M.* 315.

1822

Proceedings. *Jones v. Fitzaddams*, 3 *Tyr.* 904.

1823

Though the judgment is in debt for 100*l.*, yet, if the execution against the defendant is for less than 20*l.*, the defendant may be discharged out of custody after in being prison twelve months, without reducing the judgment. *Harris v. Parker*, 3 *Dowl. P. C.* 451.

1822

Under the 48 Geo. 3, c. 123, a prisoner is not entitled to his discharge, after remaining in execution twelve months, if the debt exceeds 20*l.*, although the excess consists of interest only, which has accrued after action brought. *Cooper v. Bliss*, 2 *Dowl. P. C.* 749.

1822

It is no objection to the discharge of a debtor under the 48 Geo. 3, c. 123, that the amount of the debt for which he is in execution is exactly 20*l.* *Thomson v. King*, 4 *Dowl. P. C.* 582.

1822

Where a defendant has remained in execution for twelve successive calendar months for a debt of 20*l.*, and 1*s.* damages, in an action of debt, he is entitled to his discharge under the 48 Geo. 3, c. 123, s. 1. *Fogarty v. Smith*, 4 *Dowl. P. C.* 595.

1822

In an application under the 48 Geo. 3, c. 123, s. 1, for the discharge of a prisoner out of custody who has lain in prison twelve months in execution for a debt not exceeding 20*l.*, the court will not inquire into other circumstances, but requires only to be satisfied of these facts. *Baxter v. Clarke*, 2 *C. M. & R.* 734; 1 *Tyr. & G.* 133.

1822

An application under the 48 Geo. 3, c. 123, must be made to the court out of which the process issues. That act does not apply to attachments. *Pitt v. Evans*, 3 *Dowl. P. C.* 649.

1822

In order to obtain a defendant's discharge under the 48 Geo. 3, c. 123, the service of the notice of application must be on the plaintiff himself, and not on his attorney. *Gordon v. Twine*, 4 *Dowl. P. C.* 560.

1822

Where a defendant seeks to obtain his discharge under the 48 Geo. 3, c. 123, the plaintiff being dead, he must serve the notice on the personal representative of the deceased, or show that there was no personal representative, before a notice to the attorney of the plaintiff will be

considered sufficient. *Ex parte Richer*, 4 *Dowl. P. C.* 275; 1 *Har. & Woll.* 518.

1822

In order to obtain a discharge under 48 Geo. 3, c. 123, it is not sufficient that the notice should be left "with a female at the plaintiff's residence." *George v. Fry*, 4 *Dowl. P. C.* 273.

1822

If a prisoner, seeking his discharge under 48 Geo. 3, c. 123, for a debt not exceeding 20*l.*, has not given ten days' notice of his application, the rule for his discharge will only be nisi in the first instance. *Moore v. Clay*, 4 *Dowl. P. C.* 5.

1822

Where a defendant is in custody in any other prison than the Fleet, he cannot be discharged in the Exchequer, under the Small Debtors' Act, unless a copy of the causes in which the defendant is in custody has been procured and verified by the proper officer. Such a motion cannot be made at chambers. *Short v. Williams*, 4 *Dowl. P. C.* 357.

1822

*Discharge under Insolvent Acts.*—The assignment under the 11th section of the Insolvent Debtors' Act, 7 Geo. 4, c. 57, vests the property of the insolvent in his assignees only from the time of its execution. Therefore, where an insolvent went to prison on the 13th of April, on the 14th sold to the defendant (his landlord) certain fixtures on the premises he had occupied, and on the 18th petitioned for his discharge under the act, at the same time executing the usual assignment of his effects to the provisional assignee:—Held, in assumpsit, brought by the assignees to recover the price of the fixtures, that the defendant was entitled to set off a sum due to him from the insolvent for rent. *Simms v. Simpson*, 1 *Scott*, 177; 1 *Bing. N. R.* 306.

1823

A sale of the goods of an insolvent under a *fi. fa.* issued upon a warrant of attorney given by the insolvent, is invalid if it take place after the commencement of the insolvent's imprisonment, notwithstanding the goods may have been seized under the writ before the imprisonment. *Kelcey v. Minter*, 1 *Scott*, 616; 1 *Bing. N. R.* 721; 1 *Hodges*, 177.

1826

In such case trover lies at the suit of the assignees. *Id.*

Where the goods of an insolvent are under an execution, and the produce of the sale paid to the execution creditor after the imprisonment of the insolvent, his assignees subsequently appointed may recover such produce as money had and received to their use. *Guy v. Hitchcock*, 5 *Nev. & M.* 660.

1828

The assignment of the estate and effects of an insolvent debtor, under sects. 11 & 19 of the 7 Geo. 4, c. 57, vests in the assignees any copyhold property the insolvent may possess, so as to enable them to maintain ejectment for the recovery of it. The entry on the court of rolls of the manor, required by s. 20, is only necessary to enable the assignees to convey the property to a purchaser. *Doe d. Brennan or Smith v. Glenfield*, 1 *Scott*, 699; 1 *Bing. N. R.* 729; 1 *Hodges*, 78.

1826



Section 57 of the 7 Geo. 4, c. 57, (the Insolvent Act), which authorizes execution in certain cases against an insolvent who has obtained his discharge, does not apply to a ca. sa. *Rivett v. Lark*, 3 Dowl. P. C. 62. 1828

A plea to an action of debt on a demise for rent, that long before the time of the demise made the plaintiff had been discharged under an Insolvent Debtors' Act, and had been permitted by his assignee to remain in the possession and management of premises, and to make the demise in question; but that, before any of the rent became due, the assignee gave a notice, claiming to have the rent paid to him, whereby the defendant became liable to pay to the assignee, the reversion not being vested in the plaintiff, and his right having, by reason of the notice, become determined—was held bad, on special demurrer. *Partington v. Woodcock*, 5 Nev. & M. 672; 1 Har. & Woll. 262. 1828

Under the 30th section of the Insolvent Debtors' Act, (7 Geo. 4, c. 57), a debt due to the insolvent will pass to the provisional assignee, although it has been assigned to a third party before the insolvent's imprisonment, if notice of such assignment was not given to the debtor before such imprisonment. *Buck v. Lee*, 1 Adol. & Ellis, 804. 1828

A plea in assumpsit alleged, that the debt sued upon had vested in the provisional assignee, the plaintiff having become insolvent, and having executed an assignment under the act. The replication alleged an assignment to a third party before the imprisonment, for good consideration:—Held, on general demurrer, that the replication was bad, for not alleging that the debtor had notice of such assignment. *Id.*

A party, on taking the benefit of the Insolvent Act, swore that certain goods, described in her schedule, belonged to the creditors of her deceased husband, but afterwards brought an action to recover them, claiming them as her own:—Held, that the fact of her so swearing, and afterwards setting up a right to the goods in herself, was an inconsistency for the consideration of the jury, but that such oath did not estop her from asserting her claim. *Thornes v. White*, 1 Tyr. & G. 110. 1828

The court for the relief of insolvent debtors has full power to imprison a man for a contempt of its authority, in not performing a condition to which he had consented by his counsel, on making a rule absolute; and its jurisdiction being clear, this court will not inquire upon affidavit into the circumstances under which it has been exercised. *In re Chapman*, 1 Har. & Woll. 449. 1827

A declaration stated, that the defendant was indebted to the insolvent before he subscribed his petition, or executed the assignment of his estate under the Insolvent Debtors' Act, for goods sold and delivered by him before he became insolvent:—Held, a sufficiently certain allegation of the time when the debt accrued. *Ferguson v. Mitchell*, 2 C. M. & R. 687; 4 Dowl. P. C. 513. 1833

To a bill filed by the assignee of an insolvent debtor, the defendant pleaded, that the consent of the creditors and of the Insolvent Debtors' Court, to the institution of the suit, had not been obtained; plea overruled. *Casborne v. Baraham*, 6 Simon, 317. 1833

The assignees of an insolvent clergyman do not acquire any right to his benefice, or to the income of it, by the assignment, nor until they have obtained a sequestration, as directed by 7 Geo. 4, c. 57, s. 28, after adjudication by the Insolvent Debtors' Court on such insolvent's petition. *Bishop v. Hatch*, and *Chuter v. Hatch*, 1 Adol. & Ellis, 171; 3 Nev. & M. 498. 1830

An individual judgment creditor may sequester the benefice for his own debt, notwithstanding the assignment to the provisional assignee; and the assignees, after adjudication, are not entitled to set aside the sequestration of such creditor, or to claim precedence over it for a sequestration issued by them pursuant to the act. *Id.*

The 34th section of 7 Geo. 4, c. 57, which invalidates certain executions issued subsequently to the imprisonment of an insolvent debtor, upon a judgment entered up on a warrant of attorney or cognovit actionem, does not extend to a sequestration granted in pursuance of a writ of sequestrari facias, issued upon such a judgment. *Id.*

A legacy of 100*l.* having been bequeathed to the wife of A., and A. being indebted to B. in 150*l.*, A. sent B. the following document, signed by himself and wife:—"We hereby authorize the executor of the late — to pay to you any legacy or monies that he may have bequeathed to us or either of us, in part payment of the various sums you have so kindly lent us, and your receipt shall be to him a sufficient discharge for the same. There appears to be about 150*l.* due to you." B. communicated to the executor that he had a claim on the legacy; but the executor said he would pay it to Mrs. A. After this communication had been made, A. in January, 1832, went to prison, and on the 29th of February petitioned for his discharge under the Insolvent Debtors' Act, and executed an assignment to the assignee; and on the 16th of May, 1832, he obtained his discharge accordingly. On the 3rd of April, 1832, the executor paid Mrs. A. the amount of the legacy, which she immediately paid over to B., under the authority before mentioned:—Held, that the property in the legacy passed to A.'s assignee under the Insolvent Debtors' Act. *Best v. Argles*, 2 C. & M. 394; S. C. nom. *Best v. Thorowgood*, 4 Tyr. 256. 1832

Seemle, that the 32d section of 7 Geo. 4, c. 57, as to voluntary preferences by insolvent debtors, does not render a judgment void as against the creditors, unless obtained by collusion with the insolvent. *Thorpe v. Eyre*, 3 Nev. & M. 214; 1 Adol. & Ellis, 926. 1834

At any rate the mere circumstance of the judgment being suffered by default, does not make it void under that section, if there be a bona fide debt. *Id.*

In order to support a security made by an in-



solvent to a creditor within three months before he is committed to prison, it is not necessary for the latter to prove pressure by him of the insolvent. It is for assignees of the insolvent, who seek to avoid the security under the provisions of the 7 Geo. 4, c. 57, s. 32, to make out that it was the involuntary act of the insolvent. *Doe v. Gillest*, 1 Tyr. & G. 114. 1833

An assignment by a debtor, he being at the time in a state of insolvency, of all his property for the benefit of all his creditors, is not void within the meaning of the 7 Geo. 4, c. 57, s. 32, (dubitante Alderson, B.) *Davies v. Acocks*, 2 C. M. & R. 461; 1 Gale, 251. 1833

An insolvent person, being in prison, endeavored to make terms with his creditors, they proposing that he should execute a composition deed for their benefit, which he at first refused; subsequently a letter was written by an agent of the creditors, stating that they would not consent to his discharge, and that he must either execute an assignment, or be made a bankrupt. The insolvent, after taking three days to deliberate upon it, with great reluctance executed the assignment:—Held, that this was not a voluntary conveyance within the above section of the Insolvent Act. *Id.*

A conveyance made to a creditor for a valuable consideration, sufficiently strong in itself to influence the debtor to make it, is not "voluntary" within the stat. 7 Geo. 4, c. 57, s. 32, for relief of insolvent debtors, though part of the consideration consists of a pre-existing debt. *Margareson v. Saxton*, 1 Y. & Col. 525. 1833

An attorney is entitled to recover from an insolvent costs incurred in endeavoring to sell property of the latter while he is in prison and taking the benefit of the act, if done bona fide, and the insolvent has derived some benefit from it. *Tabram v. Warren*, 4 Dowl. P. C. 545; 1 Tyr. & G. 153. 1836

Semble, the discharge of an insolvent under 7 Geo. 4, c. 57, applies only to the debts named in the schedule, and not to all the debts due to the creditors named. *Bishop v. Polhill*, 1 M. & Rob. 363—*Patteson*. 1836

If a defendant, taking the benefit of the Insolvent Act, the 7 Geo. 4, c. 57, inserts in his schedule the purchase money of an annuity, as well as the annual amount of the latter, he will be discharged as to the arrears of that annuity due at the time of making out the schedule, although they have been omitted, if such omission did not arise from an intention to mislead. *Jervis v. Jones*, 4 Dowl. P. C. 610. 1836

Where a defendant agreed to pay a weekly sum, which was to be increased on a contingency, and this was made a rule of court:—Held, that a discharge under the Insolvent Debtors' Act did not extend to subsequent accruing payments, and that an attachment might issue for the non-payment. *Lawrance v. Walker*, 3 Dowl. P. C. 614; 1 Har. & Woll. 205. 1836

By an agreement for the dissolution of a partnership between the plaintiff and one L., the plaintiff, in consideration of a sum of 225*l.* 4*s.* 6*d.* to be paid or secured to him, assigned the debts

due to the partnership to L.; and L., A., and the defendant, in consideration thereof, severally and respectively covenanted and agreed with the plaintiff that they or some one of their executors, &c. should and would pay the said sum of 225*l.* 4*s.* 6*d.* by instalments:—Held, that this was an absolute covenant on the part of the defendant to pay such sum at all events; and the defendant having been discharged under the Insolvent Debtors' Act, 7 Geo. 4, c. 59, s. 46, that such discharge was a good defence to an action brought to recover instalments which became due subsequently to his discharge. *Guy v. Newson*, 2 C. & M. 140; 4 Tyr. 31. 1838

An attorney, to whom an insolvent was indebted, and who held a cognovit as a security for the debt, and who was employed by the insolvent to prepare his schedule, and acted as his attorney in procuring his discharge, agreed with the insolvent to omit the debt out of the schedule, and that the cognovit should be suspended until after the discharge, and then revived. The insolvent obtained his discharge, and the attorney two years afterwards entered up judgment on the cognovit, and issued execution. The court on motion set aside the judgment and execution. *Tabram v. Freeman*, 2 C. & M. 451; 4 Tyr. 180. 1838

After taking the benefit of the Insolvent Act, a debtor contracted a new debt, and accepted a bill of exchange for the balance of the old and new debt. Being sued upon the bill, he gave a warrant of attorney for the amount; and judgment being entered up upon this warrant of attorney, the court refused to set it aside. *Philpot v. Aslett*, 1 C. M. & R. 55; 2 Dowl. P. C. 669; 4 Tyr. 729. 1839

A plea of a discharge under the Insolvent Debtors' Act was held bad, because it did not admit the existence of the cause of action. *Gould v. Raspberry*, 2 Dowl. P. C. 707. 1840

Certified copies of the schedule, &c. may be given in evidence under the Insolvent Act, by parties other than the insolvent or his creditors. *Price v. Asheton*, 1 Y. & Col. 441. 1840

#### PUBLIC COMPANY.

The assignees of A., a bankrupt, are entitled to recover in trover against the Bank of England the amount of bank post bills, converted into money by A. at a Bank of England branch bank, after notice given at the Bank of England in London, that A. had committed an act of bankruptcy. *Willis v. Bank of England*, 5 Nev. & M. 478. 1846

But they cannot recover the amount of a bank post bill paid to B., a bona fide holder for value, who had received it of A. after the commission of an act of bankruptcy, but without notice thereof. *Id.*

Bank post-bills, issued by the Bank of England in London, are not made payable at the branch banks, by 7 Geo. 4, c. 46, s. 15. *Id.*

In an action against a corporation on a bond, the condition of which recited that the company were by act of parliament authorized to raise money by bond, and that, at a general assembly



of the company of proprietors, it had been resolved, that the bond in question should be issued for that purpose, the defendants pleaded non est factum:—Held, that although the company could not, under that plea, show that the bond executed by them was invalidated by collateral matter, they might show that it was void because executed contrary to the provisions of the act of parliament. *Hill v. Manchester and Salford Water Works Company*, 5 B. & Adol. 866; 2 Nev. & M. 573. 1849

Held, secondly, that a clause in the act of parliament, whereby the company were authorized, at any general or special assembly, to order and dispose of the custody of their common seal, and the use and application thereof, empowered them to make rules and regulations for its custody, but did not require their concurrence in each particular act of sealing; and that a bond to which the seal had been affixed by the company's clerk, under a general authority from the directors, was valid. *Id.*

By another clause it was enacted, that the clerk should, in a book provided by the company, keep an account of all acts, proceedings, and transactions of the company, and that every proprietor should have liberty to inspect the same, and take copies of the entries:—Held, that entries of the proceedings in the book so kept by the clerk were not admissible in evidence on behalf of the company, against one of their own members suing them. *Id.*

The directors of a gas company are answerable for an act done by their superintendent and engineer, under a general authority to manage the works, though they are personally ignorant of the particular plan adopted, and though such plan be a departure from the original and understood method, which the directors had no reason to suppose discontinued. *Rex v. Medley*, 6 C. & P. 292—Denman. 1853

Plaintiff and defendants were members of a joint-stock company; plaintiff agreed to demise land to defendants as trustees for the company; defendants covenanted to pay him rent; and by a separate deed, plaintiff and the other members of the company covenanted to indemnify the defendants for acts done by them as trustees:—Held, that plaintiff, notwithstanding he was a member of the company, might sue defendants on their covenant. *Bedford v. Bruton*, 1 Scott, 245; 1 Bing. N. R. 399. 1854

### QUO WARRANTO.

By a local act, the inhabitants of an incorporated district are directed to elect governors and directors of the poor, who are authorized to make orders and regulations respecting the poor and the poor rates,—are to make out a list of sixteen inhabitants or occupiers, from which list justices at a petty sessions are to elect four to be overseers of the poor,—are empowered to appoint watchmen and beadles, (who are to be sworn in as constables, and act as such whilst in execution of the powers of this act; and who, together with the constables duly appointed, are to be un-

der the direction and control of the governors and directors,) clerks, collectors, treasurers, inspectors, assistant overseers, and all such other officers as they may think fit,—to dismiss them, and pay them such salaries as they may think proper,—are to ascertain and settle the sum to be assessed for parochial purposes, (for which sum poor-rates are to be made by the inhabitants,)—are to have vested in them all houses, &c. used for the accommodation of the poor, and of the watchmen and beadles, and all other property purchased for those purposes, and are to sue and be sued, and to prosecute by indictment or information:—Held, that the office of governor and director is not such an office that an information in the nature of a quo warranto will lie for an usurpation of it. *Rex v. Ramsden*, 5 Nev. & M. 325; 3 Adol. & Ellis, 456. 1856

A quo warranto information was moved for against an officer elected by ballot, on the ground that a large proportion of the persons who voted were not qualified; but it was not shown for whom the votes of those persons were given:—Held, that on this application the officer could not be required to prove his election valid, but it lay on the opposing parties to show (if that were practicable) that his majority was obtained by bad votes. *Rex v. Jefferson*, 5 B. & Adol. 855. 1856

A local act created a corporation, consisting of sworn commissioners, with summary power of seizure of goods, and imprisonment of the person, and of preventing and removing obstructions and nuisances in the streets; powers for paving, cleansing, and lighting; powers of appointing and paying officers, of determining the number of watchmen, of regulating them, and dismissing, paying, or pensioning them; of possessing property in materials required under the act, of instituting prosecutions, of imposing rates, of appointing and removing treasurers, to whom penalties, imposed by the act, were to be paid for the purposes of the act; and of hearing appeals in certain cases, brought by parties complaining of things done under the act:—Held, that an information in the nature of a quo warranto would lie against persons claiming to be commissioners. *Rex v. Beedle*, 3 Adol. & Ellis, 467. 1857

A part of the commissioners were elected by rated inhabitants, M. and T. having been candidates; and M. having been elected and sworn in, and a rule nisi having been obtained upon affidavits, that T. had the legal majority, for a mandamus to certify T.'s election, and swear him in, the court discharged it with costs; and at the same time granted a rule to show cause why there should not be an information in the nature of a quo warranto against M. *Id.*

Held, per Lord Tenterden, C. J., Taunton and Patteson, Js., (Farke, J., dissentiente), that a quo warranto information does not lie for the office of trustees under a public local act, elected as vacancies occur, by occupiers in the parish, and taking an oath of office, with power to appoint salaried treasurers, collectors, &c. of monies raised under the act, accountable to themselves; to pass bye-laws with penalties; to impose rates in case of certain other functionaries not so doing; to



supply omissions in the rates, and to relieve parties aggrieved or incompetent to pay; to appoint salaried watchmen; to purchase, hold, and manage certain property for the purposes of the act; to contract for the supply of the poor, remove nuisances, and apprehend for certain specified nuisances; to maintain the highways, and prevent encroachments thereon; to superintend the lighting, paving, watching, and cleansing of the streets; to remove dangerous buildings, on complaint upon oath (which they were to administer), and to sue in the name of their clerk, or one of themselves. *Rex v. Hanley*, 3 Adol. & Ellis, 463, n. 1857

### RATE.

A mandamus will not go to inspect the accounts relating to county rates, on an application made to the court of quarter sessions for the inspection, whilst the court was in actual discussion upon the accounts. *Rex v. Nottingham (Justices)*, 5 Nev. & M. 160; 1 Har. & Woll. 318. 1863

The 4 & 5 Will. 4, c. 48, merely changed the place where the business of allowing the accounts was to be transacted, but took no power relating to them from the justices. Id.

All business relating to the assessment, application, and management of the county rate, must be transacted by the justices in open court; but no rate-payer, or person not being a member of the court, is entitled in any way to interfere with the exercise of the jurisdiction of the justices, &c. in respect of such assessment, &c. Id.

Therefore, a rate-payer present at an adjourned sessions, held for the purpose of allowing the accounts, &c. to be charged upon the county rate, is not entitled to the inspection of such accounts, &c. previously to their allowance, although it appear that such accounts, &c. were inspected, examined, and the amounts adjusted at a private meeting of justices held previously to such adjourned sessions, and that at such sessions the accounts, &c. were allowed upon the total amounts thereof, and the names of the parties to whom due, being openly read in court. Id.

Seemingly, that a rate-payer is entitled to inspection of such accounts, &c. upon application on a day subsequent to the allowance. Id.

Quere, whether a mandamus will go to justices to direct an order to the clerk of the peace to suffer rate-payers to take copies of assessments of county rates, and orders of sessions relative to county rates, and of all payments, made thereout, and to the clerk of the peace to produce his accounts of the expenditure of the county rates, together with his vouchers for the same; the object of the application being to bring into question the legality of some of the payments. *Rex v. Staffordshire (Justices)*, 1 Har. & Woll. 277. 1863

A mandamus will not lie to justices to enforce by distress warrants paving rates, laid within the operation of the Metropolitan Street Act, 57 Geo. 3, c. xxix: the 38th section of that act giving a remedy by action, even though the rates are collected under prior local acts applicable to particular districts, by which the remedy by action

is confined to cases where no sufficient distress can be made. *Rex v. Middlesex (Justices)*, 5 Nev. & M. 124; 1 Har. & Woll. 462. 1865

The 57 Geo. 3, c. xxix, s. 38, applies to districts which were before regulated by local acts; and enlarges the power of recovering paving rates by action, where the local acts give only a right to recover by action where no sufficient distress can be made. Id.

A local act gave power to commissioners to raise money for paving, lighting, and watching a town, by rating and assessing the proprietors of houses according to the value at which the houses were taxed to the poor. It also empowered them to assess and levy a rate on certain proprietors for the purpose of certain improvements, such rate to be levied and assessed in the same manner as the other rates. In default of payment, a justice was authorized to issue a distress warrant. The act also provided, that, in case any person thought himself aggrieved by any rate or assessment, he might appeal to the commissioners, who were authorized to give relief; and further, that any one who thought himself aggrieved by any thing done in pursuance of the act, might appeal to the quarter sessions. The commissioners assessed a proprietor to a rate, levied for the purpose of the improvements, at an annual value above that at which he was assessed to the poor:—Held, (*Taunton, J.*, dissentiente), that, on his refusing to pay, a justice might be required by mandamus to issue a distress warrant, the proprietor not having appealed. *Rex v. Trecothick*, 2 Adol. & Ellis, 405. 1865

Held, by the court of K. B. (*Parke, J.*, dubitante), and the judgment affirmed on error, that under stat. 4 Geo. 4, c. 64, two justices of a town and county of a town, mentioned in schedule A. to that act, might rate the inhabitants for rebuilding the gaol of such town and county on a new site. *Thompson v. Raikes*, 1 Adol. & Ellis, 863. 1865

Although by a local act, which had been carried into effect, it had been enacted, that ground should be purchased and conveyed to the corporation of the said town, and that the justices for the town and county should cause a new gaol to be built thereon; that a limited sum should be raised by assessment on the town and county, for the purpose of the act respecting such gaol, the surplus to be repaid proportionably to the parties assessed; and that such gaol, when finished, should be a public gaol, for the town and county, and should from time to time be maintained, supported, and repaired by the corporation. Id.

The sixty-eighth section of 4 Geo. 4, c. 64, enacts, that the justices in sessions may raise money on the counties, towns, &c. to which the act extends, for defraying the expenses of the matters and things thereinbefore directed to be done respecting gaols, &c., in the same manner as rates applicable to the building, repairing, or maintenance of such prisons respectively, are now directed to be raised by law. Id.

Held by the court of error, that this applies only to the mode of raising such rates, and not to the persons on whom they are to be laid. Id.



Held by both courts, that the power of the justices to rate, as above, under stat. 4 Geo. 4, c. 64, is not limited by stat. 5 Geo. 4, c. 85, s. 15. Id.

Held by the court of K. B., on the construction of 4 Geo. 4, c. 64, ss. 45, 50, that when a presentment has been made as to the propriety of changing the site of a gaol, and the justices in sessions have taken such presentment into consideration, giving the notices required by sect. 45, and have resolved that the site ought to be changed, such justices may at their next sessions confirm the resolution, and contract for building the new gaol, without having given fresh notices. Id.

Same decision (in K. B.) as in the case above, on the power of the justices to make the rate. *Rex v. Kingston-upon-Hull (Justices)*, 1 Adol. & Ellis, 880. 1865

Held, that, under stat. 4 Geo. 4, c. 64, s. 68, which empowers justices to raise money for the purposes of the act, as to gaols, in the same manner as rates applicable to the building, repairing, or maintenance of such prisons, are now directed to be raised, the justices of a town and county might have power to raise money on the inhabitants in general for the purpose of building a gaol, though other persons might have been liable at the time of passing the act, and might continue liable to the expense of repairing and maintaining such gaol. Id.

### RECOGNIZANCE.

A motion to discharge a defendant from estreated recognizances, under the 4 Geo. 3, c. 10, must be preceded by a notice to the solicitor of the treasury. *Re Tipton*, 3 Dowl. P. C. 177. 1866

Where a defendant entered into a recognizance to appear to and try an indictment for perjury against her in Trinity Term, and she had appeared and pleaded to the indictment, but the indictment had not been tried, the court would not in Michaelmas Term discharge the recognizance, but ordered that it should not be put in suit before the last day of the term. *Rex v. Grote*, 3 Dowl. P. C. 255. 1867

Where, upon a recognizance forfeited at sessions, the defaulter has paid the penalty to the sheriff, in order to prevent a sale of his goods taken in execution, the sessions have no power to mitigate the penalty under 3 Geo. 4, c. 46, s. 6. *Harper v. Hayton*, 5 M. & R. 307. 1867

Where, upon a recognizance forfeited at quarter sessions, the sheriff has levied part of the penalty, and has the defendant in execution for the residue, the sessions have jurisdiction over the whole recognizance, and if the sheriff has notice that they have discharged the defendant wholly therefrom, before the money levied had been paid over to the treasury, an action for money had and received lies against the sheriff for the amount? Id.

Whether any notice of the order, or any demand of repayment is necessary, *quære*? Id.

By a charter of Edw. 4, the crown granted to the corporation of D. "all penalties forfeited and to be forfeited, &c. of all and every the barons, &c. in whatsoever courts the same barons, &c. should happen to be adjudged." By a charter of

Carr. 2, "all fines, forfeitures, &c. in the courts aforesaid, arising, &c.," were also granted to the corporation:—Held, that under neither of these charters did a forfeited recognizance to appear to answer a charge of misdemeanor pass to the corporation. *Rex v. Dover (Mayor, &c.)*, 1 C. M. & R. 726; 5 Tyr. 279. 1867

### RELEASE.

The defendant and one M. N. gave the plaintiff their joint and several promissory note to secure a separate debt due from each of them. The plaintiff afterwards executed a deed of release to M. N.:—Held, that although this release discharged both as to the note, it did not enure to the discharge of the separate debt of the defendant, but that the plaintiff might recover upon an account stated. *Cocks v. Nash*, 4 M. & Scott, 162. 1870

Where an action was brought by two out of four executors, and the two executors who were not joined in the action released *puis darrein continuance*, the court refused to set aside the plea, the plaintiff having failed to make out a case of fraud. *Herbert v. Pigott*, 2 C. & M. 384; 4 Tyr. 235. 1870

Seemle, that such a plea will not be set aside, unless in case of gross fraud. Id.

Where one of several plaintiffs assignees of a bankrupt releases the cause of action, and the release is pleaded, the court will set aside the plea, suspicion being thrown on the defendant's conduct in the transaction, the co-plaintiff's indemnifying the plaintiff, who had given the release, against costs. *Johnson v. Holdsworth*, 4 Dowl. P. C. 63. 1870

Courts of equity will presume a release within the same limits of time, within which juries will be directed to presume it, whether any statute of limitations is applicable to the case or not. *Baldwin v. Peach*, 1 Y. & Col. 453. 1870

### REPLEVIN.

In replevin, the defendant avowed for rent in arrear from one J. M., and also claimed the goods as being the property of himself and another as assignees of J. M., against whom a commission of bankruptcy had issued. A verdict having been taken on the whole record, the court directed it to be entered for the plaintiff on the issue taken on the title of the assignees, on the ground that the defendant could not be permitted on the same record to claim the goods as a distress for rent, and also to set up the title of the assignees. *Emery v. Mucklow*, 4 M. & Scott, 263. 1873

Where distinct cognizances are made for the same goods under several parties, not appearing to be connected in interest, if one of the cognizances be abandoned at the trial, the party under whom it was made is a competent witness for the defence. *King v. Baker*, 2 Adol. & Ellis, 333. 1876

On an avowry, or justification of a taking as a



distress for the whole rent, a jury may find a verdict for the sum due upon an apportionment. *Neale v. Mackenzie*, 1 Gale, 119. 1877

In an action against the sheriff for taking in sufficient pledges in replevin, he is liable to the amount of the penalty in the bond, viz. double the value of the goods distrained. *Paul v. Goodluck*, 2 Bing. N. R. 224; 1 Hodges, 370. S. C. non. *Hall v. Goodricke*, 2 Scott, 363. 1879

The sureties in a replevin bond are only liable for the value of the goods seized, and double costs; and if that value exceeds the amount of rent due, they will only be liable for the rent. *Hunt v. Round*, 2 Dowl. P. C. 558. 1883

Discharge by reference to arbitration. *Al- dridge v. Harper*, 3 M. & Scott, 519. 1883

### REVENUE.

**Stamps.**—An agreement to indemnify A. from all costs, charges, damages, or other expenses which he may incur as bail for B., requires an agreement stamp, under 55 Geo. 3, c. 184, the arrest of B., and consequently the liability of A., being for more than 20*l.*, though the costs, &c. incurred do not amount to that sum. *Wrigley v. Smith*, 3 Nev. & M. 181; 5 B. & Adol. 1117. 1886

An "agreement, minute, or memorandum of agreement," is liable to be stamped, only where the instrument is per se binding on the parties to it—per *Patteson, J. Rex v. St. Martin, Leicester*, 4 Nev. & M. 202; 2 Adol. & Ellis, 210. 1884

The court cannot sanction an agreement between the parties, that an objection for want of a proper stamp shall be waived; if, therefore, the objection comes to the knowledge of the court, no decree will be made until the instrument duly stamped is produced to the registrar. *Owen v. Thomas*, 3 Mylne & Keen, 353. 1884

A's attorney gives B. a written authority to pay money for A. This authority does not require a stamp, either as an agreement or as a power of attorney. *Parker v. Dubois*, 7 C. & P. 406—Abinger. 1884

Notice being given to the plaintiff of a call on certain mining shares, which he had transferred to the defendant, his attorney wrote to the defendant's attorney, to inquire whether the defendant was desirous of avoiding a forfeiture of the shares, by authorizing plaintiff to pay the amount of the call. The defendant's attorney wrote in reply, authorizing the plaintiff to pay the call:—Held, that these letters were not a contract, or evidence of a contract, and did not require a stamp. *Parker v. Dubois*, 1 Mees. & Wels. 30. 1884

When an instrument is stamped under the 2nd section of the 37 Geo. 3, c. 136, the proper stamp to be applied is that which is necessary at the time the stamp is actually affixed. *Buckworth v. Simpson*, 1 Gale, 38. 1886

The following agreement held to be relating to the sale of "goods, wares, or merchandise," VOL. IV. 42

within the exception in the Stamp Act, 55 Geo. 3, c. 184, and therefore admissible, without a stamp, to show a partnership between A. & B. "Memorandum of agreement between A. & B., which is the horse, to be 3*l.*, B. to have half at 17*l.*, and to pay half of the horse's expenses being with C., at the same time agreed for the horse to go to Newcastle to be entered for the handicap and silver cup." *Marson v. Short*, 2 Scott, 243; 2 Bing. N. R. 118; 1 Hodges, 200. 1886

A contract to make a chattel and deliver it within a certain time, is a contract relating to the sale of goods within the exception of the Stamp Act. *Pinner v. Arnald*, 2 C. M. & R. 613; 1 Tyr. & G. 1; 1 Gale, 271. 1886

A paper as follows:—memorandum, 1, J. R., consent to take 10*l.* per month from W. H. H., in discharge of a sum of 32*l.*, the said W. H. H. intends giving him; and upon the said sum being paid, he engages giving a receipt in full for all demands:—signed by J. R., and dated, requires a stamp, under stat. 55 Geo. 3, c. 184, sched. part 1. Agreement, as an agreement whereof the matter is of the value of 20*l.* *Remon v. Hayward*, 2 Adol. & Ellis, 666. 1886

A paper as follows:—"I hold of M. T. 37*l.* to put into a savings bank for her," signed and dated, is evidence of a legal debt of 37*l.* from the party signing to M. T., the money not having been put into a savings bank, but partly paid to the use of M. T., and does not show a mere trust; and M. T. may recover in debt, though parol evidence be given that the party signing had received the money to be applied, at his discretion, to the use of M. T. Id.

Where an agreement refers to another document, so that the two papers, in fact, form only one agreement, it is sufficient if one of the papers only bear an agreement stamp. *Peate v. Dicken*, 1 C. M. & R. 422; 3 Dowl. P. C. 171; 5 Tyr. 116. 1889

Where a deed is produced bearing the proper stamp, the court will receive it in evidence, without entering into the inquiry whether it was affixed upon the payment of a sufficient penalty, and within proper time, although it is proved not to have been stamped when executed. *Rex v. Preston*, 3 Nev. & M. 31; 5 B. & Adol. 1029. 1890

But with reference to the effect of the deed, the court will inquire into the time it was stamped, in cases where stamping within a limited period is required by statute. Id.

A memorandum indorsed upon an instrument, purporting to be an acknowledgment by the commissioners of stamps of the payment of a penalty, is not receivable in evidence. Id.

If an instrument offered in evidence is objected to as being improperly stamped, the party offering it may either go into the rest of his evidence and send the instrument to the stamp office, to be stamped anew, taking the chance of its coming back sufficiently early, or his counsel may argue the objection, taking the stamp as it is; but if the instrument be sent away to the stamp office,



the judge will not allow any argument as to the original stamp being proper. *Beckwith v. Benner*, 6 C. & P. 681—Gurney. 1890

The enactment in 44 Geo. 3, c. 98, s. 10, (prohibiting the bringing of actions for penalties "incurred by virtue of that or any other act relating to the stamp duties," unless prosecuted in the name of the attorney-general, or of the solicitor of stamps), applies only to cases in which the subject matter of the action relates to the stamp duties. *Smith v. Gillet or Gilbert*, 4 Nev. & M. 225; 2 Adol. & Ellis, 361. 1894

Therefore, it does not apply to actions brought for penalties incurred by printing and publishing a newspaper without complying with the regulations imposed by 38 Geo. 3, c. 78, ss. 2, 4, 7, and 10, although that act contains various provisions relating to the stamp duties. *Id.*

**Assessed Taxes.**—The demand required by 43 Geo. 3, c. 99, s. 33, previously to a distress being levied for assessed taxes, need not be made in writing, nor personally on the party from whom they are due; it is sufficient if a demand has in fact been made, and there has been a refusal on the ground of inability to pay, or for any other cause. *Rex v. Ford*, 4 Nev. & M. 451; 2 Adol. & Ellis, 588; 1 Har. & Woll. 46. 1890

It is not essential that the demand to which the refusal applies, should have specified the precise amount claimed, if the debtor understood what the amount was, and did not object to it. *Id.*

A collector of taxes has no right to take a constable or other person with him into the house of a party, of whom he is about to demand the payment of arrears of taxes, and to levy a distress for such arrears, if necessary,—unless he has reasonable ground for apprehending that an assault will be committed on him, or that the distress will be resisted. *Rex v. Clarke*, 4 Nev. & M. 671; 3 Adol. & Ellis, 287; 1 Har. & Woll. 252. 1890

Where, however, A., a collector, unwarrantably, but without any objection being made, introduces B., a constable, into the house of D., a person from whom he demands taxes, and afterwards, reasonable ground to apprehend violence arising, the collector introduces C., another constable, upon whom D. commits an assault, it is no answer to an indictment against D. for the assault on C. in the execution of his duty, that the collector had wrongfully introduced B. *Id.*

A collector demands taxes due from D., the owner of a house, and intimates, in case of non-payment, he shall distrain; upon which D. threatens A. with personal violence, but ultimately promises to send the amount on a certain day. This promise not being performed, A. goes again to D.'s house, and demands the taxes of D. D. leaves the room in which A. is, and fastens the outer door:—Held, that A. was justified in unfastening the door and introducing constables. And held, that, upon D.'s returning into the room, after the introduction of the constables, accompanied with a number of men, and commanding C., one of the constables whom he

knew to be such, to leave the house, it was the duty of C. and the other constables to remain. *Id.*

A collector of taxes may distrain without having his warrant with him, *semble*. *Id.*

**Land-Tax.**—Where an act of parliament establishing a Railway Company, authorized the company to purchase lands of corporations, tenants for life, &c., and directed that the purchase money should be applied in the redemption of the land-tax upon other parts of the property unsold:—Held, that a tenant for life, who had redeemed the land-tax before the passing of the act, might reimburse himself out of the proceeds of the lands purchased of him by the company. *Ex parte Northwick*, 1 Y. & Col. 166. 1891

The costs of an application to the court under such an act of parliament, to have the purchase money applied in the redemption of the land-tax, will be allowed out of the purchase money, although the act only makes an express provision for such costs in cases where the money is to be laid out in the purchase of lands, to be settled to the like uses. *Id.*

A., the owner of a house, which, in consideration of a premium paid to the lessor, and a covenant to repair and finish, had been demised to B. at a rent amounting to less than the annual value, redeems the land-tax thereon, under 38 Geo. 3, c. 5. A. is entitled to an annual payment from B. in respect of the difference between the rent and the annual value, viz. an annual payment bearing the same proportion to the whole land-tax redeemed, which the difference between the rent and the annual value bears to the annual value. *Ward v. Const*, 5 M. & R. 402. 1891

**Excise.**—*Quære*, whether the keeper of an office of excise since the statute 3 & 4 Will. 4, c. 51, is an officer of excise. *Goody v. Clark*, 2 C. M. & R. 273; 1 Gale, 177. 1894

*Semble*, that an office for the performance of certain duties is abolished by a statute which takes away all the duties, though it does not profess to abolish the office in terms. *Id.*

Held, that proof that the defendant had the words "Excise office" over his door, is no evidence that he was the keeper of an excise office, no act being shown to be performed by him as keeper of an office of excise, since the stat. 3 & 4 Will. 4, c. 51. *Id.*

Where a count in an information to recover a penalty of 100l. against a maltster, on the stat. 7 & 8 Geo. 4, c. 52, s. 1, and c. 53, s. 18, charged that the defendant made use of a cistern, for the making of malt, without having made a true and particular entry thereof in writing, with the officer of excise, in whose survey such cistern was intended to be used:—Held, that the count was bad. *Att. Gen. v. Dyer*, 2 C. & M. 664. 1894

In an information on s. 40 of the former stat., the count charged that the defendant did fraudulently conceal and convey from the sight of the



officers of excise a large quantity of corn for making into malt, contrary, &c.:—Held, that the count was good, and that it was not necessary to name the officers from whom it was so concealed, or allege it to have been concealed from the officers in whose district the premises were situate. *Id.*

### REWARD.

Where an advertisement respecting a stolen child promised a reward to the person who would give information where the child was, so as that he might be restored to his parents, and the plaintiff communicated to the defendant her suspicion where the child was, in order to put the matter into his hands for his benefit, if he chose to run the risk, and the child was afterwards restored to its parents by the exertions of the defendant acting upon the plaintiff's communication:—Held, that the plaintiff could not recover from the defendant, to whom the reward had been paid, either the whole or any portion of it. *Fallick v. Barber*, 1 M. & S. 108. 1897

Rewards, under the stat. 7 Geo. 4, c. 64, s. 28, for the apprehension of offenders, are not confined to cases where the person apprehending has had a loss of time or has been at any expense. *Rex v. Barnes*, 7 C. & P. 166—Coleridge. 1897

Where a reward is applied for under the stat. 7 Geo. 4, c. 64, s. 28, for the apprehension of an offender, and the facts on which the application is grounded have not appeared in evidence, the learned judge will require them to be laid before him on affidavit. *Rex v. Jones*, 7 C. & P. 167—Park. 1897

### RIGHT, WRIT OF.

As to the practice upon the entry of a nolle prosequi by the defendant in a writ of intrusion, see *Williams v. Harris*, 4 M. & Scott, 358; 1 Bing. N. R. 13. 1896

The tenant in a real action is not entitled to costs upon a nolle prosequi. *Id.*

Where the demandant in a writ of right had neglected to proceed to trial, the court granted judgment as in case of a nonsuit, leaving the demandant to his remedy by error, if the stat. 14 Geo. 2, c. 17, did not apply to writs of right. *Mason, dem., Sadler, ten.*, 2 Scott, 510; 2 Bing. N. R. 323; 1 Hodges, 358. 1896

The tenant in a writ of right not being able to discover who the demandant was, obtained a judge's order directing the demandant's attorney to deliver to the tenant's attorney within four days the true name and address of his client. The court refused to allow the tenant to sign judgment of nonpros for disobedience of this order. *Dumaday, dem., Hughes, ten.*, 2 Scott, 377. 1896

*Semble*, that the proper course would be to make the order a rule of court, and apply for an attachment against the attorney. *Id.*

Until a writ of right has been returned, the court of C. P. has no jurisdiction in the cause. *Foot v. Sheriff*, 4 Dowl. P. C. 654; 2 Bing. N. R. 528. 1896

The court of C. P. has no power to set aside a writ of right, that being a writ out of Chancery. *Id.*

A writ of right issued on the 29th December, 1834, returnable on the 26th January, 1835. The return day was altered from term to term, until it was finally made returnable in Nov. 1835:—Held, that the resealing made it a new writ, and the right of action was barred by the 3 & 4 Will. 4, c. 27, s. 36. *Leigh v. Leigh*, 4 Dowl. P. C. 650; 2 Bing. N. R. 464. 1898

The demandant in a writ of right sued out a writ of summons with a wrong return day, and after having delivered the issue and deposited the writ with the sheriff, he caused the return to be altered and the writ to be resealed, and notice of the alteration was given to the tenant:—Held, that the writ was valid, it not being executed when the alteration was made. *Miller, dem., Miller, ten.*, 2 Scott, 186; 2 Bing. N. R. 66; 1 Hodges, 185. 1896

Where a knight summoned to try a writ of right did not appear, the court was willing to allow the parties in the cause to have it tried with three knights only, on their agreeing to waive the error which would appear on the record. *Carne v. Nicoll*, 3 Dowl. P. C. 115; 1 Scott, 68. 1896

*Semble*, that when one knight has made default, the court will not proceed to call over the names of the rest of the grant assize. *Id.*

In a writ of a right the tenant may withdraw a demurrer to the demandant's count. *Twynning, dem., Lowndes, ten.*, 2 Scott, 260; 2 Bing. N. R. 133; 1 Hodges, 196. 1896

On the trial of a writ of right, the demi-mark was tendered after the knights and several of the recognitors were sworn:—Held, in time. *Davis, dem., Selby, ten.*, 2 Scott, 74. 1896

### SALE.

#### 1. OF LANDS.

*Statute of Frauds.*—A short time before the expiration of a lease of a house, the landlord agreed with the tenant to purchase his fixtures at a valuation. The lease expired, and the tenant having quitted possession of the premises without severing the fixtures, sent the key to the landlord. The broker appointed by the latter afterwards appraised the fixtures at more than 10*l.*, and signed the valuation:—Held, that the plaintiff having, at the defendant's request, waived his right to remove the fixtures, the matter bargained for was not an interest in land within 24 Car. 2, c. 3, s. 4, and that the amount ascertained by the broker might be recovered in *indebitatus assumpsit* for fixtures and effects bargained and sold, without proving a note, &c. in writing. *Hallen v. Runder*, 3 Tyr. 959. 1901

*Semble*, that such note, &c. in writing was not required under section 17, respecting the "sale of goods," of 10*l.* value or upwards. *Id.*

Upon a sale of lands by auction, a written contract indorsed on the conditions of sale, is signed by the purchaser only: letters are subsequently written by the vendor to the purchaser's attorney,



distinctly referring to the contract, and insisting upon the completion of the purchase. This contract, and the letters together constitute a sufficient note or memorandum within the statute of frauds, to enable the vendee to sue the vendor for the expenses of investigating the title, upon such title being found defective. *Dobell v. Hutchinson*, 5 Nev. & M. 251; 3 Adol. & Ellis, 355; 1 Har. & Woll. 394. 1901

And where upon such contract, it does not appear upon the face of it, or by reference, of whom the property is purchased, letters written by persons in the character of vendors may be connected with the contract for the purpose of supplying this defect. *Id.*

The defendant purchased certain leasehold premises at an auction, and signed a memorandum of the purchase on the back of a paper containing the particular of the premises, the name of the owner, and the conditions of sale:—Held, that the defendant was bound by his contract, notwithstanding it was not signed by the vendor. *Laythorp v. Bryant*, 2 Bing. N. R. 735. 1901

A signature by an auctioneer's clerk, in the character of witness merely, to a contract for the sale of property, which is signed by the purchaser alone, is not a sufficient signing of an agreement or memorandum, or note thereof, by an agent of the seller, to satisfy the statute of frauds. *Gosbell v. Archer*, 4 Nev. & M. 485; 2 Adol. & Ellis, 500; 1 Har. & Woll. 31. 1901

Quære, whether it would have been sufficient, even if the document had shown upon the face of it that the clerk had knowledge of its contents? *Id.*

The receipt of deposit money, by an auctioneer's clerk, which was paid over to the seller, and a letter from the solicitors of the seller, admitting that no title could be made, and offering to relinquish the purchase, and pay the charges of investigating the title, do not amount to a ratification of an imperfect contract for the sale of property by auction, which was only signed by the purchaser and the auctioneer's clerk, in the character of witness, so as to satisfy the statute of frauds; for the receipt of the money is a transaction distinct from the power to contract, and is within the ordinary scope of the clerk's duty; and the letter, not containing any of the terms of the contract, cannot be connected with what had been previously done, without resorting to parol evidence. *Id.*

Upon the abandonment of an unwritten contract for the sale of land, on defect of title, the deposit money and money paid by the purchaser to the auctioneer for the purchaser's moiety of the auction duty may be recovered. *Id.*

But the expenses of investigating the title cannot be recovered without proof of a written contract binding on the vendor, nor interest upon the deposit. *Id.*

*Title.*—Sale of lands, construction of contract as to title. *Ripplinghall v. Lloyd*, 5 B. & Adol. 742; 2 Nev. & M. 410. 1906

The vendor of a leasehold interest is bound to show the lessor's title to demise, unless it be otherwise stipulated in the contract of sale. *Souter v. Drake*, 3 Nev. & M. 40; 5 B. & Adol. 992. 1907

No agreement to dispense with the production of the lessor's title will be implied from the circumstances of the term being nearly expired, the small value of the property, and the absence of any premium. *Id.*

By the conditions of sale of leasehold premises, the vendors stipulated that they should deliver an abstract of the lease and of subsequent title under which the leasehold lots were held, but should not produce the lessor's title. The defendant became the purchaser, and on investigating the title for himself, it appeared to be defective, and he refused to complete the purchase:—Held, that the purchaser was not precluded from inquiring aliunde into the lessor's title, by the stipulation that the vendors should not be obliged to produce it. *Shepherd v. Keatley*, 4 Tyr. 571; 1 C. M. & R. 117. 1907

Where the plaintiff stated in his declaration, that he was possessed of a certain lease of certain premises for a certain term of years, which he put up for sale, and which the defendant purchased; in an action for not completing the purchase, the plaintiff in proving his title must prove the execution of the original lease as well as of the mesne assignments to himself. *Laythorp v. Bryant*, 1 Scott, 327; 1 Bing. N. R. 421; 1 Hodges, 19. 1907

If the assignee of a term brings an action against a purchaser for not completing the purchase, quære, whether he is bound to prove the execution of the original lease? *Id.*

A stipulation to give such a title as shall be satisfactory to the purchaser, does not authorize the purchaser to make any other than the usual objections to the title. *Lord v. Stephens*, 1 Y. & Col. 222. 1907

Deterioration of the estate, arising from delay in completing the purchase, is not a ground for rescinding the contract, but may be the subject of an allowance to the purchaser. *Id.*

A purchaser who with full knowledge of certain objections to the title granted a lease of the property to a third person, was held to have waived the objections to the title. *Ex parte Sidebotham*, 2 Deac. & Chit. 818. 1907

*Other Things.*—[In an action for damages, brought by vendee against vendor, for not making a good title to an estate:—Held, that he is not entitled to recover for expenses incurred in negotiating the purchase or for having the estate surveyed 2. That he is entitled to recover charges incurred in investigating the title, including the searching for judgments, but not the costs of drawing and ingrossing a conveyance of the estate, the same having been prematurely prepared. 3. That the vendor having filed a bill in equity, against the vendee, for a specific performance of the contract, which was dismissed with costs, which



were accordingly taxed and paid to the vendee by the vendor:—Held, that in an action for damages, the vendee could not recover his extra costs, beyond the taxed costs, which were incurred by him in defending the suit in equity. 4. That the vendee could not recover costs incurred by him in investigating the title to the estate, after the filing the bill in equity. 5. That the vendee is entitled to be paid at the rate of five per cent. for interest on his deposit money, although the court of Chancery had ordered payment at the rate of four per cent. *Hodges v. Litchfield* (Earl), 1 Scott, 443; 1 Bing. N. R. 492; 1 *Hodges*, 40. 1913

The plaintiff, an attorney, agreed for a certain consideration to convey to the defendant an estate, which the latter had purchased, upon the terms, that the vendor and vendee should pay for the conveyance in equal proportions, and the plaintiff also agreed, that, if the vendor objected to pay any expenses, he, the plaintiff, would not apply to the defendant for any further remuneration. The conveyance was made by the plaintiff; the defendant agreed with the vendor, that, if the vendor would pay the whole expense of another transaction between himself and the defendant, he, the vendor, should not pay any of the expenses of the above conveyance:—Held, that so much of those expenses as the defendant (as between himself and the vendor) had been allowed to set off against his share of the liability on the other transaction, was money had and received to the plaintiff's use, and might be recovered by him, besides the consideration originally agreed upon for making the conveyance. *Noy v. Reynolds*, 1 Adol. & Ellis, 159. 1913

Where the vendor of an estate (the vendee having made a deposit in part payment of the purchase money) fails to make out a good title by the time stipulated, and the vendee dies, the personal representative of the vendee, and not his heir, is entitled to maintain an action to recover damages for loss of interest on the deposit, and for expenses incurred by the vendee in endeavoring to procure a title—the injury accruing to the personal estate. *Orme v. Broughton*, 4 M. & Scott, 417. 1913

An agent employed to sell an estate has not, as such, authority to receive payment. *Mynn v. Joliffe*, 1 M. & Rob. 326—*Littledale*. 1912

Interest paid by a purchaser upon money borrowed by him to complete the purchase, and kept idle, (pending an endeavor by the vendor to clear up the title), may be recovered as damages against the latter, in an action for breach of his contract. *Sherry v. Oke*, 3 Dowl. P. C. 349. 1913

Quere, whether, consistently with the statute of frauds, the court can entertain a bill for rectifying an executory contract for the sale of lands, and carrying it, when rectified, into execution, even where the mistake is admitted by the answer? *Attorney-General v. Sitwell*, 1 Y. & Col. 559. 1913

## II. OF GOODS.

*Statute of Frauds.*—A memorandum of a con-

tract for the sale and purchase of goods, to satisfy the statute of frauds, is good, though no mention be made of price, provided none be stipulated for; and where the contract is for the sale of goods to be manufactured, and alterations or additions are made in the progress of the work, such alterations or additions need not be made the subject of a distinct contract in writing. *Hoadley v. MacLaine*, 4 M. & Scott, 340. 1915

In all cases of executory contracts for the purchase and sale of goods, where the parties are silent as to price, the law will supply the want of an agreement as to price, by inferring that the parties intended to sell and to buy at a reasonable price. *Id.*

*Delivery and Acceptance.*—Sale of goods, delivering bill of lading of. In re *Westzinthus*, 2 Nev. & M. 644; 5 B. & Adol. 817. 1925

Part delivery by a carrier to the consignee is prima facie such a virtual delivery of the whole as puts an end to the consignor's right of stoppage in transitu. *Betts v. Gibbins*, 4 Nev. & M. 64; 2 Adol. & Ellis, 57. 1923

The plaintiff having purchased certain timber growing on the land of B., felled it, and afterwards sold it to one J. at a certain price per cubic foot, J. to be at liberty to convert the timber on the land. The trees were marked and measured by J., the number of cubic feet in each tree being ascertained, but the total contents were not summed up. Some of the trees were taken away by the purchaser:—Held, that the transfer of the whole was complete, and consequently, that the vendor had no right of lien for the unpaid price of the timber. *Tansley v. Turner*, 2 Scott, 238; 2 Bing. N. R. 151; 1 *Hodges*, 267. 1921

In an action for the price of a fire engine sold by the plaintiff to the defendant, the defendant pleaded the statute of frauds, and the plaintiff replied, that the defendant had accepted the goods. It appeared that the defendant, after the sale of the fire engine to him by the plaintiff, had taken a person to look at it, and had mentioned who were likely to want to buy it, and that to another person the defendant said, "I know that I am going to do it," and that to a third he said, "I have a concern in the engine."—Held, that it was for the jury to consider on this evidence whether the defendant had treated the fire engine as his, and dealt with it as such, for that, if so, the plaintiff was entitled to a verdict. *Bains v. Jevans*, 7 C. & P. 288—*Alderson*. 1920

*Contract.*—In an action by a party who has bargained with a broker for the sale of goods belonging to a third person, for assuming the right to sell without having authority; in order to make out a contract for the sale, it is not necessary, in point of law, that there should be bought and sold notes. *Pauli v. Simes*, 6 C. & P. 506—*Lyndhurst*. 1931

If a party receiving an invoice does not object to it on the ground of its brevity and incompleteness, the party furnishing it will be bound by it. *Id.*

If brokers alter an invoice of the owner of



goods from the name of one purchaser to another, and send it to the latter with a letter, saying that, to simplify the transaction, they had transferred the seller's invoice to him, such invoice will amount to a contract of sale. *Id.*

In an action by the vendee on a contract made through a broker, it is sufficient for the vendee to produce the bought note, handed to him by the broker, and to show the employment of the latter by the vendor. If the sold note vary from the bought note, it lies on the vendee to prove that variance by producing the sold note. *Hawes v. Forster*, 1 M. & Rob. 368—Denman. 1931

When a contract is made through a broker, the bought and sold notes delivered to the parties constitute the contract, not the entry made by the broker in his book, especially when, by the usage of trade, the bought and sold notes are looked upon as the contract. *Id.*

An agreement was made, by which the plaintiff agreed to buy, and the defendant to sell, all the naphtha he might make during two years, say from 1000 to 1200 gallons per month. A declaration on this agreement contained no averment of any construction given by mercantile usage to the word "say;" and it was held on demurrer to the plea, that it was no breach not to have made any, there being no allegation that the neglect or refusal to do so was in fraud of the agreement. *Gwillim v. Daniel*, 2 C. M. & R. 61; 1 Gale, 143. 1931

If a party be induced to purchase an article by the fraudulent misrepresentations of the seller of it, and, after discovering the fraud, continues to deal in the article as his own, he cannot recover back the money from the seller. *Campbell v. Fleming*, Nev. & M. 834; 1 Adol. & Ellis, 40. 1932

The right to repudiate the contract is not afterwards revived by the discovery of another incident in the same fraud—Per Denman, C. J., *Littledale and Patteson, Js.* *Id.*

Where a contract, that is silent as to price, is executed by the acceptance of the goods by the defendant, the law will supply the want of an agreement as to price, by inferring that the parties must have intended a reasonable price. But quere whether the same inference arises where the contract is executory only, and the goods still remain in the possession or under the control of the seller. *Acebal v. Levy*, 4 M. & Scott, 217. 1933

Payment of price. *Elliott v. Pybus*, 4 M. & Scott, 389. 1933

*Vendor's Lien.*—Vendor's lien for price. *Dixon v. Yates*, 5 B. & Adol. 313. 1936

A purchaser of goods accepted a bill for the price, which the vendor indorsed over; and the indorsee recovered judgment on the bill against the purchaser, but did not take out execution; afterwards the vendor took up the bill and received a mortgage from the purchaser, from which, however, there were no proceeds.—Held, that the vendor was not, in point of law, paid for

the goods. *Tarleton v. Allhusen*, 2 Adol. & Ellis, 32. 1936

To assumpsit for goods sold, &c., the defendant pleaded as to 9*l.*, part of the debt, that he, at the plaintiff's request, put his name as acceptor to a stamped bill of exchange for 20*l.*, (there being no drawer's name to it), partly for the debt, and partly for his accommodation, and delivered the same to the plaintiff, who accepted it in payment of the debt, and that the bill had not become due at the time the action was commenced. The plaintiff replied, that the bill then remained in his hands unnegotiated and unpaid, and without any drawer's name put to it:—Held, that this replication was no answer to the plea, and that the plea was good. *Simon v. Lloyd*, 3 Dowl. P. C. 813. 1936

Quere, whether it would have been held good if it had been demurred to? *Id.*

*Proceedings.*—Quere, whether the vendor of goods is precluded from maintaining a count for goods bargained and sold, where the goods have been resold by him on the vendee's refusal to accept them? *Acebal v. Levy*, 4 M. & Scott, 217. 1936

The plaintiffs in London entered into the following contract with the defendants:—"October 11, 1833. Sold to G. & Son for account of Messrs. A. & Co., 200 firkins of M. & Co.'s Sligo butter, at 7*l.* 6*d.* per cwt. free on board. Payment, bill at two months from the date of landing. To be shipped this month," &c. The butters were not shipped until the following month, but the defendants had waived that condition, and they accepted the invoice and the bill of lading, which was indorsed to them. The butters were afterwards lost on the voyage:—Held, that an action for goods bargained and sold was maintainable to recover the price of the butters. *Alexander v. Gardner*, 1 Scott, 281, 630; 1 Bing. N.R. 671; 3 Dowl. P. C. 146; 1 Hodges, 147. 1936

Held also, that the landing of the goods was not a condition precedent to the claim of payment. *Id.*

Plaintiff declared in debt for goods sold, to be paid for on request. Defendant pleaded, that he never was indebted as was in the declaration alleged:—Held, that (since the new rules of pleading), he could not under this plea give evidence that the goods were sold on a credit not yet expired. *Edmunds v. Harris*, 6 C. & P. 547; 2 Adol. & Ellis, 414; S. P. Taylor v. Hilary, 3 Dowl. P. C. 461. 1936

Semble, that under the general issue evidence is admissible that the period of credit was not expired when the action was commenced. *Knapp v. Harden*, 1 Gale, 47. 1936

Goods were sold upon the following terms:—"7½ per cent. discount, bill at three months, 10 per cent. discount, cash in fourteen days:—Held, that the vendors could not sue in indebitatus assumpsit for goods sold and delivered within the fourteen days, even if the sale had been effected by fraud on the part of the vendee, so that trover



might have been maintained for the goods. *Sturt v. Smith*, 1 C. M. & R. 312; 4 Tyr. 1019. 1936

Under the general issue to an action for goods sold and delivered, the defendant may prove (even since the new rules) that the goods delivered were not such as were contracted for, although there was a special contract to pay for the goods at a certain price; and the plaintiff can then recover only on the quantum meruit. *Cousens v. Paddon*, 2 C. M. & R. 547; 4 Dowl. P. C. 488; 5 Tyr. 535; 1 Gale, 305; S. P. contra, *Roffey v. Smith*, 6 C. & P. 502. 1936

*Per Parke, B.*—The fact that the goods, &c. supplied have been retained without complaint by the defendant, is not conclusive evidence that they were of the quality contracted for, but it affords cogent evidence for a jury to draw that inference. *Id.*

### III. STOPPAGE IN TRANSITU.

A., residing in Guernsey, employed the defendant as his agent at Southampton to ship all goods which arrived there directed to A. The defendant paid the carriage and the wharfage dues, and selected the ship by which he forwarded the goods:—Held, that the transit of the goods was not ended at Southampton, and that the vendor might stop them after they had been put on board a vessel for Guernsey. *Nicholls v. Le Feuvre*, 2 Bing. N. R. 81; 1 Hodges, 255; S. C. nom. *Slater v. Le Feuvre*, 2 Scott, 146; 7 C. & P. 91. 1939

The unpaid vendor of goods remaining in his own warehouse rent free may stop in transitu, although he has given the vendee a delivery order, under which part of the goods have been removed. *Townley v. Crump*, 5 Nev. & M. 606; 1 Har. & Woll. 564. 1939

*Sale by Auction.*—Upon a sale of houses by auction, according to certain particulars and conditions of sale, one of which was for the delivery of an abstract of title within ten days, and another for the payment of a deposit to the auctioneer, the purchaser of two houses paid a deposit, signed an agreement as purchaser, and obtained a receipt from the auctioneer for the money paid as for a deposit on a sale by auction of the premises described in the particulars and conditions of sale. The abstract of title not being delivered, the purchaser brought an action against the auctioneer for the recovery of the deposit:—Held, that the production of the receipt, and of the conditions of sale, without producing the written contract signed by the purchaser, was insufficient. *Curtis v. Greated*, 3 Nev. & M. 449; 1 Adol. & Ellis, 167. 1945

Particulars of the sale by auction of a public house, describing the premises as being held for an unexpired term of years, at a rent of 55*l.*, and as comprising, amongst other things, a yard. By the conditions, the contract was to be completed on the 25th June, and any error or mistake in the description of the property was to be matter of compensation, to be fixed by arbitration. In

fact, the yard was not held under the lease, but under a tenancy from year to year, at a further rent of 10*l.* The vendors, however, procured a lease for the same term of the yard, at an additional rent of 8*l.*, dated on 23rd June, but not in fact executed until long after the 25th June. The yard was essential to the enjoyment of the premises:—Held, that this defect was not matter of compensation under the terms of the condition, but such a defect in title as justified the vendee in vacating the contract. *Dobell v. Hutchinson*, 5 Nev. & M. 251; 3 Adol. & Ellis, 355; 1 Har. & Woll. 394. 1941

The particulars of sale of certain leasehold premises in Covent-garden stated, that, under the original lease, "no offensive trade was to be carried on, and that the premises could not be let to a coffeehouse-keeper or working hatter." The original lease, when produced, appeared to prohibit the business of brewer, baker, sugar-baker, vintner, victualler, butcher, tripe seller, poulterer, fishmonger, cheese seller, fruiterer, herb seller, coffeehouse-keeper, working hatter, and many others, and the sale of potatoes, or any provisions:—Held, that there was such a material discrepancy between the particulars and the lease, as to entitle a purchaser to rescind his contract. *Flight v. Booth*, 1 Scott, 190; 1 Bing. N. R. 370. 1941

The plaintiff, who was an auctioneer, sold to the defendant by auction certain premises, and the defendant paid as a deposit a check for 100*l.* There being a wilful misrepresentation in the description of the premises, the defendant refused to pay the check, upon which the plaintiff brought an action against him on the check. The defendant having pleaded that there was no consideration for making the check:—Held, after verdict for the defendant, that evidence of the wilful misrepresentation was admissible under the plea, but that such plea would have been bad on special demurrer. *Mills v. Oddy*, 2 C. M. & R. 103; 3 Dowl. P. C. 722; 5 Tyr. 571; 1 Gale, 92. 1941

If a party has given a bill of exchange or check for the amount of a deposit on a sale by auction, any ground on which the party could recover back his deposit, if paid in money, will be a good ground of defence in an action upon the bill or check. *Mills v. Oddy*, 6 C. & P. 728. —Parke. 1942

Certain rules were posted up at a repository for horses, regulating sales by private contract there:—Held, that parties contracting at the repository having notice of the rules, impliedly adopted the terms of the rule. *Bywater v. Richardson*, 3 Nev. & M. 748; 1 Adol. & Ellis, 508. 1941

In an action of assumpsit for not completing the purchase of a house, the defendant cannot, under the general issue, set up a defence that the sale was a sale by auction, and void on the ground of puffing, as this must be specially pleaded. *Iceby v. Grew*, 6 C. & P. 671—Denman. 1942

An auctioneer put up for sale an estate in three lots. The whole estate was subject to a



mortgage of 22,000*l.*; the mortgagee did not consent to the sale. By the conditions of sale the mortgagee was to be appointed, and the vendor undertook to indemnify the purchaser against the payment of more than the appointed share. A party purchased for 15,500*l.* one lot, upon which the apportionment was 10,500*l.*:—Held, that a sale was in substance a sale of an equity of redemption for 5,300*l.*, and that, therefore, upon that sum only was the auction duty payable. *Rex v. Sedgwick*, 1 C. M. & R. 603; 1 Tyr. & G. 94; 1 Gale, 283. 1942

### SAVINGS' BANK.

By the rules of a savings' bank, deposited with the clerk of the peace pursuant to 57 Geo. 3, c. 130, s. 2, entries of deposits are to be made in a book kept by the bank for that purpose, and in a duplicate account book to be kept by the party making the deposit, which duplicate is to be a voucher for the party producing it, and a receipt for the bank when handed over to them. A deposited in the name of B., and afterwards, without B.'s authority, received back the amount and delivered up the duplicate account book:—Held, that B. still continued to be a depositor. *Rex v. Cheadle Savings' Bank (Trustees)*, 3 Nev. & M. 418. 1946

A party is not entitled to a mandamus to compel a savings' bank to refer to arbitration, under 9 Geo. 4, c. 92, s. 45, unless he show himself to the court to be at the time a depositor. *Id.*

The directors of a savings' bank are not compellable to appoint an arbitrator under stat. 9 Geo. 4, c. 92, s. 45, for the purpose of deciding upon the claim of persons professing to apply on behalf of a body of depositors, if it is a matter of dispute whether the applicants be entitled to represent the body. *Rex v. Witham Savings' Bank*, 3 Nev. & M. 416; 1 Adol. & Ellis, 321. 1946

### SCHOOLMASTER.

The master of an ancient endowed school is entitled to the school-house, unless he has been in due manner removed from his office by those having authority to do so. *Doe d. Coyle v. Cole*, 6 C. & P. 359—Patteson. 1947

The neglecting of the scholars would be a good ground of removal. *Id.*

The vicar of the parish cannot recover the school-house by ejectment, although it may have been built on what is evidently part of the churchyard, if it appear that the house was built on the site of a very old school-house, the site of which might have been granted before the disabling statutes; but if a part of the house is built on ground taken from the churchyard recently, the vicar may remove that part. *Id.*

Where the master of a school refuses to deliver up the person of a boy to his parent, on account of a quarter's schooling not having been paid according to contract, but there is no evidence that the boy was present at the refusal, or knew that his mother had wished to take him home,

and been refused, or was in any way restrained, though kept at school during the Christmas fortnight, an action for false imprisonment cannot be maintained by him. *Herring v. Boyle*, 1 C. M. & R. 377; 6 C. & P. 496; 4 Tyr. 801. 1947

But, *semble*, his mother might have maintained an action in a different form. *Id.*

### SCIRE FACIAS.

Where a sci. fa. is unnecessarily sued out, but the defendant's attorney, on his behalf, proposes terms of compromise, on which the party for a time acts, the defendant cannot afterwards object to pay the costs of the sci. fa. *Brewster v. Meaks*, 2 Dowl. P. C. 612. 1951

An application for a sci. fa., upon a judgment ten years old, will not be granted upon an affidavit of the plaintiff's present attorney, which merely states that the debt and costs are still unpaid; it must also be shown that he was the attorney when the judgment was obtained, or there must be an additional affidavit of the attorney then employed, or of the plaintiff himself. *Norfolk (Duke) v. Spencer or Leicester*, 4 Dowl. P. C. 746; 1 Mees. & Wels. 204. 1948

Upon a motion to revive a judgment by scire facias, the validity of the judgment cannot be impeached for the purpose of opposing that motion, but a separate application must be made to set aside the judgment. *Thomas v. Williams*, 3 Dowl. P. C. 655. 1948

If a plaintiff has judgment with a stay of execution, by agreement, for any period, he may, at any time within a year and a day after the expiration of such period, take out execution without a scire facias to revive the judgment. *Hiscocks v. Kemp*, 5 Nev. & M. 113; 1 Har. & Woll. 384. 1948

If a plaintiff sues a second ca. sa. on one judgment, and in the declaration on such second sci. fa. he misrecites the proceedings on the prior one, he may abandon that, amend, and proceed on the original judgment. *Klos v. Dodd*, 4 Dowl. P. C. 67. 1950

The rule for quashing a sci. fa. on the application of the plaintiff, after appearance and before plea, is nisi in the first instance, although on the terms of paying costs. *Ade v. Stubbs*, 4 Dowl. P. C. 282; 1 Har. & Woll. 520. 1951

If there is an objection to proceedings in sci. fa., on the ground that the writ had not lain a sufficient number of days in the office, the defendant should not apply to set aside the writ, but the proceedings thereon. *Williams v. Brown*, 2 Dowl. P. C. 749. 1951

A defendant cannot plead any matter to a sci. fa. on a judgment which he might have pleaded to the original action. *Baylis v. Hayward*, 5 Nev. & M. 613. 1950

And where, to a sci. fa. on a judgment, the defendant pleaded the bankruptcy of the plaintiff, but it did not distinctly and affirmatively appear that the bankruptcy had occurred since



the judgment in the original action, the plea was held bad on special demurrer. *Id.*

Quære, whether it would be good on general demurrer? *Id.*

It is not necessary for a party in a *sci. fa.* to return the demurrer book; and therefore, a judgment signed for not returning it, is irregular. *Baylis v. Hayward*, 3 Dowl. P. C. 533. 1951

### SEA.

A custom for the inhabitant landholders of a parish to dig or take from closes adjoining the sea shore, sand which had been from time to time drifted from the shore, and carried by the wind from the shore into and deposited upon such closes, is bad. First, because the sand when deposited becomes a part of the soil of the closes, and therefore the custom is for taking a profit in alieno solo; secondly, for uncertainty, it being impossible to distinguish between the original soil of the closes, and the sand from all time drifted upon it. *Blewitt v. Tregonning*, 5 Nev. & M. 234; 1 Har. & Woll. 431. 1952

Quære, whether such a right might be claimed by prescription? *Id.*

By letters patent King Charles the First granted to the mayor and burgesses of Lyme Regis the borough or town so called, and also the pier, quay, or cob, with all liberties and profits, &c. belonging to the same, and remitted also a rent of twenty-seven marks anciently payable by the corporation to the King; and the King willed that the said mayor and burgesses, and their successors, all and singular the buildings, banks, sea shores, &c. within the said borough or thereto belonging, or situate between the same and the sea; and also the said pier, &c., at their own costs and charges, thenceforth for ever should repair, maintain, and support, as often as it should be necessary:—Held, that the corporation having accepted the charter, became bound to repair the buildings, banks, sea-shores, &c.; and that they were liable in an action on the case, at the suit of an individual, for an injury resulting from their neglect to discharge this duty. *Lyme Regis (Mayor) v. Henley*, 1 Scott, 29; 1 Bing. N. R. 222. 1953

If Spanish dollars, more than 100 years old, be found in the sands of a sea-shore, it will be presumed that they came there by the loss of some vessel which was wrecked, although no part of any vessel be found near them. *Talbot v. Lewis*, 6 C. & P. 603—Parke. 1953

### SESSIONS.

*Generally.*—A court of quarter sessions cannot be adjourned by the crier without the presence of the justices. *Rex v. Middlesex (Justices)*, 3 Nev. & M. 110; 5 B. & Adol. 1113. 1955

A party found guilty by a jury at a sessions irregularly holden, is entitled to have the record of the proceedings correctly made up according to

the fact; and this court will grant a mandamus to the justices to make up such record. *Id.*

The court of quarter sessions, on a case sent by them for the opinion of the court of K. B., should state the conclusion of fact which they draw from the evidence, and not the evidence itself. *Rex v. St. Cuthbert, Wells*, 3 Nev. & M. 100. 1956

Under the 5 Geo. 4, c. 83, s. 14, (Vagrant Act), a subsequent court of quarter sessions have power to give effect to a judgment pronounced at a previous sessions of the same court, by issuing process of execution upon a conviction as awarded at such previous sessions. *Rex v. Warwickshire, (Justices)*, 4 Nev. & M. 370; 2 Adol. & Ellis, 768; 1 Har. & Woll. 18. 1964

A mandamus to the court of quarter sessions will go, commanding them to issue such process of execution where there has been no delay in making the application, or the delay has been satisfactorily accounted for. *Id.*

*Special Cases.*—Where fraud is not expressly found by the sessions, the court of K. B. cannot infer it from any state of facts. *Rex v. Llanfihangel v. Abercrombie*, 4 Nev. & M. 355. 1956

But in a case where the facts were such as to render it almost certain that the decision of the justices at sessions must have proceeded on the ground of fraud, the court sent back the case to be amended. *Id.*

Special cases from the sessions should be drawn by counsel. *Rex v. Woolpit*, 5 Nev. & M. 526; 1 Har. & Woll. 483. 1956

The court of King's Bench will entertain no objection to an order of sessions which upon the face of it does not appear to be necessarily bad, unless the particular facts are brought before the court by a special case. *Rex v. Cottingham*, 4 Nev. & M. 215; 2 Adol. & Ellis, 250. 1956

An order of removal, regular on the face of it, was, on appeal, quashed by order of sessions "for informality." No case having been stated, and the two orders being brought up by certiorari, this court affirmed the order of sessions. The court of quarter sessions, in the same order, awarded costs to the appellant:—Held, that they had power to do so, under stat. 8 & 9 Will. 3, c. 30, s. 3, though the order appeared to be quashed for informality only. *Id.*

Where upon a special case, it appeared that evidence had been received by the court of quarter sessions, which would not be admissible without a previous inquiry, not stated to have been made, the court of King's Bench refused to presume that such inquiry had been made. *Rex v. Rawden*, 4 Nev. & M. 97; 2 Adol. & Ellis, 156. 1956

The court also refused to send the case back to the sessions to be restated, in order that the omission of such statement might be supplied. *Id.*

Where it has been referred to the chairman at sessions, on an appeal, to state a case, and a case has afterwards, on certiorari, been returned to this



court by the clerk of the peace, purporting to be signed by the chairman, this court will not send it back to be restated, or quash the certiorari, on the ground of the chairman having said that he did not recollect signing the case, and upon a suggestion by the attorney for one of the litigating parties, in an affidavit, that such case does not agree with the facts proved, and that deponent believes the chairman did not settle the case. *Rex v. Matlock*, 5 B. & Adol. 883. 1956

A case sent back to the sessions to be restated, must be reheard; and the sessions may receive further evidence, and make a new order on such rehearing. *Rex v. Bloxam*, 1 Adol. & Ellis, 386; 3 Nev. & M. 385. 1956

The certiorari by which the original order was removed, does not operate to remove the subsequent one. The party wishing to contest such order must obtain a certiorari, and remove it. *Id.*

*Appeal.*—Where by the practice of the sessions eight days' notice of appeal was required at the first sessions, against an order of removal, but fourteen days' notice of an adjourned appeal, and an appeal was dismissed for want of sufficient notice for the adjourned sessions, the court refused to interfere with the practice. *Rex v. Monmouthshire (Justices)*, 3 Dowl. P. C. 306; 1 Har. & Woll. 111. 1957

Where an appeal to the quarter sessions is given by a statute against any conviction under it, to any person aggrieved by such conviction, provided he gave to the respondent a notice in writing of such appeal, and of the cause and matter thereof, and the court of quarter sessions are directed to hear and determine the matter of the appeal, that court can adjudicate only on the matter stated in the notice. *Rex v. Boulton*, 6 Nev. & M. 26. 1957

And therefore where, in the appellant's notice, grounds of appeal relating to the merits only are stated, the sessions cannot quash the conviction for defects of form. *Id.*

The court will not grant a mandamus commanding the justices in sessions to try an appeal dismissed for want of notice of trial, where the court of quarter sessions has granted a case upon the question whether it had been rightly dismissed, which has been abandoned by the party applying for the mandamus. *Rex v. Yorkshire W. R. (Justices)*, 3 Nev. & M. 757; 5 B. & Adol. 677. 1957

If a regular notice of appeal has been given for one sessions, and the appeal be adjourned at the instance of the appellants, after hearing counsel on both sides, it is not necessary to give a strictly regular notice of trial for the following sessions. *Rex v. Gloucestershire (Justices)*, 3 Dowl. P. C. 208. 1957

When the quarter sessions have improperly decided against an appeal on a preliminary objection, the court of K. B. will grant a mandamus to them to enter continuances and hear the appeal; but where an objection has been made during the trial of an appeal, to the reception of the

particular piece of evidence, and the sessions have held such objection valid, in consequence of which the appeal has been dismissed, this court will not interfere, unless the sessions send up a case. *Rex v. Frieston*, 5 B. & Adol. 597. 1957

### SET-OFF.

A debt due from wife *dum sola*, cannot be set off against a note given to the wife after marriage, if the husband elect to treat the note as his several property. *Borough v. Moss*, 5 M. & R. 286. 1960

As where he sues upon it in his own name. *Id.*

Or indorses it over to a third person. *Id.*

And it is immaterial that the wife joins in the indorsement. *Id.*

Whether the debt could have been set off in an action brought on the note by the husband and wife, *quære*? *Id.*

No set-off of judgments will be allowed, even though they arise out of the same award, without satisfying the attorney's lien. *Domett v. Helyer*, 2 Dowl. P. C. 540. 1963

Where two actions were brought by and against the same parties, in the first of which the defendant obtained an award in his favor, and in the other the plaintiff obtained a verdict with damages, the court refused to stay proceedings in the first action until a motion for a new trial in the other was disposed of, in order that the damages and costs in the action might be set off against the costs of the other. *Johnson v. Lakeman*, 2 Dowl. P. C. 646. 1962

By articles of agreement for altering and repairing a warehouse for a fixed price, it was stipulated, that in the event of the work not being completed in three months, the builder should forfeit and pay to the person with whom he contracted to do the work, 5*l.* weekly; and every week such penalty to be deducted from the amount which might remain due on the completion of the work:—Held, in an action brought for extra work, that the employer was entitled, after having paid the contract price, to set off the penalty against the extra work; and that he had a double remedy, either to deduct it or recover it. *Duckworth v. Alison*, 1 Mees. & Wels. 412. 1965

A defendant can set off those debts only which were due to him from the plaintiff at the time of action brought, as well as at the time of plea pleaded. *Braithwaite v. Coleman*, 4 Nev. & M. 654. 1965

A plea of a set-off on a bill of exchange, payable to the order of the defendant, and accepted by the plaintiff, is not supported by evidence of a bill answering to the description in the plea, which at the time of action brought was in the hands of a third party, although before plea pleaded, the bill had got back to the hands of the defendant. *Id.*

A rule for staying proceedings in a second ejectment until the costs of the first have been paid, will not be enlarged, in order to set off the costs claimed against any to which the lessors of the plaintiff may become entitled on the trial of the



second ejectment. *Doe d. Maslin v. Packer*, 4 Tyr. 144; *S. C. nom. Doe d. Martin v. Pucker*, 2 C. & M. 457. 1966

Costs in Chancery cannot be set-off against costs on a rule of K. B. *Wenham v. Fowle*, 2 Dowl. P. C. 444. 1966

The court will not order costs due from one party to another, to be set off against a sum obtained from the former by the latter to obtain his liberation from an illegal arrest, but ordered by the court to be repaid. *Pitt v. Coombs*, 1 Har. & Woll. 13. 1966

The 93rd rule of H. T. 2 Will. 4, does not prohibit the setting-off mutual claims for costs between the parties in the same suit. In an action against three defendants, a verdict was found against one and in favor of the other two:—Held, that the costs of the successful defendants might be deducted from the amount of damages and costs payable to the plaintiff by the other defendant, without regard to the lien of the plaintiff's attorney. *George v. Elston*, 1 Scott, 518; 3 Dowl. P. C. 419; 1 Bing. N. R. 513; 1 Hodges, 63. 1966

The costs of a cause were allowed to be set-off against a sum due from the defendant to the plaintiff on another account, but subject to the lien of the plaintiff's attorney: the cause and all matters in difference having been referred, and the arbitrator having ordered a verdict to be entered for the defendant, but found that the defendant was indebted to the plaintiff on other accounts. *Caddell v. Smart*, 4 Dowl. P. C. 760. 1966

The court refused to allow the costs of a case in another court, in which the plaintiff had been nonsuited, to be set-off against costs imposed by way of penalty on the attorney for the defendant in this cause, for which costs an attachment had issued. *Dicas v. Warne*, 1 Scott, 584. 1966

Semble, that two pleas of set-off may be pleaded to two several counts of a declaration; or, if demurrable, that it must be on the ground of misjoinder. *Gibson or Gilson v. Bell*, 2 Scott, 721; 1 Hodges, 136. 1967

A plea of set-off of a certain sum against a larger sum claimed in the declaration, which sum offered to be set-off the defendant alleges to be equal to the damages sustained by the plaintiff by reason of their non-performance of the promises mentioned in the declaration, was held bad on special demurrer. *Moe v. Tomlinson*, 5 Nev. & M. 624. 1967

A plea of set-off of a particular amount, is not supported by proof of a set-off of a less amount; but the plea may be taken distributively, and found, as to the part not proved, for the plaintiff; and, as to the part proved, for the defendant; and if, upon the finding on a plea of *nunquam indebitatus*, it appears on the record that the plaintiff is not entitled to recover a larger sum than that which is covered by the proof given under the defendant's plea, the defendant is entitled to judgment on the whole record. *Cousins v. Paddon*, 2 C. M. & R. 547; 4 Dowl. P. C. 488; 5 Tyr. 535; 1 Gale, 305. 1967

A defendant pleading payment and a set-off, who is unable to prove the full amount mentioned in each of the pleas, but proves sufficient to form an aggregate equal to the plaintiff's demand, will be entitled to have judgment on the whole record. *Id.*

Where any plea is pleaded besides the general issue, a notice of set-off will not enable the defendant to give in evidence the matters of his set-off under 2 Geo. 2, c. 22, s. 13, without pleading it. *Duncan v. Grant*, 1 C. M. & R. 383; 2 Dowl. P. C. 683; 4 Tyr. 818. 1967

A defendant is not entitled to give evidence of a set-off, under a notice of set-off delivered with the plea of *nunquam indebitatus*, since the rules of H. T. 4 Will. 4; and the judges were not restrained by the proviso in the 3 & 4 Will. 4, c. 42, s. 1, from making the rule of H. T. 4 Will. 4, requiring that, in all cases a set-off shall be pleaded. *Graham v. Partridge*, 1 Mees. & Wels. 395. 1967

If the plaintiff replies *nunquam indebitatus* to a plea of set-off, and the defendant proves his plea, the plaintiff will not be at liberty under his replication to show that the sum proved, or even any part, has been paid. *Brown v. Daubeny*, 4 Dowl. P. C. 565. 1968

## SEWERS.

A local act provided that no ditch, &c. should be arched over, &c. without the consent of the trustees under the act, under a penalty of 50*l.*:—Held, that a surveyor, who, after a sewer had been commenced, directed it to be continued, (without the consent of the trustees), had incurred the penalty. *Woodward v. Cotton*, 1 C. M. & R. 44; 6 C. & P. 489; 4 Tyr. 689. 1969

The arching over an old ditch of smaller dimensions than were mentioned in a consent to the making of a sewer in writing, by certain trustees under an act of parliament, was held to be a breach of a section, providing that no ditch, drain, or other water-course should be narrowed, filled up, altered, covered in, or arched over, without the consent of such trustees, nor in any other manner than should be expressed in such consent. *Id.*

All persons whose property derives any advantage from the works of the commissioners of sewers, may be assessed to the sewer's rate in respect of that property. *Soady v. Wilson*, 4 Nev. & M. 777; 3 Adol. & Ellis, 248; 1 Har. & Woll. 256. 1969

And property drained by sewers, and drains originally made and always repaired by persons independent of the commissioners of sewers, and deriving no immediate benefit from the works of such commissioners, may be assessed by reason of the general benefit and advantage resulting from such property becoming thereby accessible, and of its approaching and neighboring public ways being properly drained and cleaned. *Id.*

Held, that apartments in Somerset House, appropriated to the office of the commissioners for auditing the public accounts, are rateable by the commissioners of sewers for the city and liberty



of Westminster and parts of Middlesex, although Somerset House is declared by act of parliament to be vested in the crown, free from all incumbrances, for the purpose of establishing within the same that amongst other public offices. *Id.*

By 52 Geo. 3, c. 48, s. 7, all persons are liable to be rated to the sewer's rate, as occupiers of premises rateable thereto, who are de facto rated in respect of such premises to the poor-rates of the parishes to which that act applies. *Id.*

If commissioners of sewers have jurisdiction to rate a particular district, the court will not minutely inquire into the way in which they have exercised that jurisdiction. *Id.*

### SHERIFF.

*Liability for Acts of Officer.*—Declarations made by an officer whilst in possession of goods under a *fi. fa.*, after the return of the *fi. fa.*, are evidence against the sheriff; and no new warrant is necessary after a writ of venditioni exponas to connect the officer with the sheriff. *Jacobs v. Humphrey*, 2 C. & M. 413; 4 Tyr. 272. 1972

By the practice of a borough court, writs of *ca. sa.* are directed to A. B., serjeant-at-mace of the said borough, and also to C. D. and E. F. (naming one or more), persons who are appointed by the serjeant to execute the process of the court, and who give an indemnity to him. No warrant is ever made out on those writs. The serjeant dismisses the officer at his pleasure, and takes the fees for the execution of the process. If it is wished that process should be executed by any body, not being of the persons so appointed, it is done by consent of the serjeant on application to him, and in such case a special indemnity against the acts of such person is given to the serjeant. The serjeant is always ruled to return these writs, and he is served personally with the rule; he does not return them himself, but the officers return them in their own names. The attachment for not returning, &c. issues against the serjeant, and bail-bonds are always taken out in his name:—Held, that the officers were the officers of the serjeant-at-mace, and that he was responsible for their default in the execution of the process. *Morris v. Parkinson*, 1 C. M. & R. 163; 4 Tyr. 700. 1972

In an action against the plaintiff for the extortion of his officer, the officer undertook, by a written memorandum, in consideration of a sum of money being accepted and proceedings stayed, with costs, in seven days, and, on default thereof, that the plea should be withdrawn, and that the plaintiff should have judgment. The undertaking not being complied with, the court refused a rule nisi to compel the officer to perform his undertaking, he not being an officer of the court. *Brown v. Gerard*, 1 C. M. & R. 595; 3 Dowl. P. C. 217; 5 Tyr. 220. 1972

A sheriff's officer proved that he had seized goods under a warrant on a *fi. fa.*, which was brought to him by his man, who told him that he had obtained it from the sheriff's office. The officer also stated, that he knew the handwriting

on the warrant, which he had subsequently lost:—Held, that this was sufficient evidence to prove that the officer acted under the authority of the sheriff. *Moon v. Raphael*, 2 Scott, 489; 7 C. & P. 115; 2 Bing. N. R. 310; 1 Hodges, 289. 1972

In trespass against bailiff and sheriff, for taking plaintiff on a charge of felony to a police station, and thence to a prison, the sheriff, after pleading the general issue, justified the taking from the police station to the prison under a *ca. sa.* The plaintiff admitting the writ, and the delivery of the warrant to the bailiff, replied *de injuria absque residuo causa*:—Held, that under this replication he could not give evidence to involve the sheriff in the misconduct of the bailiff, committed before the plaintiff arrived at the police station: in order to the admission of such evidence, the circumstances should have been replied specially. *Price v. Peek*, 1 Scott, 205; 1 Bing. N. R. 380. 1972

The sheriff is a constituent part of the county court, and acts as such in issuing process of execution, and is not liable for the wrongful act of the bailiff done in the execution of such process. *Tunno v. Morris*, 2 C. M. & R. 298; 4 Dowl. P. C. 224; 1 Gale, 259. 1972

*Crown Process.*—Where a convict is sentenced to death, the proper officer, in default of express order to do execution, is the officer who has the legal custody of such convict. *Rex v. Antrobus*, 6 C. & P. 784; 2 Adol. & Ellis, 798; 4 Nev. & M. 565; 1 Har. & Woll. 96. 1974

Supposing that the court may authorize another officer to execute, such authority must be given by express order directing the second officer to execute, and sufficiently explicit for the first officer to be bound by it to surrender the custody to the second. *Id.*

It is not equivalent to such an order, if the clerk of assize, by direction of the judge who has tried and sentenced the convict, shows to the sheriff of the county in which the offence was committed, not having the custody, a calendar signed by the judge, with a minute of the sentence in the margin, at the same time delivering him a copy. *Id.*

Although the sheriff acknowledge the receipt of the calendar, and at the same time refuse to execute. *Id.*

Especially where the officer having the legal custody has previously received an order of the judge, directing that a third officer shall do execution. *Id.*

A sheriff is not bound to do execution on a criminal convicted in his county, if such criminal is not in his custody; unless the court by a special mandate direct the party who has the criminal in custody to deliver him to the sheriff, and order the sheriff to receive the prisoner, and execute him. *Id.*

The sheriffs of the county for the city of Chester have for many years executed all criminals sentenced to death for offences committed in Cheshire, by order of the court trying the prisoners. Supposing them to have been bound by



custom to execute as above, *quære*, whether this custom was done away by stat. 11 Geo. 4 & 1 Will. 4, c. 70? (But now see stat. 5 & 6 Will. 4, c. 1). *Id.*

On the trial of an information against a sheriff of a county, for not executing a convict sentenced to death, a witness cannot be asked whether he has heard that it was the custom for the sheriff to be exempt from performing, or for another officer to perform the duty in that particular county. Although it has been proved that such other officer has, in fact (under orders of the court), always performed it within living memory. *Id.*

For the purpose of showing the liability of such sheriff to execute or gibbet criminals when commanded, orders made upon former sheriffs of the same county requiring them to perform the said duties, and examined copies, from the Exchequer, of allowances by chancellors of the Exchequer, of their cravings for the expenses of so doing may be given in evidence, and that without first giving other proofs of the judgments passed upon such criminals. *Id.*

*Quære*, whether the calendar signed by the judge of assize can be received in evidence against a sheriff, without notice to produce the copy served on him by the clerk of the peace? *Id.*

On a question, whether by custom a sheriff of a county is exempt from the duty of executing criminals convicted in his county, evidence of reputation is not receivable. *Id.*

Nor is evidence admissible that by custom the sheriffs of a city are bound to execute. *Id.*

An information being filed against the sheriff of the county of Chester, for not executing a criminal condemned to death for felony committed in the county, the court refused to issue a mandamus to the corporation of the city of Chester, to allow an inspection on the defendant's behalf, of its muniments, so far as they applied to an alleged obligation of that corporation or its officers to execute such criminal, though it was sworn that the muniments were believed to contain matter of importance to the defence, and though the party applying for the inspection was a freeman, who had demanded it in that character, stating at the same time, that his object was to obtain information for the benefit of the defendant. *Id.*

*Duty and Liability on Arrest.*—It is not necessary that the sheriff's warrant issued upon a *capias* should specify the court out of which the process issues. *Astley v. Goodyer*, 2 Dowl. P. C. 619; 2 C. & M. 682; 4 Tyr. 414. 1975

A written memorandum of an arrest, and of the place where it occurred, made by a sheriff's officer, contemporaneously with effecting the arrest, sent immediately to the sheriff's office, and there filed in the course of business, is not admissible evidence of the place at which the arrest took place after the death of the officer, in an action between third persons. *Chambers v. Bernasconi* (in error), 1 C. M. & R. 347; 4 Tyr. 531. 1975

It is no objection to an arrest, that it takes place

in a gaol, if a defendant is there for his own purposes. *Loveitt v. Hill*, 4 Dowl. P. C. 579. 1975

In trespass, for breaking into the plaintiff's house, which was an unfinished house, the defendants justified under a writ of *ca. sa.* against plaintiff, and averred, that they peaceably entered the house through a hole in the wall. It appeared that this hole in the outer wall of the house opened into a small room or closet, which had a room over it, and a room under it, and that having entered this place the defendants tore down some boards, by which a staircase window, which opened into this place, was boarded up. It was proved by the builder, that this hole in the outer wall was not intended to have either a door or window put into it, but was to remain open, so that the place in question should be used as a conservatory:—Held, that if this hole in the wall had been intended to have had a door or window put into it, it must be considered that the outer fence of the house was left open, and that the defendants were justified in entering; but that, if this hole was always intended to be left open, the staircase window must be considered as the outer fence of the house, and that the defendants were therefore not justified in forcing it. *Whalley v. Williamson*, 7 C. & P. 294—*Alderson*. 1976

Trespass for breaking and entering plaintiff's dwelling-house, and assaulting and imprisoning him, &c. Pleas—first, not guilty; secondly, as to all the trespasses alleged, except the breaking of the house, a justification under a writ of *ca. sa.* and warrant thereon, by virtue of which the defendants entered the house, the outer door being open, and arrested the plaintiff. Replication, admitting the writ and warrant, *de injuria absque residuo causæ*. It was proved that the defendants, who were bailiffs, in execution of the warrant broke open the outer door of the plaintiff's house, and so gained an entrance, and arrested him:—Held, first, that the averment in the plea that the outer door was open, was a material averment, for that the doors being open was a condition precedent to the defendant's right to enter and arrest the plaintiff in his own house; and, therefore, that the plea was sufficiently traversed by the general replication, and it was not necessary to reply the breaking of the outer door; secondly, that the defendants having become trespassers *ab initio*, by the breaking of the door, the jury were rightly directed, that they might (even on the plea of not guilty), given damages in respect of all the injuries complained of in the declaration. *Kerby v. Denby*, 1 Mees. & Wels. 336. 1976

The defendant was arrested on the 12th May, carried to gaol on the 15th, and a declaration delivered on the 23th:—Held, that an application on the 4th June to discharge him out of custody, on the ground that he had been carried out of the county, and there detained two days before he was taken to the county gaol, was too late. *Fownes v. Stokes*, 2 Scott, 205; 4 Dowl. P. C. 125. 1977

*Quære*, whether this would be any ground for discharging the defendant, even had the application been made in time? *Id.*

In an action of debt for a penalty of 50*l.* for



carrying the plaintiff to a prison under *mesne* process, within twenty-four hours, the defendant pleaded that it was by the plaintiff's own consent. Replication, that the plaintiff did not consent:—Held, that on these proceedings the defendant should begin, as the plaintiff did not go for unliquidated damages. *Silk v. Humphrey*, 7 C. & P. 14—Coleridge. 1977

Taking a defendant to prison within twenty-four hours. *Dewhurst v. Pearson*, 1 C. & M. 365; 3 Tyr. 243; *S. P. Simpson v. Renton*, 2 Nev. & M. 52. 1978

Carrying an arrested party to public-houses within twenty-four hours after the arrest, without lodging him in jail within that time, is not a beginning to "carry to jail" within 32 Geo. 2, c. 28, s. 1. *Summers v. Moseley*, 4 Tyr. 158; 2 C. & M. 477. 1978

Seemle, if a party is arrested on *mesne* process, and when called on by the officer to name a safe, &c. dwelling-house to which he will be carried, names his own house, to which the officer objects, pursuant to section 1 of the 32 Geo. 2, c. 28, he cannot be carried to any tavern, &c. without his free consent. *Id.*

Refusing to accept a bail-bond, conditioned according to the exigency of a writ of *capias*, under the Uniformity of Process Act, subjects a sheriff to the penalties of the 23 Hen. 6, c. 9. *Evans v. Moseley*, 2 C. & M. 490. 1978

In an action for such refusal, the declaration averred a tender of bail and sureties, that the party should within eight days after the execution of such writ, inclusive of the day of such execution, cause special bail to be put in, &c. The bond produced was to cause special bail to be put in within eight days from the date thereof, the bond being dated on the day of the arrest:—Held, no variance. *Id.*

A party having been arrested, his attorney discovered an irregularity in the proceedings, and gave the plaintiff notice of it, whereupon he discontinued the action, and the defendant's costs were accordingly taxed and paid. The plaintiff afterwards sued out a second writ, upon which the defendant was arrested. On the execution of the first writ, the defendant's attorney gave the sheriff an undertaking to procure a bail-bond, and the sheriff having had no notice from the plaintiff of the discontinuance, said he must detain the defendant on both writs. On a motion to discharge the defendant out of custody:—Held, that it was unnecessary to give the sheriff notice of the discontinuance; and it not appearing that the defendant had sustained any damage, the court refused the application. *Price v. Day*, 1 C. M. & R. 937. 1978

Where an attorney's clerk accompanied a creditor to his debtor, and pretended that he was a sheriff's officer, and, in consequence, the defendant went away with them, not willingly, but supposing they had power to compel him; it was held, that it was a sufficient arrest to maintain trespass for false imprisonment, although no writ was produced, and it did not distinctly appear that either the creditor or the clerk touched the debtor at all. *Wood v. Lane*, 6 C. & P. 744—Tindall. 1979

Where two bailiff's kept watching a defendant at a particular house, and had a warrant to arrest him, and in fact would have arrested him if he had endeavored to get away, but did not produce the warrant, or act on it:—Held, that it did not constitute an arrest, and that he might be afterwards arrested for the same debt without a judge's order. *Hender v. Robins*, 1 Har. & Woll. 204; S. C. nom. *Robins v. Hender*, 3 Dowl. P. C. 543. 1979

Where the plaintiff's attorney obtained from the sheriff's deputy in London a warrant, which he sent to an officer in the country by the post, but did not pay the postage, and the officer having in consequence refused to take in the letter, it was returned to the dead letter office:—Held, that under these circumstances the sheriff could not be called on to return the writ. *Hart v. Weatherley*, 4 Dowl. P. C. 171. 1980

A writ issued on 17th April, was accounted non est inventus on 4th June, without a judge's order authorizing the sheriff to make such a return before the four months expired:—Held, that as the judge's order need not be stated in the writ, it must be assumed that the return was regularly obtained. *Lewis v. Davison*, 5 Tyr. 198. 1979

Seemle, that where one sheriff has made a special return to a writ of *capias*, the court will not compel his successor to make another, the circumstances remaining unaltered. *Pasmore v. Wilkinson*, 3 Dowl. P. C. 635. 1980

Where a defendant has been rescued from a bailiff, the sheriff may return the rescue as from his bailiff, and not from himself. *Gobbey v. Dewes*, 3 M. & Scott, 556; 2 Dowl. P. C. 747. 1980

The sheriff is bound to pay the necessary fee for opening the treasury during vacation, in order to file his return, if an order to make the return, under section 15 of the Uniformity of Process Act, has been made. *Rex v. Surrey (Sheriff)*, 3 Dowl. P. C. 82. 1980

One rule is sufficient in the Exchequer to make a judge's order for returning a writ in vacation a rule of court, pursuant to Reg. Gen. M. T. 3 Will. 4, No. 13, and also to call on a sheriff to show cause why an attachment should not issue against him for disobeying such order. *Kensit v. Bulteel*, 4 Tyr. 59; S. C. nom. *Howell v. Bulteel*, 2 C. & M. 339; 3 Dowl. P. C. 99 n. 1980

Contra in *K. B. Stainland v. Ogle*, 3 Dowl. P. C. 99. *Id.*

Action for a false return. *Goubot v. De Crouy*, 3 Tyr. 906. 1981

*Attachment.*—It is not necessary for bail, on moving to set aside an attachment, to swear that it is at their expense. *Rex v. Middlesex (Sheriff)*, 2 Dowl. P. C. 116. 1984

A motion for setting aside a regular attachment against the sheriff, for not bringing in the body on payment of costs, must be supported by an affidavit that bail above have justified, or that the defendant has been arrested. *Rex v. Lincolnshire (Sheriff)*, 4 Dowl. P. C. 455; 2 C. M. & R. 657; 1 Tyr. & G. 92. 1984



It is not necessary for the purpose of such a motion, that the bail should deny collusion, &c., if the defendant swears that he has a good defence to the action on the merits. *Id.*

Where an attachment has been obtained against the sheriff for not bringing in the body, it is not necessary that bail above, who are afterwards put in for the purpose of rendering the defendant, should justify before such render is made, in order to entitle them to set aside the attachment on payment of costs. *Rex v. Middlesex (Sheriff)*, 4 Dowl. P. C. 673; 1 Mees. & Wels. 182. 1985

In order to set aside an attachment against a sheriff for not bringing in the body, the affidavit should state that the application is made on his behalf, and at his expense, as well as that he is not in collusion with the defendant, by analogy to *Reg. Gen. of K. B. M. 59 Geo. 3. Rex v. Surrey (Sheriff)*, 1 C. M. & R. 581; 3 Dowl. P. C. 174; 5 Tyr. 184. 1984

An application to set aside an attachment may be made by one of the bail on his own affidavit denying collusion, without an affidavit from the other bail. *Rex v. Middlesex (Sheriff)*, 3 Dowl. P. C. 186. 1984

Where there has been a default, an attachment against the sheriff may be obtained, though the defendant is surrendered before the attachment is moved for. *Id.*

In moving for an attachment against the sheriff for not bringing in the body, it is sufficient to swear, that the original rule and not a copy was served on the under-sheriff. *Leaf v. Jones*, 3 Dowl. P. C. 315. 1984

Though rendering a defendant is equivalent to justifying bail, for the purpose of setting aside proceedings against the sheriff, yet where a judge's order was obtained for time to justify bail, and the defendant was rendered instead of the bail being justified, the court would not set aside an attachment afterwards obtained, except on payment of costs. *Rex v. Middlesex (Sheriff)*, 4 Dowl. P. C. 358. 1985

A regular attachment for not returning a writ of capias, may be set aside on payment of costs, although the sheriff took a bail-bond with one security only. *Rex v. Surrey (Sheriff)*, 2 C. M. & R. 498; 1 Tyr. & G. 32; 1 Gale, 319. 1985

Semble, aliter of an attachment for not bringing in the body. *Id.*

Where the writ was returnable on the 22nd, and the plaintiff did not declare de bene esse till the 30th, the court, on setting aside an attachment against the sheriff, on payment of costs, refused to order the attachment to stand as a security, it not appearing that the plaintiff had lost a trial. *Rex v. Middlesex (Sheriff)*, 3 Dowl. P. C. 194. 1985

It lies on the plaintiff in such a case to show that he has lost a trial. *Id.*

The affidavit of the officer need not deny collusion with the bail, nor need the bail deny collusion with the officer. *Id.*

If the sheriff is required by a judge's order to

bring in the body in vacation, and he does not obey it in due time, but before an attachment is obtained, the defendant is rendered, the contempt is not purged, and he is still liable to an attachment. The court will however set it aside, on payment of costs, and not order it to stand as a security where the plaintiff has not lost a trial. *Rex v. Middlesex (Sheriff)*, 2 Dowl. P. C. 432. 1985

The court ordered an attachment against the sheriff to stand as a security, where, had bail been put in and perfected, the plaintiff might have set down the cause for the sittings in the term, notwithstanding the accidental circumstance of there being at the time no place for the trial of causes in the C. P. in term. *Rex v. Middlesex (Sheriff)*, 1 Scott, 581; 4 Dowl. P. C. 142. 1985

Where, on showing cause against a rule for setting aside an attachment against the sheriff, on payment of costs, the only question made was, whether the bail-bond should stand as a security, and the court made the rule absolute with that term, but the plaintiff subsequently discovered that an error had been made in the dates, and that he was not entitled to have the bail-bond stand as a security:—Held, that he could not then urge a formal objection to the affidavit on which the rule was obtained. *Langton v. Viney*, 1 Mees. & Wels. 479. 1985

Where an arrest took place on the 5th of January, and bail was put in on the 12th, and the body rule expired on the 20th:—Held, that an attachment obtained in Hilary Term might be set aside, without its standing as a security, as the plaintiff had not been prevented from entering his cause for trial in the term next after the return of the writ. *Rex v. Anthony*, 4 Dowl. P. C. 765. 1985

In discussing a rule nisi for an attachment against a sheriff for an insufficient return to a writ, the court will not take cognizance of the return, unless an office copy be produced, verified by affidavit by a party as to his belief that no sufficient return has been made. *Wilton v. Chambers*, 5 Nev. & M. 431; 1 Har. & Woll. 582. 1986

Where a sheriff has paid to the plaintiff in an action the debt and costs under an attachment, the sheriff has no right to retain the defendant in custody until he is repaid. *Rimmer v. Turner*, 1 Har. & Woll. 193. 1986

Delivery of an attachment against a sheriff to the managing clerk of the London agent of the coroner, is not sufficient to allow of an attachment issuing against the coroner for not returning the attachment. *Fever v. Aubin*, 1 Har. & Woll. 332. 1986

*Duty and Liability on Executions.*—Although there is a strong reason to believe that a *f. fa.* had been issued in order to defraud the execution of a bona fide creditor, and that the sheriff is a party to the fraud, the court will not interfere summarily to compel the sheriff to pay over the proceeds of the levy to the bona fide creditor, but



the question of fraud must be tried by a jury. *Barber v. Mitchell*, 2 Dowl. P. C. 574. 1989

The defendant as well as the plaintiff may rule the sheriff to return the writ. *France v. Clarkson*, 2 Dowl. P. C. 532. 1990

A sheriff must sell goods seized under a fi. fa. within a reasonable time, and before the return of the venditioni exponas, or will be liable to an action. *Jacobs v. Humphrey*, 4 Tyr. 272; 2 C. & M. 413. 1987

Where the sheriff sells under an execution more than sufficient to satisfy the debt and costs, he is liable in trover for the excess. *Batchelor v. Vyse*, 4 M. & Scott, 552; overruling *S. C. 1 M. & Rob. 331*. 1987

If a sheriff take goods in execution after an act of bankruptcy, and sell them, the jury, in an action of trover by the assignees, may allow to the sheriff the expenses of the sale, if they think the assignees must have sold the goods, if they had not been sold by the sheriff; but this is matter for the jury. *Clark v. Nicholson*, 6 C. & P. 712; 3 Dowl. P. C. 454. 1987

Where the sheriff has been allowed to withdraw from possession by authority of a rule under the Interpleader Act, he cannot afterwards, and after he is out of office, be compelled to re-enter. *Wilton v. Chambers*, 3 Dowl. P. C. 12. 1987

A fi. fa. was put into the sheriff's hands on the 14th of December, 1833, returnable on the 30th. The sheriff went out of office on the 14th February following. A rule to return the writ was taken out in June following, which was served in the same month on the under-sheriff of the new sheriff; but it was not served on the under-sheriff of the old sheriff till November following:—Held, that an attachment afterwards obtained against the old sheriff for not returning the writ was irregular; and the court set it aside. *Yaroth, Ywroth, or Yrath v. Hopkins*, 2 C. M. & R. 250; 3 Dowl. P. C. 711; 1 Gale, 141. 1990

The plaintiff sued out a fi. fa. into Bedfordshire, and lodged it in the office of the deputy under-sheriff in London. On the receipt of it, the under-sheriff wrote to say the defendant had no effects; the plaintiff thereupon immediately sued out a ca. sa., and lodged it at the same office. Before the return of the fi. fa., finding that the defendant had effects, the plaintiff's attorney wrote to the under-sheriff not to execute the ca. sa.:—Held, that the sheriff was bound to return the fi. fa. *Smith v. Johnson*, 2 C. M. & R. 350; 1 Gale, 357. 1990

And semble, the issuing of the ca. sa. was not a countermand of the fi. fa. *Id.*

A return of nulla bona, made by the sheriff to a fi. fa. against A., is admissible in evidence upon the trial of a question as to the property in goods at the time of such return between A. and a succeeding sheriff. *Avril v. Warwick (Sheriff)*, 3 Nev. & M. 871. 1990

So, although the bailiff intrusted with the execution of such writ did not himself search for goods of A., but sent his assistant. *Id.*

After time had been several times given to a sheriff to make a return to a writ of fi. fa., a rule was made allowing him to withdraw from the possession, and to be at liberty to re-enter and re-levy, in case the invalidity of a commission of bankruptcy in a particular cause was established. The sheriff withdrew, and the cause came on for trial; but went off entirely on a point of law, and the commission was still contested before the Lord Chancellor. The goods had been in the meantime again seized by another sheriff under another writ. The court, however, made a rule on the first sheriff to return the first writ of fi. fa. *Wilton v. Chambers*, 3 Dowl. P. C. 333; 1 Har. & Woll. 116. 1990

The mere fact of a plaintiff requesting the sheriff to direct his warrant to a particular officer, does not constitute the latter a special bailiff, so as to render him the plaintiff's agent. The fact of a compromise between the parties, or of a claim for rent by the landlord, does not relieve the sheriff from the necessity of making a return to a writ of fi. fa. *Balson v. Meggat*, 4 Dowl. P. C. 557. 1990

Where a defendant, against whom a fi. fa. had issued, became a bankrupt after the seizure, and his assignees made an arrangement with the sheriff as to the disposal of the goods:—Held, that the sheriff could not be ruled to return the writ on behalf of the bankrupt. *Gilbert v. Whalley*, 2 C. M. & R. 722. 1990

*Interference on adverse Claims.*—Where a sheriff has seized goods under a fi. fa., and a claim to them is put in by another person, he is not bound to accept an indemnity from the execution creditor, but may obtain relief under the 1 & 2 Will. 4, c. 58, s. 6. *Levy v. Champneys*, 2 Dowl. P. C. 454. 1995

Where the sheriff seized goods in execution which were under distress for rent due to the landlord, the court refused to grant him relief under the Interpleader Act, though he had applied for indemnity to the execution creditor, which had been refused. *Haythorn v. Bush*, 2 C. & M. 689; 2 Dowl. P. C. 641. 1995

The sheriff in applying for relief under the Interpleader Act, should come promptly, but a late application will, under special circumstances, be allowed. *Dixon v. Ensell*, 2 Dowl. P. C. 621. 1995

Where there was great delay on the part of the sheriff in applying to the court, in consequence of negotiations between the parties, and the execution creditor afterwards abandoned his claims, the court refused to make the latter pay costs. *Id.*

The sheriff having seized goods under a fi. fa., notice was given to him on the 18th January that a fiat was about to be issued out against the defendant; and, on the 28th, a claim was made to the goods by the assignees:—Held, that an application by the sheriff, on the 29th, for relief under the Interpleader Act, was sufficiently prompt. *Skipper v. Lane*, 4 M. & Scott, 283; 2 Dowl. P. C. 784. 1995



If a sheriff receives notice on the 23rd of January, of a claim to goods seized by him under a *fi. fa.*, he will not be entitled to relief under the Interpleader Act, unless he comes to the court in Hilary Term. *Ridgway v. Fisher*, 3 Dowl. P. C. 567. 1995

The sheriff is not disqualified from applying under the Interpleader Act, where a whole term has elapsed after a notice of claim under a fiat in bankruptcy, if the assignees were not chosen until after the term. *Barker v. Phipson*, 3 Dowl. P. C. 590; 1 Har. & Woll. 191. 1995

Where a sheriff applied for relief under the Interpleader Act, and it appeared that he had been guilty of neglect, the court refused to relieve him from any liability occasioned thereby. *Brackenbury v. Laurie*, 3 Dowl. P. C. 180. 1995

The court will not interfere under the Adverse Claim Act, 1 & 2 Will. 4, c. 56, s. 6, in favor of a sheriff who has seized goods under a *fi. fa.*, unless an actual claim of the property in question appears to have been made before moving for the rule. *Bartley v. Hook*, 4 Tyr. 229. 1995

Semble, in an issue directed under the act, the claimant should be the plaintiff, and the execution creditor the defendant. *Id.*

It is not necessary for the sheriff to apply to the different parties for an indemnity, before he applies to the court under the Interpleader Act. *Crossly v. Ebers*, 1 Har. & Woll. 216. 1995

The court will not interfere to restrain a sheriff from selling goods seized by him under a *fi. fa.*, or an offer of indemnity by a third person, claiming the goods. *Harrison v. Foster*, 4 Dowl. P. C. 558. 1995

The sheriff cannot apply to the court under the Interpleader Act, unless the goods or money in dispute are actually in his hands. *Scott v. Lewis*, 2 C. M. & R. 289; 4 Dowl. P. C. 259; 1 Gale, 204. 1995

Where a sheriff, after levying the amount of an execution on the defendant's goods, paid over the proceeds to the execution creditor, not having received any notice of a claim from any one, and afterwards an action was brought against the sheriff by the defendant's assignees to recover the value of the goods:—Held, that the sheriff was not entitled to relief under the Interpleader Act. *Id.*

Under the 1 & 2 Will. 4, c. 58, s. 6, (the Interpleader Act), the sheriff need not wait for proceedings to be taken against him before he applies to the court for relief. *Green v. Brown*, 3 Dowl. P. C. 337. 1995

Where an execution was levied under a *fi. fa.*, and the sheriff delayed making a sale for more than two months, when a fiat in bankruptcy issued against the defendant:—Held, that the sheriff was not entitled to apply to the court under the Interpleader Act. *Ridgway v. Fisher*, 1 Har. & Woll. 189. 1995

The sheriff is not entitled to call a party before the court under the Interpleader Act, 1 & 2 Will. 4, c. 28, on the ground of claim set up in respect

of an interest as a partner, in goods seized under a writ of execution. *Holmes v. Mentze*, 5 Nev. & M. 563; 4 Dowl. P. C. 300. 1995

So, although the claim states that the balance of accounts is so much in favor of the claimant, as to give him the sole beneficial interest in the property seized. *Id.*

But where the execution creditor refuses either to admit or to deny the alleged partnership, the court will enlarge the time for the sheriff's return to the writ until he is indemnified. *Id.*

The court will not interfere under the Interpleader Act, unless a dispute as to the legal interest in the property seized has actually arisen. *Semble. Id.*

Where the sheriff is placed in circumstances which give him an interest in either side, the court will not relieve him under the Interpleader Act. *Duddin v. Long*, 1 Scott, 281; 1 Bing. N. R. 299; 3 Dowl. P. C. 139. 1995

The court refused to interfere in favor of the sheriff, under the Interpleader Act, where the under-sheriff's partner appeared to be concerned for some of the parties. *Id.*

If the under-sheriff is the execution creditor, or partner in business of the execution creditor, the sheriff is not entitled to relief under the Interpleader Act. *Ostler v. Bower*, 4 Dowl. P. C. 605. 1995

Where the sheriff obtains a rule for relief under the Interpleader Act, the claimants may appear without taking office copies of the affidavits on which the rule was obtained. *Mason v. Redshaw*, 2 Dowl. P. C. 595. 1995

Where the sheriff applies for relief under the Interpleader Act, he need not, in the affidavit in support of the application, deny collusion with the claimants. *Donniger v. Hinzman*, 2 Dowl. P. C. 424; *S. P. Dobbins v. Green*, 2 Dowl. P. C. 509. 1995

Where an execution creditor does not appear on being served with the sheriff's rule, the court cannot bar his claim. *Id.*

An execution creditor, served with a sheriff's rule under Interpleader Act, is not bound to appear when there are no goods liable to his execution. Where, therefore, such creditor appears upon the rule, but does not insist upon any goods being liable to his execution, he is not entitled to the costs of his appearance. *Glasier v. Cooke*, 5 Nev. & M. 680. 1995

Where the sheriff applied for relief under the Interpleader Act, but it appeared that an attachment had been already obtained against him for not retuning the writ, the court would only make the rule absolute on the terms of his paying for moving for the attachment. *Alemore v. Adeane*, 3 Dowl. P. C. 498. 1995

Held, that where a sheriff obtains a rule under the Interpleader Act, calling upon an execution creditor and a third party, who claims goods seized by the sheriff under a *fi. fa.*, to appear and state the nature of their claims; such third party must appear and state by affidavit the nature of



his claim. *Poweler v. Lock*, 4 Nev. & M. 853. 1995

On application to the court by a sheriff, under section 6 of the Interpleader Act, a third party served with the rule, and not appearing, is barred by section 3 from further prosecuting any claim brought in question by the rule, as well as where such application is made by a defendant under section 1. *Ford v. Dilly*, 6 B. & Adol. 885. 1995

A sheriff, or other officer, applying to the court under the 6th section of the Interpleader Act, need not deny collusion. *Bond v. Woodhall*, 3 C. M. & R. 601; 4 Dowl. P. C. 351; 1 Tyr. & G. 11. 1995

On motion by the sheriff under the Interpleader Act, it must be made in court, but cause may be shown at chambers. *Beames v. Cross*, 4 Dowl. P. C. 122. 1995

Under particular circumstances the court allowed cause to be shown at chambers to a sheriff's rule under the Interpleader Act. *Haines v. Disney*, 2 Scott, 183; 1 Hodges, 189. 1995

Where a new claim is raised after a rule nisi under the Interpleader Act has been obtained, the sheriff may make the new claimant a party to the rule. *Kirk v. Clarke*, 4 Dowl. P. C. 363. 1995

Where money, the proceeds of an execution, has been paid into court by the sheriff under the Interpleader Act, and the claimant abandons his claim, the rule for paying the money out of court to the execution creditor, together with his costs, is nisi in the first instance. *Stanley v. Perry*, 4 Dowl. P. C. 599. 1995

If an execution creditor abandons his process, seized under a fi. fa., in favor of a claimant, the sheriff has still a right to show in an action against him, that the goods were the property of the defendant. *Baynton v. Harvey*, 3 Dowl. P. C. 344. 1995

Costs occasioned by the rule. *Lewis v. Eicke*, 4 Tyr. 157. 1996

The court will not allow the sheriff the costs of applying to the court, under the Interpleader Act, but they will allow him extra expenses he may have been put to by obeying the rule of court directing an issue. *Armitage v. Foster*, 1 Har. & Woll. 208. 1996

Where the sheriff has not given notice to the execution creditor of an adverse claim being made, and of his intention to apply to the court under the Interpleader Act, before instructions have been given to counsel to move for an attachment for not returning the writ, the court will grant the attachment or require the sheriff to pay the costs of the motion. *Braine v. Hunt*, 2 C. & M. 418; 2 Dowl. P. C. 391; 4 Tyr. 243. 1996

On an application by the sheriff, under 1 & 2 Will. 4, c. 58, s. 6, if the judgment creditor does not appear, the court will order him to pay the costs of the application to the adverse claimant. *Tomlinson v. Done*, 1 Har. & Woll. 123. 1996

In ordinary cases the court of C. P. does not

allow the sheriff his costs of applying for a rule under the Interpleader Act. *West v. Rotherham*, 2 Scott, 802; 2 Bing. N. R. 527. 1996

The court of C. P. will not allow the sheriff applying to be relieved under the Interpleader Act his costs, where the claimant does not appear. *Oram v. Sheldon*, 1 Scott, 697; 3 Dowl. P. C. 640; 1 Hodges, 92. 1996

Nor will the plaintiff be allowed his costs, except in the event of extremely improper conduct in the parties. *Id.*

Although the sheriff is not actually allowed costs, on a motion under the Interpleader Act, yet, where he has retained possession of the goods seized at the request of the execution creditor, and has sold them with consent of all the parties, and the execution creditor afterwards abandons his claim, the sheriff is entitled to receive from him his costs of such possession and sale. *Dabbs v. Humphries*, 1 Scott, 325; 1 Bing. N. R. 412; 3 Dowl. P. C. 377; 1 Hodges, 4. 1996

The court will, on proper grounds shown, order the sheriff, or the execution creditor, to pay a third party appearing and successfully prosecuting his claim, his costs of such appearance. *Ford v. Dilly*, 5 B. & Adol. 885. 1996

The court will not, under the Interpleader Act, allow the sheriff his costs incurred by keeping possession, in consequence of a party refusing to consent to a judge at chambers making an order in the case, no authority for that purpose being given by the 1 & 2 Will. 4, c. 58, s. 6. *Clark v. Chetwode*, 4 Dowl. P. C. 635. 1996

Where the sheriff's rule, under the Interpleader Act, does not pray costs, and the claimant does not appear, the court will not, on disposing of the rule, at once order the claimant to pay costs, but will make an order conditional on his not appearing within a certain period. *Shuttleworth v. Clark*, 4 Dowl. P. C. 561. 1996

Where an issue is directed to be tried between an execution creditor and a claimant, brought before the court by the sheriff under the Interpleader Act, but the latter refuses to try, and abandons his claim, he will be liable to pay the execution creditor's costs down to the time of the claim being abandoned, and of applying to take the money paid in by the sheriff out of court. *Wills v. Hopkins*, 3 Dowl. P. C. 346. 1996

Where, in consequence of a claim made to goods seized by a sheriff in execution, the court ordered the claimant to proceed to trial upon paying a sum of money into court, which he neglected to do, and a rule was then obtained to compel him to pay the costs occasioned by his false claim:—Held, that he was liable to pay those costs as well as the costs of that rule, though no previous application had been made to him. *Scales v. Sargeason*, 3 Dowl. P. C. 707. 1996

*Fees and Poundage.*—Where an application was made against the deputy constable or bodar of Dover Castle, on the ground of his having taken larger fees for executing process than those allowed by the 23 Hen. 6, c. 9, but only



the usual fees had been allowed by the Master, the court refused to interfere, but left the party to his remedy by action. *Primrose v. Bradley*, 2 C. & M. 697; 2 Dowl. P. C. 662; 4 Tyr. 995.

1996

The only fee allowed by law to be taken by the officer from a party arrested, is *4d.*, the fee prescribed by the stat. 53 Hen. 6, c. 9: if he take more, he is liable to be sued for the penalty imposed for extortion by the 32 Geo. 2, c. 28. *Innes v. Levi*, 2 Scott, 189; 4 Dowl. P. C. 116, 195.

1996

The sheriff cannot be required to pay into court money levied under an attachment, but he is not entitled to his poundage on the sum levied. *Rex v. Devon (Sheriff)*, 3 Dowl. P. C. 10. 1997

The sheriff is entitled to poundage on the sum he received under the execution only, and not on the amount claimed or seized. *Rex v. Robinson*, 2 C. M. & R. 334; 4 Dowl. P. C. 447; 1 Gale, 209.

1997

Under a writ of extent for penalties under the excise laws, the sheriffs levied goods of the defendant of the value of 824*l.* A negotiation took place; the sheriff remained in possession, and ultimately the crown accepted 500*l.* in satisfaction of the penalties, which amounted to 1000*l.*:—Held, that the sheriff was entitled to poundage only on 500*l.* Id.

The sheriff will be allowed his costs of keeping possession, after applying to the court, where it is for the benefit of the parties, and not in furtherance of his duty. *Underden v. Burgess*, 4 Dowl. P. C. 104.

1997

### SHIP.

*Ownership.*—See 5 & 6 Will. 4, c. 19, by which the laws relating to merchant seamen are amended and consolidated.

The registered owner is not liable for articles furnished without his order for the repair of a vessel, chartered for a year, by a party who has undertaken to repair the ship during that term. *Reeve v. Davis*, 3 Nev. & M. 873; 1 Adol. & Ellis, 312.

2001

Nor, when there is no charter-party, unless the goods were ordered by the agent of the owner, or were beneficial to him. Id.

The registered owners of a steam-boat let it to A., the captain, for one year: the boat to be repaired by A., the engines to be repaired by the owners, who are to appoint an engineer:—Held, that the owners are not liable for repairs ordered by A. unconnected with the engine. Id.

By the 53 Geo. 3, c. 159, the responsibility of shipowners for damage done by their ships to other vessels, is limited to the value of the ship doing the damage:—Held, that such value must be ascertained as at the time of the accident. *Dobree v. Schroder*, 6 Simon, 291.

2004

If a person ship goods on board a vessel, knowing that she is chartered, the consignee of the goods can maintain no action against the owner of the ship if the goods be injured by bad

stowage. *Major v. White*, 7 C. & P. 41.—Parke. 2004

If the shipper of goods was warned as to the way in which the goods would be stowed, the consignee cannot maintain any action for damage occasioned by such stowage, even if the stowage were bad. Id.

The managing owner of a ship chartered by the East India Company, receives the warrants for the freight, and pays them into a bankers' in his own name, drawing checks from time to time for various sums out of the proceeds, part of which are applied for the use of the ship, and part for other purposes:—Held, that the other part-owners have no lien on this fund in the hands of the bankers, nor any claim against the bankers as their debtors.—*Dub. Sir J. Cross. Ex parte Gribble*, 3 Deac. & Chit. 339.

2006

A broker was employed to sell a ship belonging to three part-owners, two of whom communicated with him on the subject; to them he paid their shares of the proceeds of the sale, but, after admitting the amount of the third part-owner's share to be in his hands, refused to pay it to him without the consent of the other two; an action of assumpsit having been brought by the third part-owner for the share:—Held, that he was not entitled to recover. *Hatsall v. Griffith*, 2 C. & M. 679; 4 Tyr. 487.

2007

Where a person lends money nominally on his own account, but really on account of another, the real lender cannot recover the money unless he prove distinctly that the loan was in reality intended to be his, and was received as such; and, therefore, where A., as the managing owner of a vessel, was permitted by the other owners to have possession of two warrants or orders of the East India Company, to pay to the said owners or bearer the sum of money therein mentioned, for freight, and A. deposited those warrants in the hands of his bankers, and they received the money due on them, and gave him credit for it on account; it was held, in assumpsit brought after A.'s death by the surviving part-owners against the bankers, that, on proof of the above facts, they could not recover the money, because it was not shown that the loan was upon their account, for the fact of the warrants being the property of all the part-owners when placed in the bankers' hands, was, upon the evidence, consistent with the supposition that the loan of the proceeds to the bankers was A.'s loan. *Sims v. Bond*, 2 Nev. & M. 608; 5 B. & Adol. 389.

2007

*Master.*—A conviction under 6 Geo. 4, c. 110, s. 27, and 3 & 4 Will. 4, c. 55, s. 27, for detaining the certificate of a ship's registry, is bad, unless it state the purpose for which the certificate was wanted, and the person who demanded it was the "proper" officer. *Rex v. Walsh*, 3 Nev. & M. 632; 1 Adol. & Ellis, 481.

2012

The 5 & 6 Will. 4, c. 53, is the statute by which the regulation of passengers' ships is effected.

2014

In an agreement under seal for the hire of the cabins and accommodations for passengers in a



ship, there was a stipulation, that, if it should be necessary for the convenience, and at the request of the hirer, to put into an intermediate port for stock or otherwise, he (the hirer) would pay all port and necessary charges consequent thereon:—Held, that this raised an implied covenant, on the part of the captain who let the cabins, &c., to put into any such port, if required. *Corbyn v. Leader*, 6 C. & P. 32—Tindal. 2015

There was also another covenant on the part of the captain, to permit and suffer the hirer to stow away the baggage of the passengers in a part of the hold:—Held, that this, in connection with a covenant to promote the comfort and convenience of the hirer and his passengers, fairly imported that there should be some demand or request made by the hirer for the clearing the space agreed on. *Id.*

A covenant to keep up a supply of the necessary and usual quantity of water, for the use of the passengers, &c., is not broken by a deficiency for a short time, occasioned by the unusual length of the voyage. *Id.*

It is the duty of the captain of a merchant vessel, in case of misconduct of one of the crew, previously to the infliction of punishment, to institute inquiry, with the assistance of others, and to have the result entered in the log. *Murray v. Moutrie*, 6 C. & P. 471—Tindal. 2015

A seaman employed in cutting blubber on board a whaler in consequence of a quarrel with the captain followed by a blow from the mate, threw down his knife, and refused to do any more work in the ship:—Held, that such conduct was an act justifying moderate punishment; and that, although the punishment were excessive, yet, if the seaman, by some concession, might have put an end to it, and refused, he could not recover damages for the continuation of the punishment after such refusal. *Id.*

*Seamen.*—A ship was hired by government to take out convicts to Van Dieman's Land. From that place it sailed to Batavia, and on several other trading voyages. It sailed on the homeward voyage to England, and arrived safe at St. Helena, but was lost before arrival at the port of discharge, and all on board perished:—Held, that proof of these facts, and of a seaman having gone on board the ship in England, and having been seen working on board at Van Dieman's Land, at Batavia, and afterwards at St. Helena, was sufficient to go to the jury, as evidence to entitle the seaman to wages pro rata for the voyage out. *Harris v. Iye*, 1 Har. & Woll. 238. 2016

A seaman entered into articles to serve on board the ship R., "bound from the port of L. to the S. S., to procure a cargo of sperm oil, and to return therewith to the port of L., where the voyage was to end;" instead of wages he was to receive a certain share of the net proceeds of the cargo; and it was stipulated that no one of the crew should "demand or be entitled to his share of the net proceeds of the said cargo until the arrival of the said ship or vessel at L., and her cargo should be there sold and delivered, and the mo-

ney for the same actually received by the owners."

A cargo was procured, the ship was afterwards condemned in a foreign port, and the mariner accompanied part of the cargo on its homeward voyage, (it having been transhipped into another vessel, the A.), but died at sea:—Held, that "until" in the above articles is a word of limitation of the mariner's right to wages, and not of postponement of payment of them merely; and, consequently, that, as the ship did not return to L., the administrator of the mariner was not entitled to recover his share of the net proceeds of the R.'s cargo, but only to recover on a quantum meruit for his services on board the A. *Jessie v. Roy*, 1 C. M. & R. 316; 4 Tyr. 626. 2018

Where a seaman, about to proceed on a trading voyage, entered into and signed articles, whereby he agreed not to sue for wages any of the owners, except one, who was the captain, and who alone was a party to the articles:—Held, that he could not sue the other owners, although they sold and received the proceeds of the cargo, and one of them, the managing owner, adjusted the wages, and settled with the seamen. *M'Auliffe v. Bicknell*, 2 C. M. & R. 263; 1 Gale, 232. 2019

The plaintiff's wages were adjusted, and the balance struck, subject to certain deductions for insurance and interest on advances made to him before and during the voyage. It was proved that such charges were the usual ones in trading voyages, and that the accounts were always made out so. The plaintiff remonstrated against those deductions, but ultimately accepted the balance, and gave a receipt for the whole wages:—Held, that he could not recover the amount of such deductions. *Id.*

So also, where, in another voyage, he had stipulated for a 90th share of the net proceeds of the cargo on a whaling adventure in lieu of wages, and was charged with insurance on such share. *Id.*

Held, also, that such deductions need not, under the circumstances, be made the subject of a set-off. *Id.*

*Charter-party.*—Defendant, by charter-party of October 20th, 1832, agreed to go in ballast from P. to St. M., and bring back a cargo of fruit direct to L.; the charterer was to be allowed thirty-five running days for loading and unloading, to commence on December first then next; and if the vessel did not arrive at St. M. by the 31st of January, 1833, the charterer was to be at liberty to rescind the charter-party:—Held, that the defendant was bound to proceed at once to St. M., and was not at liberty to make an intermediate voyage for his own purposes, although, notwithstanding such intermediate voyage, he arrived at St. M. before the 31st January, 1833. *M'Andrew v. Adams*, 4 M. & Scott, 517; 1 Bing. N. R. 29. 2023

In a declaration on a charter-party, by which the ship was to sail from Hamburg, being tight, staunch, strong, and every way fitted for the voyage, in the course of the next November, and proceed to Lima, and having discharged her out-



ward cargo, forthwith to be made ready, and proceed to Costa Rica, and there take on board a cargo, and then proceed to Liverpool;—breaches were alleged as follows: that the vessel was not, in November, or afterwards, until or when she sailed, to wit, on the 20th of December, tight, staunch, strong, or in any way fitted for the voyage; and that, though she did then sail from Hamburg, yet, by reason of her not being tight, &c., when she so sailed, she was obliged to, and did, put back into Altona, and was detained there for a long time, to wit, until, &c.; though she did then again set sail on her voyage from Altona, she did not proceed on the voyage according to its due course, or with proper dispatch, but was unnecessarily delayed, and deviated, &c. &c.; by means of which several premises, the vessel did not arrive at Lima until, &c., and the plaintiff lost the benefit of a homeward cargo from Costa Rica, &c. The defendant pleaded, (amongst other things), as to so much of the declaration as related to the vessel not being fitted for the voyage, and by reason thereof being obliged to put back into Altona, and being detained there for such time as was necessary to put further ballast on board, payment into court of 1s., and no damages ultra; and as to so much as related to her being detained at Altona beyond the time necessary to put the ballast on board, that she was not detained there by reason of her not being tight, staunch, &c., modo et forma:—Held, on special demurrer, that the latter plea was bad, as answering only a part of the breach to which it applied, viz. the detention at Altona, and the subsequent delay and deviation, even if that was a breach, and was not merely a statement of special damage. *Porter v. Izat*, 1 Mees. & Wels. 381. 2023

Agreement to proceed to the East Indies, and there load a full and complete cargo; the fore-cabin to be filled with light goods; freight 4l. 15s. per ton of 20 cwt. for sugar, coffee, and rice, and for pepper for 18 cwt. to the ton; 100 tons of rice or sugar to be shipped, previous to any other part of the loading, to ballast the vessel:—Held, that the owner was obliged to furnish what further ballast was necessary, and that the freighter, after shipping the 100 tons of rice or sugar, was at liberty to complete the cargo with light goods. *Irving v. Clegg*, 1 Bing. N. R. 53; 4 M. & Scott, 572. 2025

A ship's husband covenanted that his ship should, at one port, take in a quantity of brandy and convey it to another port, and there receive a cargo of fruit, &c., which the freighters of the ship covenanted to supply. He did not take the brandy, and the freighters did not furnish a full homeward cargo, for which he recovered damages against them. They afterwards brought an action against his widow and representative, to recover damages for the breach of his covenant:—Held, that they could not recover in any shape, in that action, either the damages they had paid, or the costs they had incurred in defending the former action, although they were prevented from obtaining the homeward cargo by the neglect of the ship's husband, in not taking in the brandy.

*Walton v. Fothergill*, 7 C. & P. 392—Tindal. 2026

Where several goods, belonging to one owner, are carried the same voyage, a delivery of part does not defeat the lien upon the remainder for the whole freight. But if there be two contracts to carry, with different termini to the voyage in each contract, no lien attaches for freight under the one contract upon goods shipped under the other, and improperly detained on board by the carrier. Goods are divested of a lien by a complete delivery. It is for the jury to say, whether there has been a complete delivery. *Bernal v. Pim*, 1 Gale, 17. 2027

Defendants chartered plaintiff's ship from London to B., there to deliver her cargo, reload, and proceed to a port between G. and A.: freight for voyage out and home, 1300l., if delivered at G., in S., London or Liverpool; 200l. to be paid in London on the vessel's departure, the remainder on final delivery of the homeward cargo. The ship proceeded to B., delivered her cargo there, and sailed again with a cargo of hides, which defendants consigned to G. At F., the ship and about one-third of the hides were lost. The vice-consul of F., acting on behalf of defendants, at the request of the captain of the ship, transmitted the residue of the hides, by another vessel, to defendant's consignees at G., where they were accepted, and the freight from F. to G. paid by defendants:—Held, that plaintiff was not entitled to the 1300l. freight; that he was not entitled pro rata itineris for freight to B., or from F. to G., but that he was entitled to freight pro rata, from B. to F. *Mitchell v. Darthez*, 2 Scott, 771; 2 Bing. N. R. 555. 2031

In indebitatus assumpsit for freight, it appeared that goods were laden in Jamaica on board the plaintiff's ship, according to a bill of lading, which stated them to have been shipped by W. J., on a vessel bound for London, on account of the defendant, and that they were to be delivered in London to the consignees, paying freight for the same at the rate therein mentioned: the goods so shipped were the property of the defendant. The captain having delivered the goods to the consignees without recovering the freight, it was held, that the defendant was liable by law to pay the freight to the shipowners, and that independently of any express contract by charter-party. *Domett v. Beckford*, 5 B. & Adol. 521. 2034

Plaintiffs agreed with defendants to convey a cargo to O., and if the river was in possession of an enemy, to unload at F., outside the harbor. The freight was to be 475l., or, if the vessel could enter O., discharge and reload there, 300l. only: twenty-five days were allowed for unloading. Plaintiffs arrived at F. June the 2nd, and, an enemy being in possession of the river, commenced unloading there. The vessel was detained at F., partly for the convenience of defendants, and partly by bad weather, till August 25th, and by that time had discharged seven-eighths of her cargo. The enemy then having quitted the river, she entered O., where she discharged the remaining eighth of her cargo. In



July, the defendants' agent at O. gave plaintiff a bill for the larger freight. In September, the vessel obtained, at O., a full cargo for England:—Held, that plaintiffs were entitled to the larger freight, and to demurrage from the 28th of June. *Gibbens v. Buisson*, 1 Bing. N. R. 283; 1 Scott, 133. 2035

*Pilots and Ports.*—The master of a vessel does not incur the penalties imposed by 6 Geo. 4, c. 125, s. 58, for refusing to take a pilot on board, unless it distinctly appear that the pilot, at the time of offering his services, produced his license. *Hammond v. Blake*, 5 M. & R. 361. 2041

The erection of any building in a port or navigable river, which of itself is such a hindrance to the navigation thereof as to amount to a nuisance, is an indictable misdemeanor, although such building is productive of collateral benefit, sufficient, in the opinion of the jury, to counterbalance the injury done to the navigation. *Rex v. Ward*, 6 Nev. & M. 38. 2043

Therefore, the erection by an individual, of an embankment projecting into a public navigable river, and causing the navigation to be less free, is indictable as a nuisance, although it be shown that a public advantage is produced by facilitating the landing of passengers and goods, the launching of boats in foul weather, and the affording protection to small boats in certain states of the wind. *Id.*

A port may be created in modern times, with a right to receive a port duty from all who come within its limits. *Jenkins v. Harvey*, 1 Gale, 23; 5 Tyr. 326. 2043

A port duty *ex vi termini*, implies a consideration for it. *Id.*

In 1796, the corporation of Truro let to the plaintiff's testator the office of meter of the borough, with all fees, emoluments, &c. arising from the measuring of coal, &c. which should be imported or exported within the limits of the borough, after proving the corporation's right to toll. In assumpsit for this toll, it was proved that, from 1772 to 1828, (fifty-six years), their lessees had received 4d. a chaldron upon the measuring of coal imported as above. The judge told the jury that he knew no rule of law, which, upon the evidence of modern usage laid before them, would prevent them from presuming the immemorial existence of the right to the payment, but did not inform them that the plaintiff might be entitled to it as a port duty, and therefore, not against common right, or requiring an origin so ancient as the time of legal memory:—Held, that though this omission might not amount to a misdirection, a new trial must be granted. *Id.*

#### SMUGGLING.

The statute 3 & 4 Will. 4, c. 52, s. 20, enacts, that goods taken or delivered out of any warehouse, not having been duly entered, shall be forfeited. The King's warehouse is a warehouse within this clause. *Att. Gen. v. Voudiere*, 1 C. M. & R. 571; 5 Tyr. 211. 2046

By stat. 3 & 4 Will. 4, c. 53, s. 28, if goods, which shall have been warehoused or otherwise secured for home consumption or exportation, shall be clandestinely removed from or out of any warehouse or place of security, they shall be forfeited. *Quære*, whether the King's warehouse is within this clause? *Id.*

The King's warehouse is a warehouse within the meaning of the 3 & 4 Will. 4, c. 53, s. 44, prohibiting the illegal removal of goods from any warehouse or place of security in which they shall have been deposited. *Lowe v. Att. Gen.*, 2 C. M. & R. 544; 1 Gale, 249. 2046

If a vessel, having on board goods, spirits, &c., which she has unshipped at more than a league from the shore, during the same voyage approach within one league, she is liable to forfeiture by the stat. 3 & 4 Will. 4, c. 13, s. 2. *Dict.* But she incurs the forfeiture in such case only by coming within the distance during the same voyage, and not by doing so in any subsequent and distinct voyages. *Att. Gen. v. Schiers*, 2 C. M. & R. 286; 1 Gale, 223. 2047

An information charged that defendant, not being a subject of his majesty, was, on the 28th of October, found on board a vessel within a part of the United Kingdom, and within one league of the coast of the United Kingdom, such vessel being liable to forfeiture under an act relating to the customs:—Held, that a conviction for a pecuniary penalty on this information was bad; stat. 3 & 4 Will. 4, c. 53, s. 48, not having made it an offence in a foreigner to be on board such vessel within any port besides those of the Isle of Man, and the offence, created by the same section, of being on board such vessel within one league of the coast of the United Kingdom having been done away with, so far as relates to the pecuniary penalty, by stat. 4 & 5 Will. 4, c. 13, (22nd of May, 1834). *Rex v. Pereira*, 2 Adol. & Ellis, 375. 2049

On an information for penalties on the stat 6 Geo. 4, c. 108, s. 45, it was proved, that about two miles from shore, but within the limits of the port of Dover, as set out by commissioners under the stat. 13 & 14 Car. 2, c. 11, s. 14, goods were transferred from a foreign vessel, without payment of duties, to boats, which conveyed them within the low water-mark:—Held, that whether or not the transfer from the vessel to the boats was or was not within the United Kingdom, that there was an illegal unshipment within the stat. *Att. Gen. v. Tomsett*, 2 C. M. & R. 170; 5 Tyr. 514; 1 Gale, 147. 2049

Goods, the importation of which is prohibited when coming from particular places, may, under the 3 & 4 Will. 4, c. 53, s. 30, be described in an information for penalties, as goods liable to and unshipped without payment of duty, and the defendant may be charged with having been concerned in the unshipping, the duties not having been first paid or secured, although it appeared that they were in fact imported from a place to which the prohibition applies. *Att. Gen. v. Graves*, 2 C. M. & R. 669; 1 Tyr. & G. 48. 2049



A foreigner selling and delivering goods abroad to a British subject, may recover the price, although he knows, at the time of the sale and delivery, that the buyer intends to smuggle them into this country. *Pellecat v. Angell*, 2 C. M. & R. 311; 1 Gale, 187. 2049

A plea stated the consideration of a bill of exchange to be a sale of goods abroad to the defendant, an Englishman, as the plaintiff well knew, at a small price, being less than the real value for the same, for the purpose of the defendant getting them smuggled into England:—Held, that the plea did not show any participation by the plaintiff in the illegal purpose of the defendant, and that, therefore, the plaintiff was entitled to recover. *Id.*

Seemingly, that the bill would have been avoided if the plaintiff had made out invoices of the goods at a false price, to enable the plaintiff to import them, on payment of less than the legal duty, the bill being given for the full price, or for the difference between it and the false price. *Id.*

### SPIRITUOUS LIQUORS.

The stat. 24 Geo. 2, c. 40, s. 12, which prevents a person from recovering for spirits supplied to a smaller amount than 20s. at a time, does not apply to spirits supplied by a hotel-keeper to a guest who is resident in his hotel. *Proctor v. Nicholson*, 7 C. & P. 67—Abinger. 2051

The vendor of spirits in small quantities, for the price of which he is disabled from recovering by 24 Geo. 2, c. 40, s. 12, who has another demand against the vendee, may apply a payment made to him by his debtor to the price of the spirits, unless at the time of payment the debtor direct a different appropriation of it. *Philpott v. Jones*, 4 Nev. & M. 14; 2 Adol. & Ellis, 41. 2051

In the absence of such contemporaneous directions by the debtor, the creditor may so apply the payment at any time afterwards. *Id.*

And a jury may, upon the trial of an action brought by such creditor against the debtor, find that such appropriation has been made, although in the particulars of demand the plaintiff has stated that the action was brought to recover the amount of his bill, being the whole of his original demand, including the charges for spirits. *Id.*

### STATUTE.

A statute passed in a session of parliament begun in the second, and continued in the third year of a King's reign, must not be pleaded as passed in the second and third years of the reign, although such act be recited in a later statute as "passed in the second and third years," &c. *Rex v. Biers*, 3 Nev. & M. 475; 1 Adol. & Ellis, 327. 2055

On indictment for conspiracy, laying in the indictment that the defendants knew the party conspired against to bear a certain character, and

to be liable, in that character, to the operation of an act passed in the second and third years, &c., adding the title of the act correctly, the judgment was arrested for such misrecital. *Id.*

And this, although there was a general count, (to which the objection did not apply), stating merely that the defendants conspired, "by false, artful, and subtle stratagems and contrivances, as much as in them lay, to injure, oppress, aggrieve, and impoverish" the prosecutors. *Id.*

Although in an act of parliament it is expressly enacted that it shall commence and take effect from a day named, yet, if the royal assent be not obtained until a day subsequent, the provisions of a particular section, in its terms prospective, do not take effect until such subsequent day. *Burn v. Carvalho* (in error), 4 Nev. & M. 893. 2055

A party suing for penalties for the violation of an act of parliament, will not have the discretion of the court exercised in his favor, if the action be merely within the letter of the act, and not its spirit. *Ex parte Swift*, 3 Dowl. P. C. 636. 2057

### STOCK.

Where a bond is given by the borrower of a sum of stock, to secure the replacement of the stock, and payment in the meantime of sums equal to the interest and dividends, and a bonus is afterwards declared upon the stock, the lender has an equity to be placed in the same situation as if the stock had remained in his name, and is consequently entitled to the replacement of the original stock increased by the amount of the bonus, and to dividends in the meantime, as well upon the bonus as upon the original stock. *Vaughan v. Wood*, 1 Mylne & K. 403. 2059

To obtain a transfer of stock under the provisions of the 56 Geo. 3, c. 60, it is not necessary for the petitioners to show that they are beneficially entitled to it; it is sufficient if they prove their legal claim. *In re Bigg*, 1 Y. & Col. 245. 2058

Foreign securities are not within the Stock Jobbing Act, 7 Geo. 2, c. 8. *Oakley v. Rigby*, 2 Bing. N. R. 732. 2059

Gambling transactions in foreign funds are not within the prohibition of that statute. *Wells v. Porter*, 2 Bing. N. R. 722. 2059

### SUNDAY.

An attorney is not within the 29 Car. 2, c. 71, s. 1, which prohibits certain persons from doing any work of their ordinary calling on the Lord's day. *Peate v. Dickens*, 3 Dowl. P. C. 171; 1 C. M. & R. 422; 5 Tyr. 116. 2061

An attorney, who, acting on behalf of his client, agrees to become personally responsible for part of the debt owing by him, does not thereby do any work of his ordinary calling within the meaning of that act. *Id.*

A plea, that the promise and undertaking men-



tioned in the declaration was made on a Sunday, need not conclude contra formam statuti (29 Car. 2, c. 7). *Id.*

### SURETY.

A., principal, and B., surety, gave their promissory note to C. C. sues A., and takes a cognovit, payable by instalments, the first instalment to be paid on the day before that on which C. might have signed final judgment in the action if no cognovit had been given, with power to issue execution for the whole debt in case of default. A. makes a default at the day:—Held, that B. is not discharged. *Price v. Edmunds*, 5 M. & R. 287. 2064

Whether B. would have been discharged if the first instalment had been duly paid, and the further instalments had thereby stood deferred to a day subsequent to that on which final judgment would have been signed if no cognovit had been given, *quære*? *Id.*

Defendant, after he had become bankrupt, was discharged out of custody, on a ca. sa., upon executing a warrant of attorney, with two sureties, the sureties consenting that the plaintiff, in order to lessen their liability, should prove his debt under the commission. The plaintiff having proved his debt, but no dividend having been paid, the court refused, on summary application, to exonerate the sureties. *Duncan v. Sutton*, 1 Scott, 338; 1 Bing. N. R. 431. 2065

In general, a release to the principal debtor is in equity a release to the surety, but if the surety has previously to the release given by the creditor paid part of the debt, and given a security for the remainder, the general rule will not apply, but the creditor, notwithstanding the release, will, in the absence of evidence to the contrary, retain his right against the surety. *Hall v. Hutchons*, 3 Mylne & K. 426. 2065

### TENDER.

In an action of debt the defendant pleaded the general issue as to part, and as to the other part a tender, but omitted to pay the money into court: judgment having been on that account signed as for want of a plea, the court set aside the judgment for irregularity. *Chapman v. Hicks*, 2 Dowl. P. C. 641; 2 C. & M. 633. 2067

A tender before an action brought is not pleadable to an action for unliquidated damages. *Searle v. Barrett*, 4 Nev. & M. 200; 3 Dowl. P. C. 13. 2067

On a plea of tender of 1*l.* 12*s.* 5*d.*, the jury found specially, that defendant's attorney called on plaintiff, and said, "I come to pay you 1*l.* 12*s.* 5*d.*, which defendant owes you;" that the attorney put his hand in his pocket, but did not produce the money; the plaintiff said, "I cannot take it, the matter is now in the hands of my attorney:"—Held, upon a writ of false judgment, that such finding did not warrant a judgment for defendant. *Finch v. Brook*, 1 Scott, 70; 2 Scott, 511; 1 Bing. N. R. 253. 2068

The facts, however, appearing on a special ver-

dict, in which the jury had not found that there was a valid tender:—Held, that though the jury might have inferred a tender, the court could not. *Id.*

The plaintiff's attorney, before bringing the action, wrote to the defendant to say, that, unless the debt, together with his (the attorney's) charge for that letter, were paid at his office on the Wednesday following, at 12 o'clock, proceedings would be commenced. On the Wednesday, at 10 o'clock, an agent of the defendant went to the attorney's office, and there saw a boy, to whom he tendered the amount of the debt only. The boy, after referring to the letter-book, refused to accept it, unless the charge were also paid. It appeared that the writ was issued at 11 o'clock on that day:—Held (Parke, B., dubitante), that this was a good tender. *Kerton v. Braithwaite*, 1 Mees. & Wels. 310. 2068

### THEATRE.

The proprietors of Covent Garden Theatre agreed with an actor, that he should act for 24 nights during a certain period of time, at their theatre, and that in the meantime he should not act at any other place in London:—Held, that the court cannot enforce the positive part of the contract, and therefore, it will not restrain by injunction a breach of the negative part. *Kemble v. Kean*, 6 Simon, 333. 2071

An agreement that plaintiffs should be paid 36*l.* on the 31st of December, 1833, for 313*l.* lent by him on the 26th of April, 1834, if four persons named should be alive on the 31st of December, and that plaintiff should have the use of two boxes at the V. theatre, in the intermediate time, gratuitously; but if either of the four persons should die, plaintiff should pay a reasonable sum for the use of the boxes:—Held, not an agreement running with the land, and therefore not binding, as to the use of the boxes, on an assignee of the theatre. *Flight v. Glossop*, 2 Scott, 220; 2 Bing. N. R. 125; 1 Hodges, 263. 2072

### TIMBER AND TREES.

A tenant for life, subject to impeachment for waste, is entitled to the interest of money produced by the sale of timber cut by order of the court. *Tooker v. Annesley*, 5 Sim. 235. 2073

An executor is entitled to sue the lessee of his testator for a covenant not to fell, stub up, lop, or top timber trees, excepted out of the demise, such breach having been committed in the lifetime of the testator. *Raymond v. Fitch*, 2 C. M. & R. 588. 2073

The arbitrator made a special award, finding the following facts:—That the parish and manor of H., and all the messuages, lands, and tenements in his award mentioned, were from time immemorial within C. chase, and so continued until the said chase was disfranchised; and that in the 17th year of the reign of Eliz., the lord of the manor, and the owner of certain woods and coppices, whose estate A. then had, granted several leases of the same messuages, lands, and



tenements, then held of D. and P. respectively, for the term of 1000 years, with common of pasture as appurtenant thereto for certain beasts, over and upon the said woods and coppices to be used and enjoyed in the manner then accustomed by others having common of pasture over the same for the like commonable cattle. He then stated that the right of common then accustomed was from the 12th of May to the 22nd of November, except only such part of the woods wherein the owner or occupier thereof, from time to time, at his free will and pleasure, cut down the wood and underwood; which parts so cut down the owner or occupier was accustomed to inclose with a fence to preserve the growth of the wood and underwood therein, and thereby excluded all beasts therefrom until the end of three successive years from the time of such cutting, when the deer of the chase were admitted into the woods and coppices, and all other beasts, until the end of four successive years from the time of such cutting, when the commonable cattle were admitted. He then found that the lessees, their tenants, &c. had used and enjoyed common of pasture in the said woods and coppices. The question which the arbitrator raised was, whether the owner of the woods was entitled to inclose the coppices and woods, so from time to time to be cut down, and exclude therefrom all the commonable cattle for seven successive years, for the preservation of the wood and underwood:—Held, that the owner of the woods was not so entitled; that the statute 22 Edw. 4, c. 7, did not apply to woods wherein rights of common existed; and that the statute 35 Hen. 8, c. 17, s. 8, which provides, that the space where wood is intended to be cut may be inclosed and kept in severalty for seven years, only applied to woods in which immemorial rights of common existed, and not to rights of common claimed by grant. *Dibbin v. Anglesey (Marquis)*, 2 C. & M. 722; 4 Tyr. 926. 2073

#### TIME, COMPUTATION OF.

Where a certain number of days' notice of an intention to do an act is required, the day of the service of the notice is excluded from the computation, and that on which the act is to be done is included,—unless there be some special provision requiring a different mode of computation. *Rex v. Cumberland (Justices)*, 4 Nev. & M. 378; 1 Har. & Woll. 16. 2076

Therefore, notice to magistrates of an intention to apply on the 25th day of the month, for a certiorari to remove an order made by them for the allowance of accounts of surveyors of highways, served upon the 20th of the same month, is not a sufficient notice within 13 Geo. 2, c. 18, s. 5, requiring six days' notice to be given. *Id.*

Semble, that the word "till" is inclusive of the day to which it is prefixed. *Dakins v. Wagner*, 3 Dowl. P. C. 535. 2076

Semble, the mode of calculating the number of days in any notice provided by statute, is the same as that prescribed for the same purpose by Reg. Gen. Hil. 2 Will. 4, No. 8, in matters af-

ected by the rules or practice of the courts. *Burton v. Spires*, 1 Tyr. & G. 74. 2076

Where parties contract that the purchase of lands shall be completed within so many months, calendar and not lunar months are intended. *Hipwell v. Knight*, 1 Y. & Col. 401. 2076

#### TOLLS.

A mere claim of a right to take certain tolls, without showing clearly that it is a bona fide claim, is not sufficient to oust justices of the jurisdiction to convict for taking them improperly. *Rex v. Hampshire (Justices)*, 3 Dowl. P. C. 47. 2077

Under charters granting to a dean and chapter, "that they and all their men shall be quit of toll, passage, cheminage, &c. in city and borough, fair and market, in the passage of bridges, and all parts of the sea, in all places throughout England," their lay tenant of lands included in the charters is exempt from market toll and toll traverse, not only for articles going to or coming from the lands for the necessary manurance and enjoyment of them, but also for goods sent out or coming in for the purpose of merchandize. *Middleton (Lord) v. Lambert*, 1 Adol. & Ellis, 401; 3 Nev. & M. 841. 2077

Quære, whether in the latter case the exemption could have been claimed by ecclesiastical persons? *Id.*

Quære, also, whether the exemption from toll claimable at common law by ecclesiastical persons and tenants in ancient demesne, extended to goods bought and sold, or carried for the mere purpose of trade? *Id.*

If the lessee of tolls under a corporation warranty, by temporary agreement, the amount of toll claimed of individuals, it shall not affect the right to the tolls, if it appear to have been a variation, not for the purpose of claiming more at one time than another, but for the convenience of both parties. *Lancum v. Lovell*, 6 C. & P. 463—*Tindal*. 2077

#### TRESPASS.

*Assault and Imprisonment.*—In trespass for false imprisonment, proof must be given of circumstances, from which the judge and jury may decide whether there was or was not a restraint or detention of the person; and it is not enough for witnesses to swear that they considered the plaintiff was in custody, and thought that he was under restraint; nor is it enough to show that the defendant, at a police-office, stood before the plaintiff and said, "You cannot go away till the magistrate comes," if it appears that he relinquished that attitude, and went to another part of the office before the plaintiff had made any attempt to depart. *Cant v. Parsons*, 6 C. & P. 504—*Lyndhurst*. 2079

Where an action is brought for false imprisonment, and the defendant afterwards prefers an indictment against the plaintiff for an assault, which was the offence charged to have been committed



when the plaintiff was imprisoned, the court will not compel the plaintiff to try his cause, until the other proceedings are terminated. *Long v. Hutchins*, 1 Hodge, 56. 2079

Trespass for assault and false imprisonment, and taking the plaintiff to a police station. Plea, that the defendant was possessed of a dwelling-house, and that the plaintiff entered the dwelling-house, and then and there insulted, abused, and ill-treated the defendant and his servants in the dwelling-house, and greatly disturbed them in the peaceable possession thereof, in breach of the peace; whereupon the defendant requested the plaintiff to depart, which he refused to do, and continued in the house, making the said disturbance and affray therein; that thereupon the defendant, in order to preserve the peace, and restore good order in the house, gave charge of the plaintiff to a certain policeman, and requested the policeman to take the plaintiff into his custody, to be dealt with according to law; and that the policeman, at such request of the defendant, gently laid his hands on the plaintiff, for the cause aforesaid, and took him into custody. It appeared in evidence, that the plaintiff entered the defendant's shop to purchase an article in the shop, when a dispute arose between the plaintiff and the defendant's shopman; that the plaintiff refusing on request to go out of the shop, the shopman endeavored to turn him out, and an affray ensued between them; that the defendant came into the shop during the affray, which continued for a short time after he came; that the defendant then requested the plaintiff to leave the shop quietly; but he refusing to do so, the defendant gave him in charge to a policeman, who took him to a station-house:—Held, first, that the defendant was justified, under the circumstances, in giving the plaintiff in charge to a policeman, for the purpose of preventing a renewal of the affray:—Held, secondly, that the plea was not substantially proved, inasmuch as the alleged assault on the defendant himself was not proved. *Timothy v. Simpson*, 1 C. M. & R. 757; 5 Tyr. 244; 6 C. & P. 499. 2080

If, in an action for an assault, the defendant plead that he was possessed of a public-house, in which the plaintiff was making a disturbance, and that the plaintiff refusing to depart, the defendant laid hands on him, and turned him out. This plea is proved, if it be shown, that, in consequence of the plaintiff refusing to go, the defendant assaulted him, with a view of turning him out of the house, though in fact the defendant could not succeed in actually turning the plaintiff out. *Moriarty v. Brooks*, 6 C. & P. 684—*Lyndhurst*. 2080

If A. comes up to attack B., and B. puts himself into a fighting attitude to defend himself, this is not an assault by B., and will not, in an action by B. against A. for an assault, support a plea by A. of son assault dimesne. *Id.*

Upon issue taken on a plea of son assault dimesne, it is necessary to prove an assault commensurate with the trespass sought to be justified. *Reece v. Taylor*, 4 Nev. & M. 470; 1 Har. & Woll. 15. 2080

Where there are a series of matters complained of in trespass, and the plea amounts to a justification of all; in order to entitle the defendant to a verdict, it is incumbent upon him to make out all the material allegations in his plea; therefore, where the declaration complained of an assault, putting the plaintiff out of a shop, and imprisoning him in custody of a police-officer, and the plea was *molliter manus imposuit*, to remove the plaintiff from the defendant's shop, and a justification of the imprisonment, because the plaintiff had assaulted defendant, and the assault on the defendant was not proved:—Held, that, although without it the first part of the plea was sustainable, yet, being a material allegation to maintain the plea as to the imprisonment, it was necessary to prove it to entitle the defendant to a verdict. *Id.*

Semble, that it is not necessary to reply excess in every case where the allegations in a declaration in trespass are covered by a plea of justification; but, that evidence of acts consistent with the declaration, but not within the justification, may be given under *de injuria*. *Id.*

In trespass for an assault and battery, the replication *de injuria*, to a plea that the plaintiff was the defendant's apprentice, whom he moderately chastised for improper conduct, does not put in issue the question of the moderation of the chastisement. *Penn v. Ward*, 2 C. M. & R. 338; 4 Dowl. P. C. 215; 1 Gale, 189. 2081

In an action of trespass and false imprisonment, for causing a person to be taken to a police station-house; if it appeared that the going proceeded originally from the plaintiff's own will, the defendant will be entitled to a verdict on either "not guilty," or "leave and license," pleaded; but the plaintiff will not be deprived of his right to recover damages, if it appear that, being acted upon by the defendant's having made a charge of felony against him in the presence of a policeman, he went voluntarily with the policeman to the station-house for the purpose of meeting the charge. *Peters v. Stanway*, 6 C. & P. 737—*Alderson*. 2082

A private person cannot apprehend another upon a suspicion of felony, for the purpose of taking him to the place where the theft was committed, in order to ascertain whether he was the thief. *Hall v. Booth*, 3 Nev. & M. 316. 2082

A. caused B. to be taken into custody on suspicion of felony, and taken before a magistrate, who remanded B. for two days, and then discharged him:—Semble, that B., on a declaration for false imprisonment (in the usual form), cannot recover for the two days' imprisonment after the remand. *Holtum v. Lotun*, 6 C. & P. 726—*Parke*. 2082

Whether he could do so if it were stated as special damage, *quære*? *Id.*

In an action for false imprisonment, the defendant pleaded that the plaintiff had stolen feathers from a bed in a ready-furnished bedroom, let to him by the defendant, and that he therefore gave the plaintiff into the custody of a



policeman, who, because the plaintiff resisted, beat the plaintiff, and took him to a station-house. There was no evidence, either of any resistance by the plaintiff, or of any blow given by the policeman:—Held, that, on proof of the other allegation, the plea was substantially made out. *Atkinson v. Warne*, 6 C. & P. 687—Gurney. 2082

The plaintiff declared for an assault, in seizing and laying hold of him, pulling and dragging him about, striking him, forcing him out of a field into and through a pond, and then imprisoning him; plea, justifying the assaulting, seizing, and laying hold of the plaintiff, and pulling and dragging him about:—Held, no sufficient answer to the entire charge in the declaration. *Bush v. Parker*, 4 M. & Scott, 588: 1 Bing. N. R. 72. 2083

A declaration in trespass for assault and battery stated, that defendant assaulted plaintiff, and wrenched a stick from his hand, and with the said stick and with his fists gave the plaintiff many violent blows, &c. &c. Plea, as to the assaulting the plaintiff with the stick and his fist, &c., non assault demesne:—Held, after verdict, that the plea sufficiently justified the battery with the stick as well as the assault with it. *Blunt v. Beaumont*, 2 C. M. & R. 412; 4 Dowl. P. C. 219. 2083

*To Personal Property.*—If, in trespass for taking goods, the defendants plead that W. L. was possessed of a room, and that they, as his servants, removed the goods, which were incumbering the room, to a convenient distance; this plea is disproved, if it be shown that the defendants locked up the goods in the room, and took away the key. *Jones v. Lewis*, 2 C. & P. 343—Colridge. 2084

A replication to a plea to trespass de bonis asportatis, justifying the removal of the chattels because they encumbered a close, as to a part of the goods, de injuria, and as to other parts, extra force and violence, was held good on special demurrer. *Vivian v. Jenkins*, 3 Nev. & M. 14; 1 Har. & Woll. 468. 2084

Such a replication may afford a several answer to different portions of the chattels. *Id.*

If one answer be insufficient on demurrer, it will not affect the validity of the others. *Id.*

A replication of de injuria to a plea, setting out a title by demise, giving color to the plaintiff, and justifying as a servant in trespass qu. cl. fr., is bad. *Id.*

A replication of excess to a plea in trespass de bonis asportatis, justifying the removal of chattels, damage feasant, required, before the new rules, H. T. 4 Will. 4, a prayer of judgment; and the objection that there was no such conclusion might be taken on special demurrer. *Id.*

*To Real Property.*—In a declaration in trespass quare clausum fregit, the plaintiff's close is described by abutments; plea, seisin in fee in the defendant, and issue thereon. The plaintiff is entitled to recover for a trespass done in a close in his lawful possession, answering to the de-

scription in the declaration, although the defendant also has a close answering to the same description. *Lempriere v. Humphrey*, 4 Nev. & M. 638; 3 Adol. & Ellis, 181; 1 Har. & Woll. 170. 2086

So, although the abutments are stated with such generality, that the declaration would have been bad on special demurrer, and it is only by reason of such generality of description that the plaintiff's close comes within the description. *Id.*

As where the locus in quo is described as abutting in the direction of the four cardinal points, towards certain closes, and the plaintiff proves a trespass on a close of a triangular shape abutting towards such closes. *Id.*

When, in a declaration in trespass quare clausum fregit, the locus in quo is described as abutting towards certain closes, the defendant may demur specially; or may obtain a judge's order for a more certain description of the close. *Id.*

But such defect cannot be taken advantage of at the trial of an issue, raised upon a plea of seisin in fee or liberum tenementum. *Id.*

Nor could the objection have been taken, though the defendant had pleaded a denial of the plaintiff's possession of the alleged close. *Semble. Id.*

A plea of seisin in fee or liberum tenementum in trespass, admits the plaintiff's possession, in fact, of a close corresponding with the description of the close, either by name or by abutments in the declaration. *Semble. Id.*

Where, in trespass q. c. f., the defendant in his plea claims an interest in the land, a replication of de injuria is bad on general demurrer. *Hooker v. Nye*, 1 C. M. & R. 258; 4 Tyr. 477. 2087

In trespass quare clausum fregit, a person claiming to be owner of the locus in quo may be a witness to disprove the plaintiff's title. *Woolway v. Rowe*, 3 Nev. & M. 849. 2087

Declaration for seizing pigs: plea, that defendant was possessed of a close named H., in which the pigs were eating, &c., and were taken damage feasant: replication, that defendant was not possessed of the said close in the said plea mentioned, in which the pigs were alleged to be eating, &c. and issue thereon. There were several adjacent closes called H.:—Held, that the defendant was bound to show that he was possessed of a close in which the pigs were eating, &c., and that it was not enough for him to show his possession of a close named H. *Bond v. Downton*, 2 Adol. & Ellis, 26. 2087

Proof that plaintiff was in separate possession of two rooms of a house:—Held, sufficient to satisfy an allegation that plaintiff was in possession of the messuage upon which defendant had taken issue. *Fenn v. Grafton*, 2 Bing. N. R. 617. 2087

To a declaration for breaking and entering plaintiff's close, defendant pleaded, first, not guilty; secondly, that the close was not the close of the plaintiff; thirdly, that the close was the soil and freehold of the defendant:—Held, that evidence of possession was sufficient to entitle



plaintiff to a verdict on the second plea. *Heath v. Milward*, 2 Scott, 160; 2 Bing. N. R. 98; 1 Hodges, 198. 2097

Trespass for breaking and entering three closes, describing them by abutals. Plea, that the said closes in which &c. were the closes, soil, and freehold of one T. L., and justifying as his servants. Replication, that before the said times when, &c., and before the said T. L. had anything in the said closes, in which, &c., one R. T. and his wife, in right of his said wife, one A. L., and one E. K., were seised in their demesne as of fee of and in two undivided third parts, &c. of and in the said closes, in which, &c., and one A. R. was also then seised in her demesne as of fee of and in the other undivided third part of and in the said closes in which, &c. And the said R. T., and M. his wife, being so seised, afterwards and before the said T. L. had anything in the said closes, in which, &c., to wit, on &c., at &c., a certain fine was had and levied of, inter alia, the parts, shares, and interests of the said R. T. and M., his wife, of and in the said closes, in which, &c., which fine was then had and levied, inter alia, to the use of P. M. C. and his heirs, during the life of the said M. T.; by virtue of which fine, the said P. M. C. became seised in his demesne as of freehold, for the term of the life of the said M., of and in the said parts, &c. of the said R. T. and M., his wife, of and in the said closes, in which, &c. And the said P. M. C., A. L., E. K., and A. R., being so seised, afterwards and before the said T. L. had anything in the said closes, in which, &c., and before the said times when, &c., demised to the plaintiff, who thereupon entered and was possessed until the defendants wrongfully broke and entered therein, &c. Rejoinder, traversing the seisin of R. T. and M., his wife, A. L., E. K., and A. R., in the said closes, in which, &c.; on which issue was joined. At the trial the plaintiff proved a case as to two of the closes, but offered no evidence as to the third:—Held, that the issue was distributable, and that the plaintiff was entitled to a verdict as to the two closes, and the defendants as to the third. *Phythian v. White*, 1 Mees. & Wels. 216; 4 Dowl. P. C. 714. 2087

*Several Defendants.*—In an action of trespass against several, the plaintiff having proved a joint trespass committed by all the defendants, cannot waive that and give evidence of another trespass committed by only one defendant. *Tait v. Harris*, 1 M. & Rob. 282—*Lyndhurst*. 2090

If a person does not assist in a trespass either in word or deed, he is not liable for it. *Timothy v. Simpson*, 6 C. & P. 499—*Parke*. 2090

*Justification under Process.*—In an action for false imprisonment for an arrest upon a writ of capias issued on an informal affidavit, the defendant may justify under the writ, if it has not been set aside. *Reddell v. Pakeman*, 2 C. M. & R. 30; 1 Gale, 104. 2089

Where, in trespass for false imprisonment, the defendant justifies under process of outlawry, and the plaintiff replies that there was no affidavit

of debt made and filed &c., and the defendant rejoins that there was such affidavit, and sets out an irregular affidavit, and the plaintiff demurs:—Held, that the defendant was entitled to judgment, trespass not being maintainable where the process is irregular merely, and not void. Id.

*Pleading and Evidence generally.*—In trespass, a replication de injuria, also newly assigning that the goods were taken as a distress, not only for the sum alleged in the justification, but also for another sum, &c., is double. *Gisborne v. Wyatt*, 1 Gale, 35. 2092

To a declaration containing one count only in trespass for assault and false imprisonment, the plea justified the apprehending the plaintiff on a charge of felony, and proceeded to aver that the plaintiff resisted, whereupon he beat him, &c. At the trial, the justification as to the apprehension for felony was proved; but the defendant did not prove the resistance of the plaintiff. The jury having found for the defendant:—Held, that the verdict was right, the defendant having proved as much of his plea as was necessary to cover the declaration, and it not being necessary for him to prove what was unnecessarily alleged. *Atkinson v. Warne*, 1 C. M. & R. 827; 5 Tyr. 481; 3 Dowl. P. C. 483. 2092

## TROVER.

*Property and Possession.*—While the right of property in a chattel is admitted to be in one person, the right of possession of that chattel cannot be absolutely and adversely in another. *Clerk v. Adam*, 1 Clark & Fin. 242. 2092

Trover may be maintained by a gratuitous bailor of cattle against a wrong-doer who takes them out of the possession of the bailee. *Nicolls v. Bastard*, 1 Tyr. & G. 156; 2 C. M. & R. 659; 1 Gale, 295. 2092

The plea of no property in the plaintiff in trover, means no property as against the defendant. Id.

In trover the defendant pleaded that I. H. was possessed of the goods as of his own property, and that to prevent them being taken in execution he covinously pretended to sell them to the plaintiff. The replication traversed, that I. H. did for the purposes &c., covinously pretend to sell the said goods:—Held, that the replication did not admit that the goods were the property of How; but that the onus was on the defendant of proving a fraudulent sale by How to the plaintiff. Id.

Where a declaration proceeds for a number of chattels, if the plaintiff succeed in proving his right to a part only, the defendant is entitled to have the issue as to the residue found in his favor; but he is not entitled to any costs, unless he has been put to expense as to the residue so claimed in the declaration. Id.

He is not entitled in such a case to any costs, if the particulars inform him for what the plaintiff intends to proceed. Id.



*For what it lies.*—Trover lies for a lost bank-note, which the defendant has tortiously converted to his own use, though part of the proceeds had been paid by him to the plaintiff. *Burn v. Morris*, 4 Tyr. 485; 2 C. & M. 579. 2096

The acceptance of part does not affirm the taking, so as to waive the tort, but the amount received will go in reduction of damages. *Id.*

The owner of chattels stolen, who prosecutes the thief to conviction, may recover their value in trover from a person who purchased them from the thief by a bona fide sale, but not in market overt before the conviction, notice of the felony having been given whilst they were in his possession. *Peer v. Humphrey*, 2 Adol. & Ellis, 495; 4 Nev. & M. 430; 1 Har. & Woll. 28. 2096

Even though the defendant sold the goods in market overt before the prosecution of the felon. *Id.*

A., resident abroad, remitted a bill to B., his agent in England, drawn by A., and specially indorsed by him to C., with whom his children were at school, in payment of C.'s account for their board and education. B. got the bill accepted by the drawees, and sent a letter by post to C., stating that he had received a commission from A. to pay her some money on account of his children, and desired to be informed when and how it should be delivered. While the bill remained in B.'s hands, he received directions from A., to keep it, and the proceeds, in his hands, and to have a fair investigation into C.'s accounts, and after such investigation, to pay her what might be due to her. No such investigation took place, and B. detained the bill:—Held, that C. could not recover it in trover. *Brind v. Hampshire*, 1 Mees. & Wels. 365. 2097

If a defendant, liable in trover for taking goods, pays rent due from the plaintiff on the premises, whence they are taken, the execution may be limited to the excess of the verdict in trover beyond the rent paid. *Plevin v. Henshall*, 2 Dowl. P. C. 743. 2099

*Conversion.*—The forcible taking possession of a house and fixtures by the assignee of a term in the houses, is not a conversion of such fixtures. *Longstaff v. Meagoe*, 4 Nev. & M. 211. 2101

On a demand of goods by the real owner, the defendant refused to deliver them, stating as his reason for the refusal, that they had been attached in his hands by a foreign attachment in a suit against a third party, from whom he had received them as his own, which was the fact:—Held, that there was no evidence of a conversion. *Verrall v. Robinson*, 2 C. M. & R. 495; 4 Dowl. P. C. 242; 1 Gale, 244. 2101

The widow and administratrix of an insolvent, being applied to by his assignees for some papers that had been in his possession at the time of his decease, answered that they were in the hands of her attorney:—Held, not sufficient evidence of a conversion to sustain an action of trover. *Canot v. Hughes*, 2 Bing. N. R. 448. 2101

R. being employed to procure a bill of exchange to be discounted for plaintiff, instead of doing so, indorsed it, and placed it in the hands of defendant, who was the clerk to a creditor of R. Defendant carried the bill to R.'s account with his creditor, and though afterwards apprized of the circumstances under which R. held the bill, refused to restore it:—Held, that defendant was liable to plaintiff in trover. *Cranch v. White*, 1 Bing. N. R. 414. 2101

To support a plea of the statute of limitations in trover, by showing a conversion more than six years before action brought, the defendant must either prove an actual conversion in fact, or give evidence of a positive and absolute demand and refusal before that period. *Philpott v. Kelley*, 4 Nev. & M. 611; 3 Adol. & Ellis, 106; 1 Har. & Woll. 134. 2101

The demand and refusal necessary to afford evidence of a conversion in trover, must be absolute and unqualified. *Id.*

A pipe of wine belonging to the plaintiff was deposited in the defendant's cellar, and was bottled at a time during which there were conflicting claims to it by the plaintiff and the assignees of the party to whom it was sent, and who resided in the defendant's house. By whom or by whose orders the wine was bottled did not appear, though there was some evidence that it was likely to be injured from not being bottled:—Held, that it was a question for the jury, whether the act of bottling operated as a conversion:—Held, also, that it was a question for the jury, to say, under all the circumstances, whether the drinking of a part of the wine, taken in connexion with the bottling, amounted to a conversion; and they having found that it did not, the court refused to disturb the verdict. *Id.*

The mere taking away and destroying a part of the property which is in the hands of a bailee, who may deliver up the rest, is not a conversion of the whole, so as to enable the party entitled to maintain trover for the whole—*Per Patteson, J., and Coleridge, J. Id.*

A letter written to a bailee by the bailor's attorney, within six years before action brought, in which he says that the bailor has instructed him to commence the necessary proceedings for the recovery of the goods, which were deposited with the bailee, and demanded as long ago as on a day named—more than six years before action brought,—and threatening to commence proceedings if the goods are not delivered within a week,—is evidence of a demand and refusal, more than six years before action brought, proper to be submitted to the jury under a plea of the statute of limitations to trover for the goods, *semble. Id.*

A. lent goods to B., who died, and on his death the goods came into the possession of C., who, when the goods were demanded of him, said that he should do nothing but what the law required. C. did not afterwards deliver up the goods:—Held, in an action of trover, to be a sufficient conversion by C. *Davies v. Nicholas*, 7 C. & P. 339 —Coleridge. 2101



*Action.*—In an action of trover, the plea of not guilty admits the plaintiff's property or right of possession, but only a property or right of possession to the extent necessary to maintain the action; therefore, it is open to the defendant to show that he and the plaintiff were tenants in common. *Stancliffe v. Hardwick*, 2 C. M. & R. 1; 3 Dowl. P. C. 762; 5 Tyr. 551; 1 Gale, 127. 2104

If, however, the defendant has made a conversion in fact, which he proposes to justify by reason of his joint control over the chattel, he must plead in confession and avoidance; the plea of not guilty, putting in issue the fact only of the conversion, and not the tortious nature of it. *Id.*

*Semble*, that where a defendant has a lien on goods, and the only evidence of a conversion is a demand and refusal, it is not necessary to plead the lien specially. *Id.*

If a defendant in trover plead, that the goods "are not, nor were the property" of the plaintiff, in manner and form as in the declaration is alleged, (concluding to the country); this will be taken to be an informal plea, traversing the allegation of the declaration, that the plaintiff "was possessed" of the goods "as of his own property;" and, therefore, on this plea, it will be a good defence to show that the goods, though the property of the plaintiff, had been pledged by him as a security for money. *Samuel v. Morris*, 6 C. & P. 620—Alderson. 2104

But whether this plea would not be bad on special demurrer, *quære*? *Id.*

Where the plaintiff in trover claims under a sale, the defendant, under a plea that the goods are not the plaintiff's property, cannot show the sale to have been fraudulent. The fraud must be pleaded. *Howell v. White*, 1 M. & Rob. 400—Fatteson. 2104

A party, who, being employed by plaintiff to procure a bill of exchange to be discounted, lodged it instead with defendant, as a security for a debt due to defendant, was held a competent witness for plaintiff in an action of trover brought by plaintiff for the recovery of the bill. *Fancourt v. Bull*, 1 Bing. N. R. 681. 2104

A written demand in trover made by A. B., stated that he held the plaintiff's power of attorney; and the defendants' attorney said, in the presence of the defendants, that he would admit the service of the demand and tender of the charges, but that the defendants declined to deliver the goods, and would leave A. B. to seek such remedy as the law would give him:—Held, that it was not necessary on the trial of the cause to produce the power of attorney. *Leuckart v. Cooper*, 7 C. & P. 119—Tindal. 2104

In trover for goods, the defendant pleaded payment of money into court, and the plaintiff replied that he had sustained more damages: the defendant paid into court the cost price of the goods, having offered the goods in specie to the plaintiff two days only after they ought have been delivered. The plaintiff proved that he had sustained inconvenience and loss by not having the goods delivered at a proper time. The jury, however,

found for the defendant, and the court refused to set aside the verdict. *Evans v. Lewis*, 3 Dowl. P. C. 819. 2104

Where, after an act of bankruptcy, a sheriff seizes and sells goods in trover by the assignees, the jury may deduct, in their estimate of the damages, the expenses of the sale. *Clarke v. Nicholson*, 1 C. M. & R. 724; 5 Tyr. 233. 2104

Defendant, a sheriff, who held goods taken in execution, delivered them to plaintiffs, assignees of a bankrupt, after an action of trover had been commenced by them: the plaintiffs accepted the goods without condition:—Held, that they could not recover in the action more than nominal damages; at all events, not without alleging special damage in the declaration. *Moon v. Raphael*, 2 Scott, 489; 7 C. & P. 115; 2 Bing. N. R. 310; 1 Hodges, 289. 2104

### TRUSTEE.

A new trustee, appointed under 11 Geo. 4 & 1 Will. 4, c. 60, without a reference to the Master, the petitioner being the only person interested in the trust property. *Ex parte Shick*, 5 Sim. 281. 2105

A testator devised his freehold estates to trustees, upon trust as to three undivided fourth parts, "to pay to, or permit and suffer" his wife and daughters to receive "the clear yearly rents and profits," and as to the other undivided fourth part, "to permit and suffer" his son to receive "the clear yearly rents and profits." He further directed that the shares of his wife and daughters should be for their sole and separate use; and that the trustees should let the estates upon certain conditions, and out of the rents should pay all taxes, and for repairs:—Held, that the legal estate in the whole of the premises vested in the trustees. *White v. Parker*, 1 Scott, 542; 1 Bing. N. R. 574; 1 Hodges, 112. 2105

The above devise was to two trustees, "their heirs and assigns," and the testator directed that upon the death, incapacity, or refusal to act, of any trustee or trustees, a new trustee or trustees should be appointed. One of the trustees died, and the survivor, by a deed of lease and release and appointment, to which all the *cestui que trusts* were parties, renounced the trust, and conveyed the premises to one new trustee, who acted in execution of the trusts:—Held, that notwithstanding the intention of the testator, that two trustees should always be in existence, and notwithstanding the appointing new trustees was not strictly pursued, the legal estate in the premises vested in the trustee so appointed, and that he was therefore liable to be sued in covenant as assignee of the reversion of certain premises belonging to the testator. *Id.*

Where, by the terms of a settlement, it appears to be the intention of the parties that there should at all times be two trustees of the property comprised in the settlement, the appointment of a single trustee in the place of two original trustees, and the transfer by them of the trust property to such single trustee, is a breach of trust,



and the original trustees are responsible accordingly. *Hulme v. Hulme*, 2 Mylne & K. 682. 2105

A trustee who has purchased the trust property, and sold it at a profit, and who has been compelled by a suit in equity to refund the profit, will not, under circumstances affecting him with moral fraud, be charged with the costs of the suit. *Baker v. Carter*, 1 Y. & Col. 250. 2107

If a trustee mixes trust funds with his private monies, and employs both in a trade or adventure of his own, the cestui que trust may, if he prefers it, insist upon having a proportionate share of the profits, instead of interest on the amount of the trust funds so employed. *Docket v. Somes*, 2 Mylne & K. 655. 2107

If a trustee admits that a balance belonging to the cestui que trust is in his hands, an action at law for money had and received may be maintained by the cestui que trust on such admission. *Roper v. Holland*, 4 Nev. & M. 668; 3 Adol. & Ellis, 99; 1 Har. & Woll. 167. 2108

Where the trustee of an estate, who had funds belonging to his cestui que trust in his hands, said that he was ready to pay him 10*l.* down if he would give credit for certain repairs:—Held, that it was such a statement of account and declaration of a balance due as would maintain an action. *Id.*

When a court of equity traces out trust money in the hands of a person who has not *prima facie* a right to hold it, that money must be paid into court. *Leigh v. Macauley*, 1 Y. & Col. 260. 2108

#### UNIVERSITY.

A member of the University of Oxford cannot be arrested by civil process out of the court of the Chancellor of the University, unless such process issue in a suit commenced against him whilst resident within the precincts of the University. *Perrin v. West*, 5 Nev. & M. 291; 3 Adol. & Ellis, 405; 1 Har. & Woll. 401. And see *Thornton v. Ford*, 15 East, 634. 2110

Upon the return to a *habeas corpus cum causa* to remove the body of a defendant, in custody under a warrant of the Chancellor of the University of Oxford, the defendant will be discharged, unless it appear distinctly, and not merely by inference that the defendant was resident within the jurisdiction of the Chancellor's court at the commencement of the suit. *Id.*

Whether a defendant can be arrested out of the precincts of the University of Oxford, upon a warrant of the Chancellor of the University, *quære?* *Id.*

#### USE AND OCCUPATION.

Where there has been an actual enjoyment, assumpsit for use and occupation lies in respect of incorporeal hereditaments. *Bird v. Higginson*, 4 Nev. & M. 505; 1 Har. & Woll. 61. 2111

Seemle, that where a count in assumpsit to recover a rent reserved by parol demise by the

plaintiff to the defendant of an incorporeal hereditament, states, that the defendant actually occupied under such demise, the plaintiff may recover for the use and occupation. *Id.*

But where a count, upon a parol demise of a messuage, and the right to hunt, &c. over a manor, stated merely that the defendant entered and became and was possessed of the messuage, right, liberties, and premises, so to him granted as aforesaid:—Held, that the plaintiff could not recover for the use and occupation. *Id.*

In an action of use and occupation, the defendant cannot show, by the cross-examination of the plaintiff's witnesses, that the premises are held under a written agreement, but it afterwards appeared by the evidence of the defendant's witnesses that the premises are so held, the plaintiff is not bound to put in the written agreement. *Marston v. Dean*, 7 C. & P. 13—Coleridge. 2111

Use and occupation cannot be maintained by the lessor of a tenancy from year to year against the trustees under a deed of assignment for the benefit of creditors, upon an occupation by them for the purpose of disposing of the insolvent's property, unless they have actually occupied as tenants. *How v. Kennett*, 5 Nev. & M. 1; 1 Har. & Woll. 391. 2114

The question whether the acts of the trustees show an intention to become tenants, which was acted upon by the lessor, is a question for the jury. *Id.*

It is no misdirection in such a case to submit the case upon all the facts to the jury, to say whether the acts of the trustees amounted to a contract to become tenants of the premises; that is, whether they meant to become tenants, or, if not, whether they so acted as that the lessor was induced to believe, and did believe, that they meant to become his tenants. *Id.*

An action brought against two persons, being the executors of a deceased termor, for the use and occupation by them of the demised premises, and entry and occupation by one was proved:—Held, that it did not enure as that of both, so as to make them jointly liable *de bonis propriis* in assumpsit for use and occupation. *Nation v. Tozer*, 4 Tyr. 561. 2114

Where lands were let by auction, subject to conditions of sale, and a memorandum of the terms was signed by the auctioneer and the tenant, and underneath there was a signature of approval by the owner, and a direction to pay the rent into the hands of the auctioneer. In an action for use and occupation brought by the auctioneer against the tenant, in which a verdict has been found for the plaintiff, the court granted a new trial, upon the ground that the case had been left as an entire question of fact, without the attention of the jury having been called to the legal effect of the memorandum. *Evans v. Evans*, 3 Adol. & Ellis, 132; 1 Har. & Woll. 239. 2114

Seemle, that in such a case the auctioneer could not maintain use and occupation. *Id.*

In an action for use and occupation since the new rules, it cannot be left to the jury to say



whether the evidence produced by the defendant does not amount to an admission by the plaintiff that it has been paid, and that nothing is due, without a plea of payment or settlement; and such evidence is inadmissible under a plea of set-off for money due on an account stated between the parties. *Linley v. Polden*, 3 Dowl. P. C. 780. 2116

Nil habit in tenementis cannot be pleaded to a count for use and occupation, either in assumpsit or debt. *Curtis v. Spitty*, 4 M. & Scott, 554. 2116

In an action for use and occupation of lodgings, a witness, who was the only person who had occupied them, was called to prove that the defendant had taken them of the plaintiff, and had put her in them:—Held, that she was a competent witness without a release. *Harman v. Holbrook*, 1 Gale, 176. 2116

In an action for use and occupation, the fact of the mortgagee of the premises having given the defendant notice to pay the rent to him, may be given in evidence under the general issue, if the rent sought to be recovered accrued due after the notice; but if the rent accrued due before the notice, this defence must be specially pleaded. *Waddilove v. Barnett*, 4 Dowl. P. C. 347. 2116

### USURY.

Defendant lent money at usurious interest to plaintiff; to color the transaction, a sale of goods for the amount of the money lent was made by plaintiff to defendant, and the goods were transferred; and it was agreed that they should be resold to plaintiff at a higher price, if a bill drawn by defendant on plaintiff for the repurchase money, should be dishonored. The bill was dishonored, and the defendant retained the goods:—Held, that the plaintiff might recover in trover for the full value of them, without deducting the money advanced on the first pretended sale. *Hargreaves v. Hutchinson*, 2 Adol. & Ellis, 12; 4 Nev. & M. 11. 2117

On demurrer to a declaration framed on a contract, which is in terms a purchase of an annuity of £01. for sixty years, for the price of £001., the court will not infer usury. *Ferguson v. Sprang or Spring*, 3 Nev. & M. 665; 1 Adol. & Ellis, 576. 2120

A deed by which A., in consideration of £001., grants to B. an annuity or rent-charge of £01. a year for sixty years, is not on the face of it usurious; to raise the question of usury upon a declaration on such a deed, the defendant must plead an usurious contract, and thereby raise an issue of fact for the jury; the declaration is good upon demurrer. When it is a matter of calculation, (other than the very simplest), whether a contract is usurious, the court will not look at it to see whether it is so; that is a question for the jury. The risk of the insolvency of the grantor of an annuity, otherwise usurious, is not such a risk of the principal money as will operate to make such a grant valid. *Id.*

A customer applied to his bankers to lend him

4000*l.* at 5*l.* per cent, which the bankers agreed to. He then asked the bankers what balance he was expected to keep with them; they answered, he could not keep less than 1000*l.*; upon which the customer said, "Very well; they might leave it to him." The customer paid into and drew out from the banking-house in one year, various sums, amounting to 108,000*l.*:—Held, that, under the circumstances, the loan was not usurious. *Ex parte Patrick*, 3 Deac. & Chit. 638. 2121

A. employs B. as a calico-printer, and before the accounts for printing become due, from time to time advances him various sums of money, charging him, besides interest, with 1*l.* 10*s.* per cent. as a trade premium, which it was customary for persons in the same trade to take under the like circumstances. A. was also in the habit of paying debts owing by B. to other persons before they became due, when A. deducted the usual discount, but charged B. with the full amount of the debt, besides interest, and the trade premium above mentioned. Semble, that both these modes of dealing were usurious. *Ex parte Millington*, 3 Deac. & Chit. 298. 2123

By 5 & 6 Will. 4, c. 41, so much of the 12 *Anne*, st. 2, c. 16, as enacts, that any note, bill, or mortgage shall be void by reason of usury, is repealed; and it is enacted instead, that such securities shall be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration only. 2124

By 3 & 4 Will. 4, c. 98, s. 7, bills not having more than three months to run, are not to be subject to the usury laws. 2124

Bills and notes not having more than three months to run, by which more than 5*l.* per cent. interest is secured, or which are discounted on usurious terms, are by 3 & 4 Will. 4, c. 98, s. 7, rendered available securities for all purposes, for the whole amount for which they were intended to secure, including the usurious interest. *Connop v. Yeats or Meaks*, 4 Nev. & M. 303; 2 Adol. & Ellis, 326. 2124

Therefore, a warrant given to secure the amount of an usurious bill of three months, which had been dishonored at maturity, was held also to be protected by the act. *Id.*

Where sums of money advanced, and to be advanced, are secured by deed, and any of the dealings then contemplated by the parties are tainted by usury, the deed is wholly void as a security, although the legal debt is not impeached. *Ex parte Millington*, 3 Deac. & Chit. 298. 2125

In a declaration for usury, the day from which the forbearance is to commence must be alleged and proved precisely as stated, although laid under a videlicet; and if a different day is proved, or no day at all is proved, it is not sufficient. *Fox v. Keeling*, 2 Adol. & Ellis, 670; 4 Nev. & M. 523; 1 Har. & Woll. 66. 2127

Where usurious interest was alleged to have been taken on the renewal of a bill, and the contract to forbear and the forbearance were alleged to have been from the time of making the agreement for renewal, until the second bill became due, but no evidence was given of any precise day



on which the transaction took place:—Held, that the usury was not sufficiently made out. *Id.*

### VESTRY.

A local vestry act directs, that vestrymen shall take an oath that they will faithfully execute the duties reposed in them as vestrymen appointed in pursuance of that act, and that they are duly qualified according to the rate of qualification thereby prescribed; by a public vestry act the constitution of the vestry is changed: vestrymen elected under the new act cannot be required to take the oath prescribed by the former act. *Rex v. St. Pancras*, 3 Nev. & M. 425; 1 Adol. & Ellis, 80. 2131

In parishes which have adopted the Vestry Act, 1 & 2 Will. 4, c. 60, the number of vestrymen to be lotted out at the first election of vestrymen under that act is one-third of those vestrymen who, at the time of the election, were in actual existence, and not one-third of a complete vestry, nor one-third of a complete vestry deducting from such third the number of the vacancies. *Id.*

In parishes within the metropolitan police district, or the city of London, or in which the rated householders exceed 3000 persons, persons, to be eligible as vestrymen, and to be capable of acting as such within 1 & 2 Will. 4, c. 60, must be resident householders, rated upon a rental of 40*l.*; but it is not necessary that such rating should be in respect of property in their own occupation. *Id.*

So, as to eligibility in parishes not being within the metropolitan police district, or the city of London. *Id.*

So, as to capacity to act as vestrymen in such parishes, *semble. Id.*

A parish is not "divided into districts for ecclesiastical or other purposes," within the sect. 22 of 1 & 2 Will. 4, c. 60, where a small portion of the parish is annexed to a chapelry, created in an adjoining parish, or where the parish has been, for the convenience of collecting the poor-rates, divided into four districts, which districts have been adopted by the returning officer of a borough (within which the parish is situated), for the purpose of taking the poll at an election for members of parliament. *Id.*

The trustees appointed and acting under a local act of parliament for building a church, which authorizes them to levy rates upon the inhabitants of the parish, and directs that the accounts shall be audited and allowed by the quarter sessions, are, nevertheless, compellable, under sect. 34 of the General Vestry Act, and 1 & 2 Will. 4, c. 60, to produce and explain their accounts before the auditors of the parish accounts, applied under and in consequence of the adoption of the last-mentioned act. *Rex v. St. Pancras New Church (Trustees)*, 5 Nev. & M. 219. 2131

*Semble*, that all boards, &c., having power to levy rates on the inhabitants of a parish which

adopts the General Vestry Act, are compellable to produce and explain their accounts before the auditors. *Id.*

Auditors of parish accounts, appointed under that act, can hold meetings only in the board room of the vestry. *Id.*

A mandamus to appear, and produce and explain accounts to auditors, cannot direct the parties to appear, &c., "at such time and place as the auditors may appoint, and give notice thereof," where by statute the parties are only required to appear at a meeting directed to be held at a certain place. *Id.*

When, upon a motion to quash the return to a mandamus for insufficiency, and to issue a peremptory mandamus, the matter is set down in the crown paper for argument, the counsel for the crown is entitled to begin, although the counsel for the defendants propose to urge objections to the mandamus itself. *Id.*

The court has power to mould the rule for a mandamus, but cannot remould the writ after it has issued, and award a peremptory mandamus in a more limited form than the original mandamus. *Id.*

By a local act the inhabitants of the parish of C., paying church and poor-rates, were empowered to elect guardians of the poor; in the Vestry Act (58 Geo. 3, c. 69), which regulates the mode of voting in vestries, is a proviso, that that act shall not affect the right or manner of voting in any vestry held by ancient usage or by a special act:—Held, that this proviso did not except the parish of C. from the operation of 58 Geo. 3, c. 69; and that to bring a vestry within the exception it must have a peculiar constitution. *Rex v. Clerkenwell*, 3 Nev. & M. 411; 1 Adol. & Ellis, 317. 2131

The magistrates are bound, under 59 Geo. 3, c. 12, to appoint all persons nominated and elected by the parishioners to be members of the select vestry, and have no discretion to reject any person so nominated and elected. *Rex v. Kent (Justices)*, 4 Nev. & M. 299; S. C. nom. *Rex v. Adam*, 2 Adol. & Ellis, 409. 2131

An inhabitant may be a member of a select vestry, although he be a magistrate acting within the parish. *Id.*

An overseer may be a select vestryman, by virtue of an election by the parishioners, although he be also a member of the select vestry by virtue of his office. *Id.*

The court will not grant a mandamus to churchwardens to assemble the parishioners for the purpose of taking a poll upon a motion, carried by a show of hands at a vestry meeting, to do an illegal act, as, to apply a portion of a fund held in trust for charitable purposes to the erection of a monument to the memory of the donor of the fund. *Rex v. St. Saviour's Southwark*, 3 Nev. & M. 879; 1 Adol. & Ellis, 380. 2131

A vestry being about to be held in Manchester, for the election of churchwardens, notice was given that the meeting would be held in the parish church, but that, if a poll was demanded, it



would be adjourned to the town-hall. At the meeting there was a show of hands, upon which a poll was demanded; and thereupon the chairman, without taking the sense of the meeting, adjourned the election to the town-hall, where a poll was taken:—Held, that the proceeding was regular, no business having been interrupted by it, and the adjournment, in a particular event, being part of the original appointment. *Rex v. Chester (Archdeacon)*, 1 Adol. & Ellis, 342.

2131

## WARRANT OF ATTORNEY AND COGNOVIT.

*Defeazance.*—The defeazance to a warrant of attorney, dated 5th June, 1824, stated that it was given to secure the payment of 420*l.* (with costs of judgment, if signed) on the 5th December, 1826, and that it was agreed that the plaintiff should enter up judgment thereon at his pleasure, and issue execution, &c.:—Held, that the plaintiff was restrained by this defeazance from suing out execution before the 5th December, 1826. *Hiscocks v. Kemp*, 5 Nev. & M. 113; 1 Har. & Woll. 384.

2135

J. executed a warrant of attorney to confess judgment; the defeazance recited a mortgage made by M. to A., with a proviso for redemption on payment of the principal on a day named, with interest in the meantime; the defeazance further recited, that J. gave the warrant of attorney as a security for the payment of the interest after the rate, at the time and in manner appointed by the mortgage deed; and that it was intended that judgment should be entered up forthwith. It further provided, that no execution should be issued till default should be made of the interest, at the times, &c. (as before); but that, if default should be made in such payment, execution might be issued at any time, and from time to time thereafter, for all the arrears of interest then due, and thenceforth to accrue due. Judgment was entered up on the warrant. The interest due up to the day named in the mortgage, inclusively, was paid soon after that day. Afterwards demand was made on J. for payment of interest accruing after the day. On application to the court to order satisfaction to be entered on the roll:—Held, that the motion was, at all events, premature, execution not having issued; and, per Littleale and Williams, Js., that it was not sufficiently clear, from the defeazance, that the warrant of attorney was intended to cover only the interest up to the day named, inclusively, for the court to interfere. *Atkinson v. Jones*, 2 Adol. & Ellis, 439.

2135

Where the defeazance to a warrant of attorney requires any thing to be done on demand, before judgment can be entered up there must be an actual demand upon a person capable of giving a substantial answer; therefore, a demand made upon an insane person is not sufficient to authorize the judgment to be entered. The only remedy is by an application to equity. *Capper v. Dando*, 2 Adol. & Ellis, 458; 4 Nev. & M. 335; 1 Har. & Woll. 11.

2135

*Presence of Attorney.*—*Fisher v. Papanicolas*, 4 Tyr. 44.

2136

Where a defendant in custody was about to execute a cognovit, and the defendant's attorney being absent from home, the plaintiff's attorney suggested another attorney to act for him, to whom the defendant made no objection, but went to his office, and, on being asked by that attorney if he wished him to attest the execution as his attorney, answered in the affirmative:—Held, that this was an express naming of the attorney, within the meaning of the 72nd rule of H. T. 2 Will. 4. *Bligh v. Brewer*, 1 C. M. & R. 651; 3 Dowl. P. C. 266; 5 Tyr. 222.

2135

It is not necessary that the attorney who attends on behalf of a prisoner, to explain and attest a cognovit, should make the declaration required by the rule of H. T. 2 Will. 4, c. 72, in writing on the cognovit. *Robinson v. Brooksbank*, 4 Dowl. P. C. 395.

2135

It is a sufficient compliance with the rule of 1 Reg. Gen. H. T. 2 Will. 4, s. 72, if the attorney who is called on by a defendant in custody to witness a cognovit, make the declaration required by the rule *viva voce*. *Wilson v. Price*, 4 Dowl. P. C. 213.

2135

*Stamp.*—The court refused to grant a rule for setting aside a cognovit at the instance of the defendant, because it was not stamped. *Clarke v. Jones*, 3 Dowl. P. C. 277.

2137

A cognovit containing terms of agreement must be stamped; but it is sufficient to support an execution under it, if it is stamped by the time cause is shown against a rule for setting aside the execution, on the ground of its not having been stamped. *Rose v. Tomblinson*, 3 Dowl. P. C. 49.

2137

*Judgment.*—Since the rules of H. T. 4 Will. 4, s. 1, Reg. 3, it is not necessary, in order to sign judgment on an old warrant of attorney, to show that the defendant was alive within the term. *Robinson v. Lester*, 3 Dowl. P. C. 531; *S. P. Cockman v. Hillyer*, 2 Dowl. P. C. 816; 4 M. & Scott, 487.

2138

In order to obtain judgment on an old warrant of attorney, it is necessary to show that the defendant was "alive" and not merely "seen" within a reasonable time before the application. *Chell v. Oldfield*, 4 Dowl. P. C. 629.

2138

In order to obtain judgment on an old warrant of attorney, it is sufficient if the affidavit states that the defendant was "seen alive within ten days." *Krell v. Jay*, 4 Dowl. P. C. 600.

2138

The court of K. B. will now grant a rule to enter up judgment on a warrant of attorney, upon an affidavit showing that the defendant was alive within a reasonable time, whether the day on which he is shown to have been alive be in term or not. *Jordan v. Farr*, 4 Nev. & M. 347; 2 Adol. & Ellis, 437.

2138

The court granted a rule moved for on the third day of term, upon an affidavit stating that



the defendant was alive on a day six days previously to the commencement of the term. *Id.*

It being shown that one of two defendants, who had given a joint and several warrant of attorney, was alive within a reasonable time, the court allowed judgment to be entered up as against him alone. *Id.*

Where a defendant was seen alive on the 23rd of April, and a motion to enter up judgment on a warrant of attorney was made on the 27th of May, it was granted. *Watts v. Bury*, 4 Dowl. P. C. 44; 1 Har. & Woll. 371. 2138

The court refused to enter up judgment on a warrant of attorney, where the attesting witness, an attorney of the court, refused from malice to make the necessary affidavit. *Mille v. Donoughoo*, 1 Har. & Woll. 184. 2138

Where an attesting witness to an old warrant of attorney is abroad, his affidavit need not be produced. *Taylor v. Leighton*, 2 Dowl. P. C. 746. 2138

The affidavit of the attesting witness to a warrant of attorney cannot be dispensed with, merely on the ground of his illness. *Owen v. Holles*, 4 Dowl. P. C. 572. 2138

Judgment may be obtained on an old warrant of attorney, although only an office copy of the affidavit of its due execution is produced. *Webb v. Webb*, 4 Dowl. P. C. 599. 2138

An affidavit, in support of a motion for entering up judgment on a warrant of attorney (given when no suit is pending), need not be entitled in any cause. *Davis v. Stanbury*, 3 Dowl. P. C. 440. 2138

It is no objection to entering up judgment on an old warrant of attorney, that the defendant, since the execution of it, had become insane. *Pigot v. Killick*, 4 Dowl. P. C. 287; 1 Har. & Woll. 518. 2138

It is necessary to obtain leave of the court to enter up judgment against husband and wife, on a warrant of attorney executed by the wife dum sola. *Staples v. Purser*, 2 Dowl. P. C. 764. 2138

In the Exchequer, where the defendant gives a cognovit, the costs may be taxed before judgment is signed: and if, by the terms of the cognovit, the plaintiff is at liberty to tax costs and sign judgment, but signs his judgment before the costs are taxed, the judgment is irregular. *Wilson v. Northern*, 4 Dowl. P. C. 212. 2139

Affidavit of debt unpaid. *Ashman v. Bowdler*, 4 Tyr. 64. 2139

Where a warrant of attorney refers to the plaintiff, "his executors and administrators," but the affidavit of execution makes no mention of "executors or administrators," the court will not allow judgment to be entered up. *Baldwin v. Thompson*, 2 Dowl. P. C. 591. 2139

**Parties** ]—Where a joint warrant of attorney is given by two or more persons, one of whom is an infant, the court will order it to be vacated as against the latter, and to stand against the other

parties. *Ashlin v. Langton*, 4 M. & Scott, 719. 2133

To entitle a defendant to relief from a judgment signed on a warrant of attorney, given by him for the price of goods supplied by the plaintiff, on the ground of infancy, the defendant, at the time of keeping a shop, and acting as if he were of age, he ought to make out a clear case; merely swearing that he is an infant of the age of 20 years, and giving an extract from a register of births, is not sufficient for the court to act upon. *Weaver v. Stokes*, 4 Dowl. P. C. 724; 1 Mees. & Wels. 203. 2133

The court set aside a judgment on a warrant of attorney, entered up, even before the late rules of H. T. 4 Will. 4, where the defendant was dead at the time of signing judgment, although in the defeazance it was stipulated that the plaintiff should, without leave of court, be at liberty to enter up judgment, notwithstanding the defendant's death. *Heath v. Brindley*, 4 Nev. & M. 235; 2 Adol. & Ellis, 365. 2140

Quære, whether judgment entered up on a warrant of attorney more than 12 months old, without leave of the court, but in pursuance of an express agreement on the defeazance that the plaintiff shall be at liberty to do so, is valid. *Id.*

Leave granted to enter up judgment on a warrant of attorney, where one of three plaintiffs was dead. *Harper v. Jackson*, 1 Har. & Woll. 214. 2140

**Amount.** ]—Under a cognovit, by which it is agreed that no judgment is to be signed or execution issued, unless default made in payment of a certain sum, with costs, by instalments, the plaintiff may sign judgment and issue execution for the whole sum, if default is made in one instalment. *Rose v. Tomblinson*, 3 Dowl. P. C. 49. 2141

Where a warrant of attorney is given for the payment of a sum of money by instalments, with a power reserved to the plaintiff to issue executions from time to time, as the payments become due; seemble, that the body of a defendant may be taken in execution a second time, although he has been discharged under a previous execution. *Atkinson v. Bayntun*, 1 Hodges, 7: S. C. not S. P. 1 Bing. N. R. 444. 2141

M. being in custody on execution, pursuant to a warrant of attorney, by which he had agreed that execution should issue from time to time for certain instalments of a mortgage debt, defendant, in consideration that plaintiff would discharge M. out of custody, undertook that he should, if necessary, be forthcoming for a second execution:—Held, that defendant's was a valid contract. *Atkinson v. Bayntun*, 1 Bing. N. R. 444: S. C. not S. P. 1 Hodges, 7. 2141

B. gives A. a cognovit, by the terms of which the debt and costs are to be paid by instalments, and in case of any default the whole to be leviable, C., as surety, undertaking that B. shall attend at a certain place within seven days after any notice requiring such attendance, so that in the event of any instalment not being discharged



before the time appointed for such attendance, a ca. sa. may be executed; default being made and notice given, B. attends and offers to surrender, but obtains time from A. for the payment of the instalment then due:—Held, that the undertaking of C. is discharged. *Turner v. Pyne*, 3 Nev. & M. 354; 1 Adol. & Ellis, 34. 2141

Where in a cognovit it is stipulated that judgment shall not be entered up until after the final hearing of a Chancery suit, and the final decree or order thereupon, when, in the event of the final decree or order being in favor of the plaintiff, the judgment and execution upon the cognovit are to operate in accordance with the decree or order, and the plaintiff is to be entitled to levy for the amount decreed, and no more; the plaintiff is not authorized to enter up judgment, pending an appeal to the Lord Chancellor, against a final decree at the Rolls dismissing the defendant's bill. *Jones v. Reynolds*, 3 Nev. & M. 465; 1 Adol. & Ellis, 384. 2141

Where a defendant is in custody upon a cognovit, which it is alleged has been satisfied, the court will refer it to the Master, to see whether there is anything due upon it, but will not order the defendant to be discharged. *Wilson v. Price*, 4 Dowl. P. C. 213. 2142

#### WARRANTY AND DECEIT.

The warranty of a servant, respecting whose authority from his master no more appears than that he was entrusted not to sell, but to deliver a horse and to receive another, with some money in exchange, pursuant to some previous bargain, the terms of which are not shown, will not bind his principal. *Wooden v. Burford*, 4 Tyr. 264. 2142

Bone spavin in the hock is unsoundness in a horse, and therefore is a breach of a warranty of soundness, whether it produces lameness apparent at the time of the warranty or not, and though it may not produce lameness for years after. *Watson v. Denton*, 7 C. & P. 85—Tindal. 2144

Mere badness of shape, though rendering the horse incapable of work, is not unsoundness. *Dickinson v. Follett*, 1 M. & Rob. 299—Alderson. 2144

The first vendor of a horse warranted sound, is not competent to prove soundness for his vendee, in an action brought against him on a subsequent sale with warranty. *Biss v. Mountain*, 1 M. & Rob. 302—Alderson. 2145

Plaintiff bought a horse, warranted sound, by private contract, at a repository. At the time of sale there was a board fixed to the wall of the repository, having certain rules painted upon it, one of which was, that a warranty of soundness there given should remain in force at noon of the day following, when the sale should become complete, and the seller's responsibility terminated, unless a notice and surgeon's certificate of unsoundness were given in the meantime. The rules were not particularly referred to at the time of this sale and warranty. The horse proved unsound, but no complaint was made

till after twelve on the following day. The unsoundness was of a nature likely not to be immediately discovered; some evidence was given to show that the defendant knew of it; and the horse was shown at the sale under circumstances favorable for concealing it. After verdict for the plaintiff:—Held, that there was sufficient proof of the plaintiff having had notice of the rules at the time of the sale to render them binding on him. Also, that the rule in question was such as a seller might reasonably impose, and that the facts did not show such fraud or artifice in him as would render the condition inoperative. *Bywater v. Richardson*, 3 Nev. & M. 748; 1 Adol. & Ellis, 508. 2145

Where a horse has been sold under a warranty of soundness, the seller is liable to an action, if the horse is not sound at the time of sale, though the horse is returned, and though the buyer suffers a considerable time to elapse before he complains of the unsoundness, or offers to return the horse. *Patteshall v. Tranter*, 4 Nev. & M. 649; 3 Adol. & Ellis, 103; 1 Har. & Woll. 178. 2146

If a person has bought a horse with a warranty, which has been broken, and he tenders the horse back to the seller, who refuses to receive it, the buyer is entitled to keep the horse for a reasonable time till he can fairly sell it, and may recover against the seller for keeping the horse during that time. *Ellis v. Chinnock*, 7 C. & P. 169—Coleridge. 2147

Where a horse, warranted sound, turns out to be unsound, and is, after notice to the seller, resold by the purchaser, the latter may recover not only the difference of price between the first and second sales, but also for the keep of the horse for a reasonable time. *Chesterman v. Lamb*, 4 Nev. & M. 195; 2 Adol. & Ellis, 129. 2147

But the question, whether the horse has been kept an unreasonable time before the re-sale, is a question for the jury; and if the seller rests his defence on the soundness of the horse, and does not request the judge to put the question of time to the jury, the court will not, upon motion for a new trial, look into the evidence upon this point. *Id.*

A. sold a picture to B., warranting it a Claude. B. sold it to J., and warranted it a Claude to him. The picture was not a Claude, and J. brought an action against B. on the warranty. B. defended the action, and J. recovered damages and costs against him. B. then brought an action against A. upon the first warranty:—Held, that B. was in this action entitled to recover against A. the amount of the damages and costs that B. has paid to J., and also the costs incurred by B. in defending the first action; but that, if the jury should be of opinion that the sale from B. to J. was not a real sale of the picture in the ordinary course of business, but merely a colorable sale, on the usurious discount of a bill, they ought to disallow these sums. *Pennell v. Woodburn*, 7 C. & P. 117—Tindal. 2147

Upon a sale of pictures, a bill of parcels of "four pictures, views in Venice, Canaletti, 1604." is evidence from which a jury is at liberty to infer



a warranty that the pictures were the production of that artist. *Power v. Barham*, 6 Nev. & M. 62; 7 C. & P. 356; 1 Har. & Woll. 683. 2148

If in an action on a warranty of pictures, it appears that, before the sale, the vendor stated to the vendee that they were the works of a particular master, it will be for the jury to consider whether the vendor made this representation as a part of the contract of sale, or whether the defendant made the representation as matter of opinion only. If, in such an action, the defendant plead non-assumpsit only, the genuineness of the pictures is not in issue, and the jury only need consider it with a view to the amount of damages. *Id.*

An action of deceit does not lie against a person making an untrue representation to another, on the faith of which the hearer acts, and thereby incurs damage, if the party making such representation did not know it to be untrue. *Freeman v. Baker*, 5 B. & Adol. 797. 2148

The owners of a ship circulated advertisements of sale, beginning with a description of the ship which stated her to be copper-fastened, after which was a notice, that the hull, masts, yards, and rigging, were to be taken with all faults. Under this was printed the "inventory," which was followed by a list of the ship's stores and tackle, and there was then a further announcement, that the vessel and her stores were to be taken with all faults, and without allowance for weight, length, quality, quantity, or any defect whatever. The owners afterwards executed a written contract of sale, not stating the vessel to be copper fastened, but containing this clause:—"On payment of the purchase money, the said brig, with what belongs to her, shall be delivered according to the inventory which hath been exhibited; but the said inventory should be made good as to quantity only; and the said brig, together with her stores, shall be taken with all faults, in the condition they now lie, without any allowance for weight, length, quality, or any defect whatsoever."—Held, (assuming that the advertisements could, by words of reference, be incorporated with the contract of sale), that the word "inventory" in the contract referred only to the list of stores, &c., and not to the prior part of the advertisement; and therefore, that on the two documents taken together, no warranty appeared that the ship was copper-fastened. *Id.*

In an action on an agreement, in which fraud is pleaded, the plea is not supported, unless some wilful misrepresentation should have been made. *Stevens v. Webb*, 7 C. & P. 60—Parke. 2148

A defendant in an action for goods bargained and sold at a specific price, will not be allowed to show, either in bar of the action or in mitigation of damages, that there was a false representation of the quality of the goods, unless it be specially pleaded. Where timber was sold, warranted "sound," and an issue was taken as to whether it was sound or not, evidence was allowed to be given, with a view of showing that in the timber trade the word "sound" had a technical and conventional meaning. *Woodhouse v. Swift*, 7 C. & P. 310—Alderson. 2148

Action against the defendant for falsely representing that the life interest of A. B. in certain trust funds, of which the defendant was trustee, was charged with only three annuities, whereby the plaintiff was induced to advance a sum of money for the purchase of an annuity from A. B., secured by his bond, &c.; and also by an assignment of such trust funds, whereas the defendant, at the time he made such representation, well knew that the same funds were also charged with a mortgage for 20,000*l.* It appeared on the trial, that the representation in question was made, if at all, by parol. Lord Abinger, C. B., and Gurney, B., were of opinion that this was a representation concerning or relating to the credit and ability of A. B., so as to come within the 9 Geo. 4, c. 14, s. 6. Parke, B., and Alderson, B., were of opinion that it was not. *Lyde v. Barnard*, 1 Mees. & Wels. 101. 2148

The vendor of a trading concern guaranteed the net profit of the business sold, and of another business in which the purchasers were also engaged at a certain specific sum:—Held, that this guarantee applied to the profits made by the two concerns, after deducting the interest allowed on the amount of further capital advanced by the purchasers, for the purpose of carrying on the concerns. *Kirby v. Wright*, 2 Mylne & K. 131. 2149

## WATER.

If water has been accustomed to flow along a channel from time immemorial, and it has been appropriated, the first owner of the adjoining lands on both sides who appropriates it, without doing any injury to any one, either above or below him, acquires such a right by his appropriation, that though he may not have enjoyed it for twenty years, he may maintain an action against any owner of the lands above him who wrongfully diverts the water from its ancient channel. *Frankum v. Falmouth (Earl)*, 6 C. & P. 529—Alderson. 2150

If a party, who has a right to the use of running water, as an owner of adjoining lands, has appropriated it, and by his declaration claim the right to it as the owner of a mill not twenty years old, this is bad, and the judge at the trial will not allow it to be amended; and even if the jury find the plaintiff's right specially, and it be indorsed on the postea, under the stat. 3 & 4 Will. 4, c. 42, s. 24, the court above will not give judgment for the plaintiff on that finding; because, if the plaintiff had stated his right properly, the defendant might have pleaded differently. *Id.*

Plaintiff declared that he was possessed of a mill; and by reason thereof was entitled to the use of a certain stream for the mill, and that the water ought to run and flow to the mill, and that defendant "wrongfully and injuriously diverted the same:—"—Held, that, on a plea of not guilty, the only matter in issue was the fact of the diversion, and that the right to the use of the stream, as claimed, was admitted. The defendant also pleaded, that the plaintiff was not entitled to the water-course by reason of



the possession of the mill; and also that the water ought not to run and flow to the mill. The jury (being directed by the judge to find specially) found that the defendant had diverted the stream, and prevented it from supplying water necessary for the proper enjoyment of the plaintiff's premises, as they existed before the mill was erected, but found no right in respect of the mill:—Held, that on this finding, the variance in the declaration was material, and that the court could not give judgment for the plaintiff under stat. 3 & 4 Will. 4, c. 42, s. 24. *Frankum v. Felmouth (Earl)*, 4 Nev. & M. 330; 2 Adol. & Ellis, 452; 1 Har. & Woll. 1. 2150

The court directed that judgment should be entered for the defendant on the last two issues, and for the plaintiff on the first, without damages. *Id.*

In an action for diverting water from the mill of A., he obtained a verdict; A. & B., afterwards in possession of the mill, brought an action for a similar injury against the same defendants:—It was held, that as A. & B. were in possession of the mill formerly in the possession of A., it must be presumed they were privy in estate with him, and that consequently the record was admissible in evidence in the second action. *Blakemore v. Glamorgan Canal Company*, 1 Gale, 78. 2152

In a declaration in trespass on the case, the plaintiff stated, by way of inducement, that the defendant, before the committing of the grievance thereafter mentioned, was possessed of a close used as a private road, and then the injury was stated to have been sustained by the defendant digging a sewer in the said close, used as a private road, and thereby withdrawing the water from a pond on the plaintiff's close. It was in evidence that, at the time of digging the sewer, the defendant's close was not used as a private road:—Held, that, under the plea of not guilty, the defendant admitted all matters of inducement: and semble, that the allegation of the user of defendant's close was surplusage. *Dukes v. Gosling*, 1 Scott, 570; 1 Bing. N. R. 589; 1 Hodges, 120. 2152

The wrongful act complained of was the digging and continuing the sewer, and thereby diverting the water from the pond. The evidence was, that the water was not diverted by digging the sewer, but previously, for the purpose of making the sewer; and it appeared, that since the sewer had been made, the water in the pond could not rise to its former height:—Held, that there was no variance between the declaration and the proof, so far as it related to the continuing of the sewer. *Id.*

Defendants having erected, on their own premises, a permanent obstruction to a navigable drain, leading from a river through defendant's premises to plaintiff's close:—Held, that an action lay for the plaintiff, notwithstanding the portion of the drain which passed through plaintiff's close had for sixteen years been completely choked up with mud. *Bower v. Hill*, 1 Scott, 526; 1 Bing. N. R. 549. 2152

In case for obstructing plaintiff's right of way

to his close by a navigable water-course, it appeared that the plaintiff's close which abutted on the water-course, had been detached, about five years before the action, from certain premises called the King's Head Inn. The only evidence of user was by persons frequenting the King's Head Inn in boats, before the plaintiff's close was detached:—Held, not evidence to go to a jury to support the right claimed by the plaintiff. *Bower v. Hill*, 1 Scott, 526; 2 Bing. N. R. 339; 1 Hodges, 45. 2152

In an action on the case for disturbing the plaintiff in the use of a well, by putting rubbish into it, the plaintiff will be entitled to recover, if by means of the rubbish, the water has been shallowed, and the well rendered less convenient for use; but if the effect only was to make the water temporarily muddy, that is too minute a damage to support the action. If in an action on the case, a plaintiff, in the first count, claimed the right to the use of a well as appurtenant to "a certain dwelling-house:" and, in a second count, complain that the defendant obstructed a water-course, which the plaintiff claims as appurtenant to "a certain other dwelling-house," the word "other" is here not matter of description, and therefore is no ground of nonsuit, that both the rights claimed were appurtenant to the same house. *Taylor v. Bennett*, 7 C. & P. 329—*Coleridge*. 2152

#### WAY.

*Highways.*—The 5 & 6 Will. 4, c. 50, is the present consolidated act relating to highways.

The general turnpike act, 4 Geo. 4, c. 95, s. 87, gives an appeal to the sessions to any person who shall think himself aggrieved by any thing done by any two justices, in pursuance of that act or any local turnpike act; and declares that the determination of the sessions shall be final and conclusive, and that no proceeding to be had in pursuance of that act shall be removed by certiorari. The sessions, on appeal against a certificate of two justices, that a turnpike road, made under a local act, had been completed, and was fit to be travelled upon, having decided that the certificate was void in point of law, and having refused to go into the merits of the appeal in point of fact, this court refused to grant a mandamus to them to hear the ground that their decision was contrary to the local act.

A local turnpike act recited, "that the making and maintaining a new road from Leeds to join the Wakefield and Halifax turnpike road, at a certain point, and several branch roads (therein also described) from out of the said main turnpike road, would be an advantage to the inhabitants of Leeds and Halifax, and to the public in general;" and it authorized the making of the said several roads, and enacted, "that the said new roads should not be respectively open to the public, or become public roads until two justices should have certified that the said roads respectively, and the works thereon respectively, were completely made, and fit to be travelled upon, throughout the whole length of such roads re-



spectively." *Semble*, per Littledale and Taunton, J., that the making of all the branch roads was not a condition precedent to the main road becoming a public road as soon as it was completed and fit to be travelled on; but that the main road, when so completed, and certified so to be by two justices, became a public road, although the branch roads were still unfinished. *Rex v. Yorkshire W. R. (Justices)*, 5 B. & Adol. 1003.

2154

Where, by an act of parliament, trustees are authorized to make a main line of road from one point to another, and a portion only of the road is completed, the district through which the part completed is situate is not bound to repair it, although made by the trustees, and used by the public and repaired by the district for upwards of 30 years, and although it be of great utility to the public. *Rex v. Edge Lane*, 6 Nev. & M. 81.

2154

Nor does it make any difference that the line of road has been in some measure varied by subsequent acts of parliament, and the completed parts made the subject of distinct enactments with respect to repairs and tolls to be done and taken by the trustees; the object of all the acts being to make a communication between the same districts. *Id.*

Where a public way crosses the bed of a river which washes over it at every high tide, and leaves a deposit of mud, *semble*, the parish is not bound to make it good. *Rex v. Landulph*, 1 M. & Rob. 393—*Patteson*.

2156

Upon a question whether waste land on the side of a road belonged to the owner of the adjoining inclosure, or to the lord of the manor, grants made by the lord of the waste lands lying on both sides of the road at a considerable distance from the spot in dispute, but in continuity with it, are admissible in evidence; acts of ownership having been proved to have been exercised by the lord, on the waste in the immediate vicinity of the wastes adjoining to the plaintiff's enclosure. *Doe d. Barrett v. Kemp*, 2 Scott, 9; 2 Bing. N. R. 102; 1 Hodges, 231.

2156

But grants made by the lord, of waste lands in other parts of the manor, which were not in continuity with the spot in dispute, are not admissible in evidence. *Id.*

The court will not compel a magistrate by mandamus, to issue a warrant for a parish highway rate, under stat. 13 Geo. 3, c. 78, ss. 45, 67, made upon the occupier of lands within his district, if it appear that, in the magistrate's belief, and in fact, there is a legal doubt as to the occupier being liable to contribute to the repairs of the parish highways, and that the magistrate is likely to be sued if the warrant be granted and acted upon, and this although the occupier has not appealed against the rate. *Rex v. Greame*, 2 Adol. & Ellis, 615.

2157

On motion for a mandamus to justices to grant a distress warrant for levying a highway rate, it appeared that the rate was contested on the following grounds: 1. The lands in respect of which payment had been refused, were part of a district

inclosed 35 years ago by act of parliament, leaving none but private roads, which were repaired by the landholders, and never having been assessed to the highway rate. 2. No statute duty had been called for in respect of these lands, before making the present rate. 3. The special session at which the order for making such rate was signed, had been convened, without notice from the high-constable. 4. The order was signed by two persons not stating themselves to be justices. 5. The rate was not dated. The occupier against whom the rate was applied for had not appealed to the sessions, but he threatened the justices with an action if they granted a warrant, and the opposite party made no express offer to indemnify them:—Held, that a mandamus ought not to go, it being doubtful whether upon some objection among those taken, the justices might not be liable to an action if they granted the warrant. *Rex v. Morehouse*, 2 Adol. & Ellis, 632.

2157

In a cognizance for a highway rate, made for the purposes mentioned in the 30th and 45th sections of 13 Geo. 3, c. 78, such rate must be expressly alleged to be an equal assessment of 9d. in the pound on the yearly value of the lands, &c. The statement of its being an equal assessment of 9d. in the pound upon all occupiers of lands, &c. within the parish, is not sufficient. *Morrell v. Harvey*, 6 Nev. & M. 35.

2157

The court refused to award a mandamus, commanding justices to enforce, by issuing a warrant of distress, a highway rate assessed upon land which had never been rated before, and the liability of which to be rated was denied. *Rex v. Somersetshire (Justices)*, 4 Nev. & M. 394.

2157

And the prosecutor having, previously to the motion for a rule for a mandamus, merely purposed to call a meeting for the purpose of obtaining an indemnity for the magistrates, without actually offering a sufficient indemnity, the rule was discharged with costs. *Id.*

A public thoroughfare was stopped, whereby the plaintiff, a bookseller, whose shop was in the thoroughfare, suffered a loss of custom:—Held, sufficient special damage to entitle him to his action on the case. *Wilks v. Hungerford Market Company*, 2 Scott, 446; 2 Bing. N. R. 281; 1 Hodges, 281.

2158

By statute, it was provided that no action should be brought "after six calendar months after the cause of such action should have arisen." A nuisance was caused on the 2nd of April, and continued until the 2nd of July, and the jury gave damages at the rate of 10l. per month; the action was not commenced until the 30th December:—Held, that damages for two days only could be recovered, the action being brought too late to sustain the previous damage. *Id.*

It was enacted by a statute, made for the purpose of enabling a company to build a market, that it should be lawful for the company to build on part of a certain thoroughfare, provided another avenue was made on an adjacent spot; the



company, for the purpose of carrying on their building, put up a barrier, which stopped the thoroughfare, and continued it for an unreasonable time:—Held, in an action for so stopping the thoroughfare, that, the plaintiff need not complain that the company had stopped the whole way, and neglected to open the new one, but that it was sufficient to state in the declaration that the old way was stopped for an unreasonable time—*Gaselee, J. dissentiente. Id.*

A local act directed that no person should be capable of "acting as a commissioner in execution thereof, in any case wherein he should be personally interested in the matter in question," and that any person who should so act as a commissioner being so disqualified, should forfeit 100*l.* The commissioners were in part elected by parishes within a certain precinct. An order had been made by them for constructing a foot-way along the frontage of the defendant's, among other premises, in a particular manner. The defendant, who was afterwards elected a commissioner, attended at a special meeting of the commissioners, and first moved to rescind the order as to all except his own premises, which was negatived. On a motion being made to alter the order, by adopting a less expensive mode of paving, he supported the proposition in a speech, and took an active part in the discussion and in opposing the original order. He then proceeded to the ballot with the other commissioners. In an action of debt for the penalty, there was a count charging the defendant with acting as commissioner where he was personally interested, and voted accordingly. Another count only charged him as acting as such commissioner, in which he was personally interested. The jury found that the defendant did not vote on the occasion in question, and gave him a verdict:—Held, that he did not act as a commissioner in proposing or rescinding the order, except as to his own premises, but there was evidence that he had "acted" as a commissioner by addressing the meeting on the motion for altering the order, and by taking an active part in the discussion; and that, as the only question left to them was whether he had voted, and not whether he had acted as a commissioner in any other manner, he was entitled to a new trial. *Charlesworth v. Rudgard, 1 C. M. & R. 498; 4 Tyr. 824. 2158*

The evidence of a person who proceeds to a ballot, is admissible as to the share he personally took in it. *Id.*

*Semble*, the addressing commissioners of paving by a commissioner, in complaint of a grievance affecting him individually, is not "acting" as a commissioner. *Id.*

*Turnpike Roads.*—By a turnpike act a toll was imposed "for every horse, &c. drawing any coach, &c.," with a proviso that no person should be subject to pay toll more than once in any one day, "for or in respect of any carriage, or any horse, &c." passing through the gates of the trust, such person producing a ticket denoting that the toll had been paid on that day. The plaintiffs passed with a stage-coach, drawn by

four horses, and paid toll:—Held, that they were not liable to a second toll for passing again on the same day with the same horses, though drawing a different carriage—the toll being imposed on the horses only. *Niblett v. Pottow, 4 M. & Scott, 595. 2166*

A clerk to turnpike trustees is not personally liable under a clause, by which they may sue and be sued in his name. *Emery v. Day, 4 Tyr. 695. 2164*

A local turnpike act directed that the trustees should keep books, in which they should enter their accounts, and also their orders and proceedings, and that all persons should have access to such entries. By a subsequent local act it was directed, that the trustees should keep a book, in which they should enter their accounts, which book should be open to the inspection of the trustees, or of any creditor on the tolls. The General Turnpike Act, 3 Geo. 4, c. 126, s. 73, re-enacted the latter provision as to all turnpike-road accounts; and sect. 72 directed, that all trustees of turnpike-roads should keep a book of their orders and proceedings, which should be open to the inspection of any of the trustees, and should be read as evidence in courts, as there directed. That act also provides, that the enactments therein contained shall extend to all other turnpike acts, except where, by that act, it is otherwise ordered:—Held, that these clauses of the general and of the second local act, superseded the provisions of the original act and limited the power of inspection at first given to the whole public, confining it to trustees, and to trustees and creditors in the respective cases of orders and accounts. *Rex v. Trustees of North Leach and Whitney Roads, 5 B. & Adol. 978. 2164*

By a memorandum of an agreement between the trustees of a turnpike-road and N., the trustees agreed to let and N. to take the tolls for a year at a certain rent; and N., as renter of the tolls, and D. as his surety, severally promised the trustees that N. should pay the rent at the appointed times, and perform certain conditions annexed to the agreement:—Held, that the contract was several and not joint, and that the trustees could not sue the parties jointly for arrears of the rent. *Lee v. Nixon, 1 Adol. & Ellis, 201; 3 Nev. & M. 441. 2165*

*Quære*, whether a contract for the demise of tolls by the trustees of a turnpike-road, signed by one only of two persons appointed by the trustees to the office of clerks to the trustees, is a valid demise under 3 Geo. 4, c. 126, s. 67? *Id.*

A local turnpike act imposed tolls for every horse not drawing; it provided, generally, that if the tolls had in any one day been paid for the passing of any horse, such horse should on that day be permitted to repass once toll free; but enacted, that the toll for horses drawing any stage-coach, should be payable every time of passing. The trustees let the tolls, with power to collect them according to the act, and subject to such rules and restrictions as should be made



by the trustees; and the lessee covenanted with the trustees, to permit the owners of stage-coaches, waggons, &c. to pass in following manner, viz. horses drawing any such carriage as thereinbefore mentioned, to be returning at any time during the same day. Horses passed through a gate, drawing a stage-coach, and full toll was paid for them; they returned the same day, drawing another stage-coach, and the lessee exacted full toll:—Held, that the lessee ought, by his covenant, to have demanded quarter toll only. *Fenton v. Swallow*, 1 Adol. & Ellis, 723.

2166

By the general act, 13 Geo. 3, c. 84, the trustees of turnpike-roads were empowered to demand and take for every waggon having the fellies of the wheels of less breadth or gauge than six inches, and for horses drawing the same, one half more than the tolls which should be payable for the same respectively. By s. 7 of the 3 Geo. 4, c. 126, which repealed the 13 Geo. 3, c. 84, the trustees under any local act were empowered, from and after the 1st of January, 1833, to take for any waggon having the fellies of the wheels of less breadth than 4½ inches, or for the horses drawing the same, one half more than the tolls payable by such act for any carriage having the wheels of the breadth of six inches. By the 4 Geo. 4, c. 95, s. 5, it is provided, "that where the trustees of any road should not, previously to the passing of the 3 Geo. 4, c. 126, have taken and collected the additional tolls directed by the 13 Geo. 3, c. 84, and the local act should not have provided a scale of tolls applicable to the road, such trustees should, from the 1st January, 1824, continue to take and receive for every waggon having the fellies of the wheels of less breadth than 4½ inches, the same tolls as were by such local act payable in respect of such waggon;" and by s. 6, "that where any local act should have a prescribed rate of toll in respect of the breadth of the wheels of carriages, and where the additional toll, authorized to be taken by the 13 Geo. 3, c. 84, should not have been collected and imposed, the trustees should, after the 1st January, 1824, continue to collect tolls prescribed in the local act, and should not collect the increased toll under the 7th sect. of the 3 Geo. 4, c. 126. By a local act, 1 & 2 Geo. 4, c. 85, a scale of toll was prescribed, by which a toll of 4½d. was imposed for each horse drawing any waggon drawn by four horses, whether the fellies of the wheel were of the breadth of six inches and upwards, or less. The trustees under this act had, previously to the passing of the 3 Geo. 4, c. 126, taken and collected the additional toll directed to be taken by the 13 Geo. 3, c. 84:—Held, that such increased toll (6½d.) was properly demanded; the case not falling within the exemption contained in the 5th & 6th sections of the 4 Geo. 4, c. 95. *Pickford v. Davis*, 4 M. & Scott, 683.

2169

A local act empowered trustees of a turnpike-road leading into a town to collect tolls from persons passing more than a hundred yards along it, and to borrow money on the credit of the tolls. By an act for improving the town, the road trustees

were prohibited from repairing a certain portion of it nearest the town, and the town commissioners were to maintain it in future:—Held, that the road trustees might still take the same tolls for passing over that part, and that it still continued part of the same turnpike-road for all purposes but that of repair. *Phipson v. Harvett*, 1 C. M. & R. 473; 5 Tyr. 54.

2169

*Surveyors.*—Under 13 Geo. 3, c. 78, (the General highway act), a waywarden may charge in his account law expenses incurred in the discharge of his duty, though not incurred on the occasions specified in the 65th section of the act. *Rex v. Fowler*, 3 Nev. & M. 626; 1 Adol. & Ellis, 836.

2159

Law expenses incurred in resisting a rule for a certiorari to remove the allowance, by a justice, of the accounts of the preceding waywardens, are expenses which a waywarden may insert in his account, and which the justices may allow, if they think proper. *Id.*

All expenses bona fide incurred by a waywarden, in the execution of the duty imposed upon him by the Highway Act, may be inserted in his account, and may be allowed or disallowed by the justices in their discretion. *Id.*

The 13 Geo. 3, c. 78, s. 48, which requires the accounts of the surveyors of highways to be laid before one justice, and on his refusal to allow them, before the justice at petty sessions, gives no original jurisdiction over the accounts to the justices at petty sessions, even if by consent of all parties they be laid before them. *Rex v. Cumberland (Justices)*, 5 Nev. & M. 578; 1 Har. & Woll. 497.

2159

A charter granted by the Crown, exempting the tenants of the demesne lands in a manor from the payment of chimagium, or road money, is no excuse for the non-performance of statute duty on the highways. *Rex v. Siviter*, 5 Nev. & M. 125; 1 Har. & Woll. 376.

2159

An allowance of a surveyor's accounts at special sessions is irregular, if they have not first been carried before a single justice, though the vestry did not desire it, and though no notice was taken of the omission, on the accounts being discussed at the special sessions. *Rex v. Goodenough*, 2 Adol. & Ellis, 463.

2159

A. and B., being co-surveyors of the highways of a parish, it was agreed between them that A. should deliver up the rate-book to B., and that B. should pay A. out of the monies he should collect under the rate, the sum of 15*l.*, which A. had advanced beyond the amount collected by the previous rate. The book was accordingly delivered to B., who collected more than 15*l.*, but expended the whole in the repair of the roads, and did not pay A. the 15*l.*:—Held, that A. might maintain an action to recover it. *Luddard or Liddard v. Holmes*, 2 C. M. & R. 586; 1 Tyr. & G. 9.

2159

Churchwardens and overseers have not such a property in the account-books of a late surveyor of the highways as to enable them to maintain trover for them; and their remedy is under the



stat. 13 Geo. 3, c. 78, s. 48. A late surveyor of highways, on his account-books being demanded of him at the vestry, said, "I have not got them, I have delivered them to my brother J.," who in his presence, said, "I have them, and I will keep them." J. was one of the overseers of the poor of the parish:—Held, in an action of trover against A., that this was no evidence of a conversion by A., as the overseer is a person to whom the books are to be delivered under the stat. 13 Geo. 3, c. 78, s. 48, and the judge will not leave it to the jury to say whether this delivery over was colorable. *Addison v. Round*, 7 C. & P. 285—Alderson. 2159

*Stoppage and Diversion.*—Justices cannot make an order for stopping up part of a highway as unnecessary, under 55 Geo. 3, c. 68, s. 2, unless they have viewed the highway together; nor unless the finding that it is unnecessary be the result of that view. *Rex v. Cambridgeshire (Justices)*, 5 Nev. & M. 440. 2161

But it is no objection, that previously to the view the road had been stopped up de facto by the owner of the adjoining land without legal authority. *Id.*

The view is sufficiently stated upon the order in these terms, "we having upon view found," &c. *Id.*

It is no objection to such order, that in the part of it which directs that the soil of the road to be stopped up shall be sold to the owner of the adjoining land, if he be willing to purchase, or to some other person that the words, "for the full value thereof," occur only at the end, and not also after the part which directs a sale to the owner of the adjoining land, if willing. *Id.*

Nor, that it does not contain any direction as to the application of the money arising from the sale. *Id.*

Nor, that no certificate of sale is written by the justices at the foot of the order. *Id.*

Nor, that the owner of the land adjoining to the road stopped up was himself, at the time of making the order, waywarden of the parish in which the road is situate. *Id.*

Nor that the road has become unnecessary by reason only of the substitution, by the owner of the adjoining land, of another road over his own land, and the adoption by the public of such substituted road. *Id.*

Semble that upon motion for a certiorari to bring up an order of sessions confirming an order of justices for stopping up a highway, the court cannot entertain objections to the validity of the order, whether on the ground of want of jurisdiction, or otherwise, unless such objections arise upon the face of the order itself. *Id.*

A notice of appeal against an order for stopping up a highway, is sufficient if it state that the appellant is aggrieved by being compelled to go a greater distance to the next market town from their respective residences than they would have gone if the road intended to be stopped up were put and kept in a proper state of repair.

*Rex v. Ady*, 4 Nev. & M. 365; 1 Har. & Woll. 42. 2161

It need not expressly state that they are aggrieved by the order. *Id.*

An act for inclosing lands in the parish of A. authorized commissioners to make new roads, and also to divert, turn, alter, or stop up any of the present public roads, as they should think proper: it directed them to prepare and sign a map describing the roads, and to give certain notices therein prescribed, and to hold a meeting for the purpose of hearing objections, in which they were to be assisted by a justice of the peace—the said commissioners and justices to have power to confirm and alter the map—and all roads set out, or finally ordered and directed to be set out and continued, were to be for ever stopped up and extinguished, and deemed and taken to be part of the lands to be divided and allotted: provided that no roads passing through old inclosures should be stopped up, diverted, turned, or altered, without an order of two justices:—Held, that a road passing partly through old inclosures and partly over lands to be inclosed, was not, nor was any part of it extinguished, by reason of its not being mentioned or set out in the map or award, and of the latter part of it being included within a private allotment. *Rex v. Downshire (Marquis)*, 6 Nev. & M. 92. 2161

By an order of justices, it was stated, that three justices having particularly viewed the public roads within the parish of A., thereafter described, and being satisfied that they were unnecessary to be continued, did order that such roads should be stopped up and extinguished:—Held, that this order was invalid, inasmuch as it did not appear upon the face of it that the justices were, upon the view, satisfied that the roads were unnecessary. *Id.*

The court will make the same intendment in favor of an order of justices as in favor of a conviction. *Id.*

*Bridges.*—Though there cannot be a bridge which the county is bound to repair, where there is no *cursum aquæ*, yet it is a question of fact in each case, whether an arch thrown over a *cursum aquæ*, is such a bridge or not, *semble*. *Rex v. Whitney*, 4 Nev. & M. 594; 3 Adol. & Ellis, 69; 7 C. & P. 208; 1 Har. & Woll. 147. 2171

The fact of the arch or bridge having no parapets, does not of itself prevent its being a county bridge. *Id.*

Judgment by default, upon an indictment for non-repair of a highway, is not conclusive evidence against the parish, of a liability on their part to repair such highway, *semble*. *Id.*

An infant seised of lands in the actual possession of his guardian in socage, in not indictable for the non-repair of a bridge *ratione tenuræ*. *Rex v. Sutton*, 5 Nev. & M. 353; 1 Har. & Woll. 423. 2173

The guardian in socage, if in possession of the lands charged with the repairs, is indictable. *Id.*  
So, any occupier of the lands charged. *Id.*



Whether the guardian in socage, or other owner of the lands charged, not in possession, would be also indictable, *quære*? *Id.*

*Ferries.*—Where there is an ancient ferry from A. to B., which leads to a public highway, and another constructs a landing place in C., a short distance from B., and carries passengers over from A. to C., from whence they pass to the same highway upon which the ancient ferry is established, before it reaches any town or village, it is an injury to the ancient ferry, for which an action will lie. *Huzzy v. Field*, 2 C. M. & R. 432; 1 Gale, 177. 2173

But where there is a river passing by several towns or places, the existence of an ancient ferry over such river from a particular point on one side to a particular point on the other, does not preclude persons from using the river as a public highway, from or to all the towns or places on its banks, which are not in a line leading from one terminus of the ferry to the other. *Id.*

Where the owner of a boat which was accustomed to ply for hire, and to carry passengers across a haven, employed a servant for that purpose, and the servant on one occasion received a passenger on board, and carried him across the haven, near the line of an ancient ferry, and paid the fare over to his master:—Held, that the servant was acting at the time in the course of his master's service, and for his master's benefit, and that the master was answerable for his act, and would have been liable in an action on the case for such act, if it had been distinctly proved to have amounted to an evasion of the ferry. *Id.*

*Private Ways.*—The plaintiff, assignee of a lease granted for lives by a bishop in right of his see, used a way, without interruption, to and from his premises for more than twenty years, over the locus in quo, called the A.; the defendant, by assignment of a similar lease of it, obstructed the way; in an action on the case for this obstruction:—Held, first, that since the 2 & 3 Will. 4, c. 71, the above user conferred no title as against the reversioner, the bishop; nor, secondly, against his lessee, or persons claiming under such lessee during the term. *Walker v. Bright*, 1 C. M. & R. 211; 4 Tyr. 502. 2176

A declaration claiming a right of way "by reason of" the possession of certain premises, is supported by proof of a reservation of way in a conveyance of them granted by a tenant for life to the plaintiff. *Id.*

Right of way for tithe-owner. *James v. Dodds*, 4 Tyr. 101. 2176

Trespass. Plea, way used for forty years by the occupiers of the defendant's farm, as of right, and without interruption. Replication, traversing the user as of right:—Held, that under this issue plaintiff might give in evidence that the way had been used by leave and licence only. *Beasley v. Clarke*, 2 Bing. N. R. 705. 2177

A plea of twenty years' right of way, under 2 & 3 Will. 4, c. 71, is not defeated by proof of an agreed alteration of the line of way, nor by a

temporary non-user, under an agreement of the parties. *Payne v. Shedden*, 1 M. & Rob. 382—*Patteson*. 2177

## WEIGHTS AND MEASURES.

Malt was sold by defendant to plaintiff by a measure called a hobbett, being a measure established by local custom, without specifying the proportion which that measure bore to the standard, and as directed by 5 Geo. 4, c. 74, s. 15. The parties afterwards settled their accounts, and inter alia as to the malt:—Held, that, in an action by the plaintiff against the defendant for wages, the defendant might prove the settlement of accounts as a payment of the plaintiff's demand. *Owens v. Denton*, 1 C. M. & R. 711; 5 Tyr. 359. 2178

## WHARF.

An order signed by O. for the delivery, by the defendants, wharfingers, of twenty sacks of flour to the plaintiff, (the party named in the order), was lodged with and accepted by them in the usual course of business, they at the same time declaring they had but five sacks to spare, which the party might have, and he received accordingly. On application for the rest, they declined to deliver it. On trover brought against them by the party named in the order, it did not appear that he knew that O. had any other flour in the defendants' possession, and the defendants did not produce any delivery orders by which any such flour had been previously appropriated by O. The jury found that the defendants had accepted the order generally, and gave a verdict for the plaintiff for the value of the fifteen sacks. The court refused to disturb the verdict, and held, that trover was maintainable, as the defendants had not limited their acceptance of the order to any minor quantity of O.'s flour then in their hands, or alleged that they must select the sacks to be delivered to the plaintiff. *Gillet v. Hill*, 2 C. & M. 531; 4 Tyr. 290. 2179

Where goods consigned to A., in London, and deliverable in the river, were, by his direction, he being insolvent, landed on a wharf at which he had been in the habit of landing goods, A. having no premises adjoining the river, but having a warehouse in the city, and the goods were stopped in transitu in the hands of the wharfinger:—Held, in an action of trover for the goods, by the assignees of A., (who became bankrupt a few days afterwards), against the wharfingers, that the proper question to be left to the jury was, whether the wharfingers received the goods, as A.'s agents, to take possession of them for his own benefit as owner, or as agents only, to forward them to him, or to keep them for the seller. *James v. Griffin*, 1 Mees. & Wels. 20. 2179

Goods were forwarded by K., a carrier, from London to Liverpool, addressed to the plaintiff (at the Isle of Man), "care of D., (the defendant), Brunswick Street, Liverpool." The goods were landed by K. on a public wharf at Liverpool, and, on the same day, notice was sent to



the defendant of their arrival, and he signed the carrier's book, containing an acknowledgment that the goods in question had arrived for him, (the defendant). He caused them to be entered in the clearance and manifest of a steam vessel about to sail for the Isle of Man. It was proved also, that, on former occasions, when goods had been brought by K. for the defendant, he had desired that they might remain at the wharf till he sent for them. The defendant never sent to the wharf for the boxes until six days after their arrival, when they were not to be found:—Held, in an action on the case, against the defendant for negligence in not taking proper care of the goods, that there was evidence for the jury of a delivery to and an acceptance by him. *Quiggin v. Duff*, 1 Mees. & Wels. 174. 2179

### WILL.

The statute 25 Geo. 2, c. 6, makes void a devise to an attesting witness, although there be three other attesting witnesses to the will. *Doe d. Taylor v. Mills*, 1 M. & Rob. 288—Denman and Bolland. 2182

A will or codicil, containing a devise of real estates, but not duly witnessed, is good if confirmed by a subsequent codicil, having the proper attestation, though the latter document be in no way annexed to the will or prior codicil, and though the attesting witnesses to the latter codicil did not see the former one or the will: Semble, however, that the instrument relied upon as confirming a previous one, should distinctly refer to it. Testator by several unwitnessed memorandums subsequent to his will, left a freehold house, acquired among other estates since the date of the will, to his daughter; and he afterwards made the following codicil, which was duly attested:—"I make this a further codicil to my will; I give and devise all real estates purchased by me since the execution of my said will to the trustees therein named, their heirs, &c., to the uses and upon the trusts therein expressed, concerning the residue of my real estates."—Held, that the house passed to the trustees, and not to the daughter. *Utterton v. Robins*, 1 Adol. & Ellis, 423. 2186

A testator devised all his real estates to his children equally, and afterwards entered into contracts for the sale of his estates, but died before they were completed. The purchasers afterwards abandoned their contracts, because they were unable to procure a conveyance from some of the devisees who were infants:—Held, that though the contracts were properly abandoned, the will was revoked as to the premises therein comprised. *Tebbot v. Voules*, 6 Simon, 40. 2192

A. devised estates of which he had only the equitable fee, and afterwards agreed to sell part of the estates, and, to remove an objection taken by the purchaser, but which was not well founded, he suffered a recovery:—Held, that though the recovery was an equitable one, and the purpose for which it was suffered was expressly mention-

ed in the deed declaring the uses; and though the limitations thereby made of the property not intended to be sold were precisely the same as before the recovery, and were expressed to be in restoration and confirmation of them, the will was revoked. *Locke v. Foote*, 5 Simon, 618. 2192

The right of an equitable owner of a copyhold estate to dispose of his equitable interest by will, cannot be controlled by the custom of a manor. *Lewis v. Lane*, 2 Mylne & K. 449. 2199

Devise of "all my freehold and leasehold, and all my money, securities, stock, goods, chattels, and all other my property whatsoever and where-soever; to hold the same unto and for the use of the devisee, her heirs, executors, administrators, and assigns:"—Held, to pass testator's copyhold property. *Edwards v. Barnes*, 2 Bing. N. R. 259; 2 Scott, 411; 1 Hodges, 293. 2199

A. devised certain copyhold lands to his widow, M. E., for life, remainder to his nephew, J. E., and his wife S. E., for their lives, remainder to S. E., (the daughter of J. E. and S. E.), for life, and after the death of M. E., J. E., and S. E., and of S. E. the daughter, "to revert to my next male heirs for ever:"—Held, that these words meant "heirs male of the body," and that as the testator died without issue, the reversion, on the determination of the life estates, descended to the customary heir. *Doe d. Eustace v. Easley*, 1 C. M. & R. 823; 5 Tyr. 450; 1 Gale, 36. 5199

Since the stat. 55 Geo. 3, c. 192, copyholds will pass by a devise, the words of which are general, though the deviser has both freehold and copyhold lands, and has not made any surrender to the use of his will. *Doe d. Edmunds v. Llewellyn*, 2 C. M. & R. 503; 1 Gale, 193. 2199

An heir at law is not to be disinherited without express words, necessary implication, or declaration plain. *Davis dem., Selby ten.*, 2 Scott, 82. 2201

If the general intention of a testator can be collected upon the whole will, particular terms used which are inconsistent with that intention, may be rejected as introduced as the testator's mistake or ignorance of the force of the words used. *Sherratt v. Bentley*, 2 Mylne & K. 149. 2201

That construction of a will is to be preferred, which, consistently with the rules of law, gives effect to the greatest part of it. *Gallini v. Doe d. Gallini* (in error), 4 Nev. & M. 894; 3 Adol. & Ellis, 341; 5 B. & Adol. 621. 2201

Whether the doctrine, that a general intent is to be preferred to a particular intent manifested in a will, is incorrect and vague, *quære?* Id.

Testator being seised in tail of lands at C., with remainder to his son in tail, and reversion to himself in fee, and being seised in fee of other lands at D., devised "all his real estates whatsoever, over which he had any disposing power," to R. and his heirs, in trust for testator's son for life, with several remainders over in tail, subject to terms for the payment of debts, annuities, and marriage portions:—Held, that by this devise,



testator's reversionary interest in the land at C. passed to the devisee. *Mostyn v. Champneys*, 1 Bing. N. R. 341; 1 Scott, 293. 2207

A devise was made to J. of the messuage or tenement wherein the testator resided, with the offices and other edifices and buildings, yards, gardens to the same adjoining, and all the several closes, &c. called by the names, &c., with the appurtenances, part of the farm and lands then in his own occupation. A further devise was made to B. of all other the testator's closes, and in the same place, with their appurtenances, except what he had before devised to J. Several cottages adjoining the house in which the testator resided, had been purchased, together with it, by him, but had been separated by a wall, and were not at any time in his occupation:—Held, that they passed by the devise to J.:—Held, also, that evidence of declarations by the testator, made at the time of giving instructions for and executing his will, were inadmissible for the purpose of showing that he intended the cottages to go to B. *Doe d. Preedy v. Holton*, 5 Nev. & M. 391; 1 Har. & Woll 528. 2207

Devise, by a testator, describing himself as of Leverington, of "all and singular the messuages, lands tenements, and hereditaments, of what tenure soever the same may be, situate, lying, and being at Leverington aforesaid, and in Wisbeach St. Peter's and Wisbeach St. Mary's," to trustees, one of whom he described as of Leverington Parson Drove. The parish of Leverington included a chapelry called Leverington Parson Drove, and the testator had lands situate at Leverington, as well within that portion of it called Leverington Parson Drove, as the other:—Held, that the land situated in Leverington Parson Drove passed by the will. *Doe d. Edwards v. Johnson*, 1 Har. & Woll. 439. 2207

A rent charge is extinguished by a devise to the grantee of part of the land out of which the rent charge issues, notwithstanding the devise is expressly made over and above the rent charge. *Dennett v. Pass*, 1 Bing. N. R. 388; 1 Scott, 218. 2213

When a charge on the land is clear, and upon the construction of a will it is doubtful whether or not the testator meant to transfer the charge from the realty to the personality, it will be held to continue a charge on the land. *Id.*

W. G., in 1775, devised his manor house and estates to his nephew for life; remainders to the nephew's first and other sons in tail male. The nephew's son, T. G., took under the will; and upon his marriage, in 1801, suffered a recovery, and conveyed the estates to the use of himself for life, remainders, subject to a term, in S. H. F.; and another, for securing a jointure and raising portions for younger children, to the use of the settlor's first and other sons by the marriage in tail male. Power was given to the trustees to sell and exchange the lands, and invest the monies. In 1804, S. H. F., the termor and trustee under the settlement, devised his own estates in trust for the second son of J. G., the settlor, in tail male, and in like manner to the

third and other sons, &c., with a power to the trustees, if at any time the person entitled to the possession, or to the rents and profits of the said estates, should be a minor, to receive and apply such rents and profits during the minority. *Proviso*, that in case and so often as the manors, lands, &c. devised by the will of W. G. for an estate in tail male should descend to or devolve upon any son of the said J. T. (the settlor), or heir male of the body of such son, and the person on whom the same should so descend or devolve should, under the trusts of the present will, be tenant in tail male of the messuages, lands, &c. devised by this will, so as to be then actually in possession or entitled to the rents, issues, and profits thereof; and there should, at the same time, be any other son, &c. of the said T. G., then the estate by this will declared to be in trust for the person so becoming entitled under the will of W. G. should cease and determine, and the now devised premises should be in trust for the person, who would be entitled if the forfeiting party were dead, and there were a failure of issue in tail male. No express reference was made in this will to the settlement of 1801. S. H. F. died in 1813, and his devised estates vested in the trustees for the second son of T. G. The eldest son of T. G. died in 1816, and T. G. himself in 1828; whereupon his estates vested in the same second son: he was still a minor. Several children of T. G. by the marriage of 1801, and likewise the widow, survived him. Many parts of the settled estates had been sold and exchanged by the trustees under the settlement:—Held, by Denman, C. J., and Patteson, J., (Taunton, J., dissentiente), that under these circumstances the estate devised by S. H. F. to the second son of T. G. did not go over by the shifting clause. *Fazakerley v. Gilbert*, 1 Adol. & Ellis, 897. 2218

T. J. S. devised estates in fee in the following words: "to my right and lawful heir at law, for the better finding out of whom I direct advertisements to be published immediately after my decease in some of the public papers," and then he added, "that if no heir at law was found, he constituted W. L. his lawful heir, on condition that he changed his name to S." The testator knew that he had cousins alive *ex parte materna*, and the estates were chargeable with the payment of legacies within twelve months after his decease:—Held, that the testator intended to designate an heir of the blood of the S.'s, and not an heir *ex parte materna*. *Davis v. Lowndes*, 1 Bing. N. R. 597; 1 Hodges, 125. 2220

Seemle, that the condition as to taking the name of S., was satisfied by using it in conjunction with that of Lowndes, and that it was unnecessary to obtain a sign manual from the king. *Id.*

For the purpose of showing the right under which the tenant held the lands, certain decrees in Chancery, touching the title to the same lands, made in a cause in which other parties were claimants, were held inadmissible in evidence. *Id.*

Where a fine was levied by the devisee by his



new name of S.:—Held, no objection, the lands being properly described. Id.

Vide, what would be the effect of the fine if levied by a trustee. Id.

R. B. devised certain freehold premises to his wife during widowhood, and after her death or marriage to his nephew, R. B. R., for life, and after his decease "unto and equally between all and every the children of his said nephew, R. B. R., their heirs and assigns respectively, as tenants in common, if more than one, and if there should be but one child, then the whole to such only child, his or her heirs and assigns; but in case there should be no child or children of his said nephew, R. B. R., living at the time of the decease or marrying again of the testator's said wife, then over;" and he devised the residue of his real estate to certain other persons in fee. By a codicil, bearing the same date as the will, and executed at the same time, the testator directed "that neither the said R. B. R., nor any or either of his issue, shall by virtue of this my will take or be considered as entitled to a vested interest or interests, unless and until they shall respectively attain the age of twenty-one years." The testator's widow died in the lifetime of R. B. R., who, (having attained twenty-one), upon her decease, entered into possession of the devised estate, and afterwards died, leaving several children him surviving, all under the age of twenty-one years:—Held, that the devise to the children and the substituted devisees over failed of effect, and that the devised estate descended to the testator's heir at law. *Russell v. Buchanan*, 2 C. & M. 561; 4 Tyr. 384. 2220

A. devised to his daughter for life, remainder to F. J. B. for life, remainder to preserve remainder to the first and every other son of F. J. B. in tail, "and for and in default of such issue, unto the younger branches of B. W. lawfully begotten, and to their heirs for ever, to be equally divided between them, share and share alike, and to take as tenants in common; and in default of such issue, unto the elder branches of B. W. lawfully begotten, and to their heirs for ever, to be equally divided between them, share and share alike, and to take as the tenants in common." F. J. B. died without issue after the death of the deviser. The only descendant of B. W. living at the date of the will were two daughters, M. H. and A. E. M. H. had four daughters, two of them were the lessors of the plaintiff; also J. K., only child to the eldest son of B. W., and T. W., only child of the third son of B. W. The same persons were living at the death of the deviser, and between that time and the date of the will T. W. had had a daughter. At the time of the death of F. J. B., all the above-mentioned persons were dead, except the two lessors of the plaintiff. Several persons, descended from the third son of B. W. and from one of the lessors of the plaintiff, came in esse between the death of the testator and the death of F. J. B., and were living at the latter time:—Held that if the devise was not altogether void for uncertainty, still the lessors of the plaintiff could

not take under it. *Doe d. Smith v. Fleming*, 2 C. M. & R. 638; 1 Gale, 278. 2220

Devise of freehold, copyhold, and leasehold estates, and all other the testator's real and personal estates, unto N., H., and H., their heirs administrators, executors, and assigns, and to the heirs, executors, administrators, and assigns of the survivor, upon trust to pay and apply, or permit and suffer M. to take the rents and profits for her absolute use for life, and after her decease, upon trust for A., B. and C., and their lawful issue respectively, in tail general, with benefit of survivorship to and amongst their issue respectively, as tenants in common, such issue not to have a vested interest till twenty-one; and the said trustees after the death of A., B., and C., or either of them, to apply the whole or any part of the rents and profits of the trust estates, not exceeding the presumptive share of each child, towards his or her maintenance during minority:—Held, that the trustees took an estate in fee in the freehold and copyhold, and an absolute interest in the leaseholds. *Curham v. Newland*, 2 Scott, 113; 2 Bing. N. R. 64; 1 Hodges, 278. 2225

Devise of land to trustees, in trust to permit testator's wife and daughters to receive the clear rents, three parts to their sole and separate use, and the testator's son the clear rent of the fourth part; the trustees to pay all outgoings, to repair, and to let the premises:—Held, that the legal estate, as to all the four parts, vested in the trustees. *White v. Parker*, 1 Scott, 542; 1 Bing. N. R. 574; 1 Hodges, 112. 2225

Upon the death of one of two trustees, the survivor was to appoint another in place of the deceased, and to convey the premises to him, to hold them jointly with the survivor. One of the trustees being dead, the survivor by a deed, to which the cestui que trusts were parties, appointed P. sole trustee, in place of himself and the deceased, and conveyed the premises to P., to hold to him and his heirs, and not jointly with the surviving trustee:—Held, that the whole legal estate passed by that conveyance to P. Id.

A devise to a woman, "her heirs and assigns for ever, with the intention" that she may enjoy the same during her life, and by her will dispose of the same as she thinks proper," gives an estate in fee. *Doe d. Herbert v. Lewis*, 4 Nev. & M. 696; 3 Adol. & Ellis, 123; 1 Har. & Woll. 231. 2230

Devise of freehold estates to T. P., the testator's cousin, for the term of his life, with a power to lease for seven years, and subject to the said estate for life, the testator devised the same to such of his, the testator's relations, of the name of P., being a male, as the said T. P. should appoint or adopt; and in default of such appointment or adoption, then "unto the next and nearest relation, or nearest of kin of the testator of the name of P., being a male, who should be living at the testator's decease, his heirs and assigns for ever;" the said T. P., who was the nearest relation of the testator of the name of P., died without making any appointment or adoption in pursuance of the directions contained in the will:—



Held, that T. P. took an estate in fee under the ultimate limitation. *Pearce v. Vincent*, 2 Scott, 347; 2 Bing. N. R. 329; 1 Hodges, 358. 2230

T. J. Selby by his will devised as follows:—"To My right and lawful heir-at-law, (for the better finding of whom, I direct advertisements to be published immediately after my decease in some of the public papers), all my manors, lands, &c., in B., to hold the aforesaid manors, &c., to my heir-at-law, his heirs, executors, administrators, or assigns for ever, subject and chargeable with the payment of all my just debts, funeral charges, bonds, annuities, and all legacies hereinafter mentioned, (various legacies to relations on his mother's side), all which debts, legacies, &c. I do hereby order and direct to be paid by the said heir-at-law, his heir, executor, or assigns, within twelve months after my decease; but should it so happen that no heir-at-law is found, I do hereby constitute W. Lowndes, &c., my lawful heir, on condition he changes his name to Selby: and I give the estates and all manors before mentioned, together with all rights, &c., before mentioned, to the aforesaid W. Lowndes, subject to and chargeable with all the legacies, debts, &c. before mentioned:—Held, that on failure of an heir of the blood of the testator within the time limited for payment of the legacies, &c., the fee-simple vested under this devise in W. Lowndes; and that the condition was satisfied by his changing his name to Selby within a reasonable time, and without a licence from the crown. *Davies, dem., Selby, ten.*, 2 Scott, 71. 2230

Testator devised lands to his wife and certain trustees in fee, in trust for his wife for life; and after her decease, for the use of his three children for their lives, in equal shares, and to the issue of their respective bodies for their respective life only, in equal shares, for ever; and in case of the death of either of the three without issue, then upon trust for the survivors or survivor in equal shares, for life only, or to their respective lawful issues, in equal shares for life only; and in case there should be only one child then living, in trust for such only child for life only, and the issue of such only child for life, in equal shares; and if but one issue of such child, to such issue for life only, and the heir of his or her body, for ever: in case there should be no issue of such child, remainder over. Either child who should marry was to have a power to make a settlement of his share for the lives of the parties, and the lives of their issue, with remainder over in tail. By a codicil, reciting the above devise, the testator, after the decease of his wife, devised the same land to the trustees in fee, in trust for his three children as tenants in common, for the term of 99 years from his decease, if they or either of them should so long live; and after the determination of that term, and subject thereto, to the trustees in fee, to preserve contingent remainders: and the uses expressed in the will, as far as the law would permit, were to be carried into perfect execution:—Held, that under the will and codicil, the three children of the testator took in the lands devised estates for the term of 99 years, if they should respectively so long live, as tenants in common, with remainder to the trustees in the codicil named,

and their heirs, during the respective lives of the said three children, in trust to preserve contingent remainders, with remainder to the said three children as tenants in common in tail general, with cross remainders between them in tail general. *Brooke v. Turner*, 2 Scott, 611; 2 Bing. N. R. 422. 2236

Devise to A. for life; remainder to B. in tail male. During A.'s life B. dies leaving a daughter, C., who also, during the life of A., dies, leaving a son, D. A. dies. D. cannot take. *Doe d. Parker v. Gregory*, 4 Nev. & M. 308. 2236

Devise to A., B., and C., and their lawful issue respectively in tail general, with benefit of survivorship among the issue respectively as tenants in common:—Held, that A., B., and C., took life estates, and their children contingent remainders in tail general, by purchase, in their respective parents' shares, with cross-remainders in tail among A., B., and C.: the testator having used the word "issue" as synonymous with "sons" or "daughters." *Cursham v. Newland*, 2 Scott, 105; 2 Bing. N. R. 53; 1 Hodges, 272. 2237

Whatever be the prima facie meaning of the word "issue" in a will, it is not a technical expression and will yield to the intention of the testator, to be collected from the words of the will; and therefore it requires a less demonstrative context to show the testator's intention in regard to the word "issue," than in regard to the technical expression "heirs of the body." *Lees v. Mosley*, 1 Y. & Col. 589. 2237

A testator after giving a pecuniary legacy to his heir-at-law, directed his debts and funeral expenses to be paid and discharged by his executrix hereinafter named. He afterwards gave to his daughter, E. S., whom he made, constituted, and ordained his executrix, all and singular his lands, tenements, and messuages, by her freely to be possessed and enjoyed:—Held, that the executrix took only a life estate. *Doe d. Ashby v. Baines*, 2 C. M. & R. 23; 1 Gale, 135. 2243

A. devised copyhold lands to his son, D. S., and his wife, and J. H. and his wife, or the survivor of them for their lives; and after the decease of all of them, to the male heir-at-law of him the testator, his heir and assigns for ever; he then bequeathed legacies to three other sons and afterwards died, leaving five sons and one daughter, three by his first wife, and three by the second:—Held, that the fee vested at the testator's death in the person who was then his male heir-at-law, and did not remain contingent until the determination of the life estates. *Doe d. Pilkington v. Spratt*, 5 B. & Adol. 731. 2253

A testator devised certain real estates to trustees and their heirs, upon trust that his daughter M. should, until she should attain the age of twenty-one, if sole and unmarried, receive out of the rents and profits an annuity of 60*l.*, and that she should thereafter and until she attained thirty-one, if sole and unmarried, receive a further annuity of 40*l.*; but in case his said daughter should marry without the consent of his trustees, then she should be paid only an annuity of 50*l.* for her sole use, and that the estate should imme-



diately upon the marriage be in trust for the children of his daughter, M., as tenants in common in tail; and for default of such issue, in trust for his late testator's sister, S., and her heirs forever: provided always, that in case his said daughter, M., should marry with the consent of the trustees, it should be lawful for them to settle the estates upon M. and her husband for their joint lives, and the life of the survivor, with remainder to the issue of the body of his said daughter, in such shares and proportions as the trustees should appoint, and in default of such appointment, in such shares and proportions as were thereinbefore limited. M. married with the consent of the trustees, (upon which occasion a settlement was made pursuant to the will), and died without issue:—Held, that the remainder to S. was conditional, depending on M.'s marriage without consent; and that M. having married with consent, the remainder to S. failed although M. died without issue. *Toldervey v. Colt*, 1 Mees. & Wels. 250. 2255

A. devises land to B. and his heirs, but in case B. dies without heirs, then to C. and his heirs; or in case B. offers to mortgage or levy a fine, or suffer a recovery upon the whole or any part thereof, then to go to C. and his heirs. B. and C. are strangers in blood. The fee vests in B., and the executory devise to C. is void. *Ware v. Cann*, 5 M. & R. 341. 2256

Devise of leaseholds to testator's daughter for life; remainder to her two sons for life; and in case she should not have a son or sons to attain the age of twenty-one, and of such sons dying without lawful issue, then to her daughters, their executors, administrators, and assigns; and if such daughters should die without issue, remainder over: all the residue of testator's estate to his daughter:—Held, that the testator's daughter took an estate for life in the leaseholds, with remainder to her two sons for life, with the ultimate remainder, on certain contingencies, to herself. *Bradshaw v. Skilbeck*, 2 Scott, 294; 2 Bing. N. R. 182; 1 Hodges, 240. 2243

Testator, seized in fee of several estates, devised them to trustees in fee, upon trust to permit his sons and daughters respectively and severally to receive the rents and profits of the respective estates, with a clause for preserving contingent remainders. And from and immediately after the decease of any of his said children, the testator devised the estate limited to him or her for life, unto or among his or her child or children, living at his or her decease, for their natural lives, as tenants in common, but with equal benefit of survivorship among the rest of the said children, if more than one, and any one of them should die without leaving issue; the child or children of each son or daughter taking the rents and profits of his or her parent's estate only. And from and after the decease of all the children of each of his sons and daughters without issue, he gave the estate or estates to them respectively, limited to and among all the issue of such child or children during their lives as tenants in common, and to descend in like manner to the issue of his said sons and daughters respectively, so long as

there should be any stock or offspring remaining. And for default, or in failure of issue of any of his said sons and daughters, he devised the estate limited to him on her dying without issue to the survivors of his sons and daughters, for their respective lives, as tenants in common; and after their respective deaths to the children of the survivors of them, during their respective lives, as tenants in common, with such benefit of survivorship as aforesaid; and after the decease of all of them, to the issue of such children, in like manner as the testator had devised the original estate of each of the sons and daughters. And for default, or in failure of issue of all his sons and daughters but one, he devised all the estates to that one in fee:—Held, that, under this devise, a son of the testator did not take an immediate estate tail in the premises devised to him, but an estate for life, with remainder in tail to his children as tenants in common, remainder to himself in tail. *Doe d. Gallini v. Gallini*, 3 Adol. & Ellis, 341; 4 Nev. & M. 894; S. C. 5 B. & Adol. 621. 2243

### WORK AND LABOR.

Where work was not duly performed according to a special contract, and there is a common count for work, labor and materials, as well as a special count, the defendant may prove the inferiority of the work and materials, and the plaintiff will only be entitled to recover on the common count for so much as the work, labor, and materials are worth. *Chappel v. Hicks*, 4 Tyr. 43; 2 C. & M. 214. 2272

Where there is a special contract for work, to be done at a fixed price, and the declaration consists of the common counts in debt on simple contract for work and labor, to which the defendant pleads that he never was indebted, he may prove as well since the new rules of pleading, Hil. 4 Will. 4, Nos. 1 & 2, as before, that the work was done in an improper manner. *Cousins v. Paddon*, 5 Tyr. 535; 2 C. M. & R. 547; 4 Dowl. P. C. 488; 1 Gale, 305. 2272

Where a specific contract has not been performed, a plaintiff cannot recover upon it on a general indebitatus count; therefore, the defendant, on a plea of non-assumpsit, or nunquam indebitatus, may show that the work was done under a specific contract, and that the specific contract was not performed; but where a plaintiff is entitled to recover quantum meruit, the plea of non-assumpsit or nunquam indebitatus to such a count puts in issue the quantum of the value, and if no value have been given, the plaintiff is not entitled to even a nominal sum. Id.

Per Parke, B.—If a workman contract to supply labor, it must be taken to mean that the labor shall be of the quality which would be bestowed by a workman of ordinary skill in his trade. Id.

Assumpsit for goods (a machine) sold and delivered:—Held, that the defendant might shew under the general issue that the machine was manufactured by the plaintiff for the defendant, under a condition, that if it did not work, nothing



should be paid for it; that it could not be made to work, and that it was useless to the defendant:—Held, also, that although the machine was not proved to have been returned to the plaintiff, he was not entitled to any damages on the quantum valebat, without showing some new implied contract arising from the defendant's dealing with the goods. *Grounsell v. Lamb*, 1 Mees. & Wels 352. 2272

An allegation in a plea, of an agreement that a workman should not be paid, unless the work should be completed within 14 days before Michaelmas day, was held not to be supported by evidence of an agreement, that he should not be paid unless the works should be completed 14 days before Michaelmas day. *Thomas v. Lambert*, 3 Adol. & Ellis, 51; 4 Nev. & M. 592; 1 Har. & Woll. 224. 2273

To a plea, that work in respect of which plaintiff sued, was not, according to agreement, done to the satisfaction of defendant or his surveyor; plaintiff replied that it was done to the satisfaction of defendant and his surveyor; without this, that it was not done to the satisfaction of defendant or his surveyor:—Held, that upon this issue it was sufficient to show that the work was done to the satisfaction of the defendant. *Bradley v. Milnes*, 1 Scott, 626; 1 Bing. N. R. 644; 1 Hodges, 158. 2273

In assumpsit for refusing to allow the plaintiff to proceed with certain work according to agreement, the defendant pleaded that the work was to be done to the satisfaction of A. B., and that

part of the work which was done was not to his satisfaction, and therefore he discharged the plaintiff:—Held, that upon this issue it was not necessary for the defendant to call A. B. *Vickers v. Cocks*, 3 Dowl. P. C. 492. 2273

In an action of debt for work and labor on an implied contract, the defendant, on the plea that he never was indebted, may go into evidence to prove that the work was done under such circumstances, and show that there was no implied contracts to pay any thing; but upon this plea the defendant cannot go into evidence of misconduct, except such as goes to show that there was no implied contract to pay. *Cooper v. Whitehouse*, 6 C. & P. 545—Alderson. 2274

Where an action was brought by a builder for the amount of extra work done, there having been a written contract between the parties:—Held, that the plaintiff ought to have produced the written contract at the trial, in order that it might appear what was within the contract, and what not. But as the objection was not taken by the defendant at the trial, the court set aside the verdict which the jury had found for the defendant; and ordered a new trial without costs. *Jones v. Howell*, 4 Dowl. P. C. 176. 2274

A letter signed by both parties, specifying the prices to be charged for some work to be done, is not in itself a complete contract; and therefore, parol evidence is admissible of a contemporaneous agreement as to the period of payment. *Knapp v. Harden*, 1 Gale, 47. 2270







AN

# ANALYTICAL DIGEST,

&c.

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## ABATEMENT.

1. THE four days within which the plea in abatement must be delivered, are to be computed exclusively of the first, and inclusively of the last day. *Ryland v. Wornald*, 2 Mees. & W. (xx.) 393; and 5 Dowl. (r. c.) 580.

2. A plea of coverture in abatement, held not a plea of non-joinder within the 3 & 4 W. 4, c. 42, s. 8, so as to entitle the plaintiff to sign judgment, for non-compliance with the requisites of the statute. *Jones v. Smith*, 3 Mees. & W. (xx.) 526.

3. Where the action was not commenced until on the verge of the Statute of Limitations, and a plea of abatement for non-joinder of parties was put in, the Court refused to deprive the party of a defence which the law gives, by permitting an amendment, or to go into the equities of the case. *Roberts v. Bate*, 6 Add. & Ell. (x. n.) 778.

And see ECCLESIASTICAL PERSONS.

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## ACCORD.

Plea, in covenant for neglecting to repair, that in consideration of the defendant, at the request of plaintiff having become tenant from year to year, and promised to repair, the plaintiff would give time until, &c. for that purpose, and would relinquish all claim in respect of the breaches of covenant, averring that defendant was ready and willing to perform the agreement, and that the plaintiff commenced an action on the covenants before the day given, held bad, and judgment for plaintiff; *non obst. vered.* *Bayley v. Homan*, 3 Bing. N. S. (c. r.) 915.

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## ACCOUNT.

1. Where in an action of account against a co-partner and bailiff, upon the plea, amounting to that of *plene computavit*, the evidence did not show that the result of the account so rendered was a balance ascertained and agreed upon be-

tween the parties, but the plaintiff insisted that in the account the defendant should be charged as factor only for a moiety, and as a partner for the other, and liable to losses; held, not sufficient to sustain the plea, and that the plaintiff was entitled to judgment, *quod computet*, generally upon the whole declaration, and that the account should be taken according to the real relation between the parties. *Baxter v. Hosier*, 5 Bing. N. S. (c. r.) 288.

2. Where *A.* being indebted to three persons, *B.*, *C.* & *D.*, constituting the firm of *B. & Co.*, covenanted with them for the payment: two of the firm dying, and the third retiring, having assigned all the interest to *E.*, who with *F.* afterwards continued trading under the same firm of *B. & Co.*, with whom *A.* continued to deal, and made payments: *C.* afterwards sued *A.* on the covenant; held, first, that in the absence of any assent on the part of *C.*, *A.* could not apply the payments to the subsequent partners in liquidation of the sum secured by the covenant: held also, that although on the ground of apparent unity of interest, *A.* might sustain a bill of discovery against *E.*, yet the then subsequent partners could not be joined as parties to discover what they might show as witnesses, and that in the absence of any connexion appearing between their accounts and those of *A.*, *C.* and *E.*, they could not be joined in a bill for an account by *A.* against *C.* and *E.*; that the bill setting up a partial case of equity in connexion with the case for discovery, and introducing improper parties, was therefore bad on demurrer. *Jones v. Maund*, 3 Younge & C. (xx. xq.) 347.

3. Upon numerous exceptions to the allowance and disallowance of items in a deceased agent's accounts by the Master, a review ordered, with directions not to allow items merely because appearing in the books, unless the monies also appeared from other entries to have been received. *Mayhew v. Brettingham*, 1 Coop. (cn. c.) 43.

4. Where preliminary accounts or inquiries are necessary, the plaintiff to be at liberty, on notice, to move to have them taken, and an order, &c.,



without prejudice to any question in the case, where parties are not competent to consent; or where competent, and consent, the defendants may not have put in their answer. Reg. Gen. 5, May, 1839, 1 Beav. (ch.) Ap. xi.

5. Where the subject matter in which the account was sought to be taken was not matter of set-off, but matter of damages, demurrer allowed. *Glennie v. Imri*, 3 Younge & C (ex. eq.) 436.

And see TRUSTEE; LIMITATIONS, STAT. OF; MORTGAGE; PARTNER.

### ACCUMULATION.

1. Upon a bequest of stock to trustees to invest the dividends in the purchase of more stock, until for so long as *M. I.* should live, and then to pay the fund, with the accumulations, to *R. T.* and his issue, and he gave also the residue to *R. T.* and his issue; held, that the dividends and accumulation, after 21 years, and until the death of *M. I.*, was undisposed of, and passed to the residuary legatees. *O'Neill v. Lucas*, 2 Keene, (ch.) 313.

2. Where the testator was entitled to a sum charged on an estate, and devised it to accumulate for 20 years, and, subject to certain payments, he gave the sum, specifying it, with its accumulations, for the benefit of grandchildren, and after the end of 20 years, "the principal of the said sum to merge in the estate;" held, that the grandchildren were entitled to the accumulated interest only. *Scott v. Earl of Scarborough*, 1 Beav. (ch.) 154.

3. The 39 & 40 Geo. 3, c. 98, was not intended, nor does it operate, to alter any disposition of a testator, except his direction to accumulate; and the income which the statute forbids to accumulate must go as in the case of intestacy: where the testator empowered trustees to sell the real estate when they pleased after his death, but if not done before the death of his youngest child, then to sell for the benefit of the grandchildren or their children, and his youngest child survived him 29 years; held, that the direction that the income should accumulate after 21 years was void, and that the void accumulation belonged to the next of kin, but the unexhausted interest arising out of the real estate to the heir. *Eyre v. Marsden*, 2 Keene, (ch.) 564.

4. Upon a bequest to the grandchildren of the testator living at his death, to be divided on the death of the survivor of three persons, and a gift over in case of the death of any before he should be entitled to recover his share, to be paid at the same time and manner as directed as respected the original share; held, that such gift over applied to accruing as well as original shares. *Eyre v. Marsden*, 2 Keene, (ch.) 564.

5. Where the testator, by blending real and personal estate, rendered a suit necessary, the costs directed to be paid *pro rata* by the heir and personal representative, out of void accumulations, devolve on them respectively. *Ib.*

And see LEGACY; LIMITATION OF ESTATES; WILL.

### ACT OF PARLIAMENT.

Where a dock company were by an Act empowered to sell lands, and reinvest the proceeds in other lands, the expenses of reinvestment to be paid by them; and in the same Act the Lords of the Treasury were empowered to purchase certain quays within a given time, but nothing was there expressly said as to payment of expenses by them: by a subsequent Act the time was extended, and all the former provisions extended to the latter Act: held that the clauses as to the reinvestment and payment of expenses applied *mutatis mutandis*, and that the Lords of the Treasury were liable to pay the expenses of reinvesting the purchase-money of the property purchased by them. *In re Lords of Treasury*, 7 Sim. (ch.) 154; and affirmed on appeal, 1 Myl. & Cr. (ch.) 876.

And see CORPORATION, 4, &c.

### ACTION.

- [A] WHEN MAINTAINABLE.
- [B] PARTIES TO.
- [C] FORM OF.
- [D] NOTICE OF.

#### [A] WHEN MAINTAINABLE.

1. Where the contract on the face of the record appeared to be a bargain for a horse conditioned for his trotting against time, and within the mischief and against the stat. 9 Ann. c. 14; held, that the action could not be maintained. *Brogden v. Marriott*, 3 Bing. N. S. (c. p.) 88.

2. Where the defendant sold a gun to the plaintiff's father, with a warranty that it was of a certain maker, and knowing that it was purchased for the plaintiff's use: the plaintiff having sustained injury by its bursting, being of an inferior make, and not according to the warranty; held, that he might sustain an action on the case for the injury consequent upon the defendant's fraud, although *semb.* he could not upon the contract, it being made with another party. *Langridge v. Levy*, 2 Mees. & W. (ex.) 519.

3. Where the plaintiff had authorized a party to purchase a cow, which he had done, but was taken away by the defendant; held, that by bringing the action the plaintiff had elected to take the bargain, and had a sufficient right of property to maintain the action. *Thomas v. Philips*, 7 C. & P. (s. p.) 573.

4. Where the jury found the hiring to be by the year, but wages payable quarterly, and the plaintiff having been dismissed, and after tender and refusal of his services, brought an action before the quarter for which he claimed to be paid had expired; held, that he could not maintain the action for service done and performed. *Smith v. Hayward*, 2 Nev. & P. (q. b.) 432; preferring the authority of *Archard v. Hornor*, 3 C. & P. 349, to that of *Gandell v. Pontigny*, 4 Campb. 375.

5. *Assumpsit* held maintainable by a corporation on an executory contract for the supply of gas, the object for which the company was incorporated, and although made by parol; held also, that the Court were bound to take notice that the



plaintiffs were a corporation, having been so created by statute, and the action brought in that character. *Church v. Imperial Gas Company*, 3 Nev. & P. (q. s.) 35; and *Ad. & Ell.* 846; overruling the distinction in *East London Waterworks Company v. Bailey*, 4 Bing. 283.

6. Where goods sold upon sale or return, had been detained an unreasonable time; held, that *assumpsit* for goods sold and delivered was maintainable. *Beverley v. Lincoln Gas Company*, 2 Nev. & P. (x. s.) 283; and 6 *Ad. & Ell.* 829.

7. Held also, that *assumpsit* may be maintained against a corporation aggregate, without a head, on an executed parol contract. 1b.

8. A mere expression to a third party of intention to marry the plaintiff is not sufficient to support the action for breach of promise; and where coupled with a statement, "as soon as my business is settled," held only conditional, and that performance must be averred. *Cole v. Cottingham*, 8 C. & P. (x. r.) 75.

9. Money having been embezzled by the clerk to a savings bank; held, that an action could not be maintained against the trustees and managers of, but that the remedy was by arbitration under 9 Geo. 4, c. 92, s. 45. *R. v. Mildenhall Savings Bank*, 2 Nev. & P. (x. s.) 278.

And see *Crisp v. Bunbury*, 8 Bing. 394.

10. Where goods were sold on 5th October, to be paid for in two months; held, that the action could not be maintained until after the 5th December; in such cases the computation of time would be by calendar months, and to exclude the day on which the contract is made. *Webb v. Fairmanner*, 3 Mees. & W. (x.) 473.

11. Where the defendant being indebted for shares to the K. company, sent a check to the plaintiffs, their agents, which was by them lost; and upon a correspondence between them and the defendant, the latter offered to give a fresh check, if the plaintiffs would give an indemnity; the plaintiffs having paid the amount to the K. company; held, that they could not maintain the action for money paid, the payment having exonerated the defendant from no debt for which he was liable; nor on the count for an account stated, to support which, there must be an admission of a subsisting debt; the only action would have been upon the special promise. *Lubbock v. Tribe*, 3 Mees. & W. (x.) 607.

And see *Tucker v. Barrow*, 7 B. & Cr. 624.

12. Where after a seizure by the excise of spirits, and several applications made for the restoration on giving bonds for securing any penalties which might have been incurred on paying the value into the receiver's hands, to abide the event, which were refused; the defendants then offered "to give up all claim to the seizure," and hold themselves responsible for such proceedings as might be instituted, upon which on receipt of the money, they were given up; a general verdict was afterwards found against the parties, and one penalty by consent taken; in an action to recover back the former sum paid, held that the payment having been made upon a compromise, and voluntary settlement upon good consideration, the goods having been rightfully tak-

ken, it was final, and the action not maintainable. *Atlee v. Backhouse*, 3 Mees. & W. (x.) 633.

13. Upon an agreement for partnership in a stage-coach, to run at certain hours, and stipulating that so long as the plaintiff should continue in the business of a coach proprietor, the defendant would not by himself, or with any other party, run or use any coach over any part of the road at certain hours, under a penalty of 40*l.*, to be recovered as liquidated damages, and each also bound himself in the penalty of 10*l.*, for the true performance of the agreement, to be recovered as aforesaid; held, first, that the agreement for the partnership was a sufficient consideration for the partial restraint on the defendant's trade, and an action maintainable for breach of it, after dissolution of the partnership by notice from the plaintiff; and secondly, that the 40*l.* was to be considered as liquidated damages, and not as a penalty. *Leighton v. Wales*, 3 Mees. & W. (x.) 545.

14. Where parish officers had for a long time obtained possession of, and let portions of waste land to paupers, and cultivated portions for the use of parish paupers, without molestation by the lord or the copyholders, and the defendant was found by the jury to be a mere stranger, held that the bare possession was sufficient to entitle the plaintiffs to maintain trespass. *Matson v. Cook*, 6 Sc. (c. r.) 179.

15. Where the defendants were empowered to make a canal, passable for all boats, and to receive tolls for their passage, and to raise sunken boats, if the owners should omit to do so for 24 hours, and to detain the boats until the expenses of raising were paid; held, that it was compulsory on them to do so, and that an action was maintainable against them for injury occasioned to the plaintiff's boats, in consequence of the non-removal of a sunken vessel. *Parnaby v. Lancaster Canal Company*, 3 Nev. & P. (q. s.) 623.

16. Plea in *assumpsit*, that the plaintiff had been twice bankrupt, and had not paid 15*s.* in the pound under the second commission, held, on special demurrer, a good bar to the action, the 6 Geo. 4, c. 16, s. 127, acting retrospectively, and vesting all the after-acquired property of the bankrupt in his assignees. *Young v. Kishworth*, 3 Nev. & P. (q. s.) 585.

And see ACTION ON THE CASE; ASSUMPSIT, ATTORNEY; BANKRUPT; BILLS; BOND; CARRIER; CONTRIBUTION; CORPORATION; COVENANT; DEBT; DISCOVERY; EJECTMENT; EXECUTOR; GUARANTEE; JUSTICES; LIMITATIONS; STATUTE OF; MASTER; PARTNER; PATENT; RAILWAY; SHERIFF; TRADE; TRESPASS; TROVER; USE AND OCCUPATION; WAGER.

#### [B] PARTIES TO.

1. Where the plaintiff's broker agreed with the defendants (being share brokers) for the purchase of shares, notes of which were made and sent in their own names, but immediately afterwards the entry in the books was altered to the name of the real seller, and a second contract note sent to the plaintiff, but the former note was



neither demanded nor sent back; held, that evidence of a custom in L. to send in brokers' notes without disclosing the principal's name was properly rejected, and that the defendants having signed the contract in their own names, were liable, although known to be agents. *Magee v. Atkinson*, 2 Mees. & W. (xx.) 441.

2. Where *A. B.* and *C.* having separate interests in lands, by arrangement amongst themselves, employed an agent to put them up to sale, which was done in separate lots, and the defendant became the purchaser, subject to the conditions of sale, by one of which the vendors were to deliver an abstract, and the conveyance be executed, and the purchase-money be paid on a certain day, from which time the purchaser was to have possession, and that if he was let in before payment he was to be deemed tenant at will, and pay four per cent. "as and for rent;" the defendant knew of the private arrangement, and was let into possession, but no abstract was ever delivered or interest paid; held, that no implied contract to waive the delivery of the abstract could be raised from the mere circumstance of the defendant being let into possession, and secondly, that no joint ownership being proved, the plaintiffs could not support a joint action for use and occupation. *Seaton v. Booth*, 1 Nev. & P. (x. b.) 528.

3. Where upon a mortgage of chattels to the wife before marriage, it appeared that upon payment of the principal at a day not arrived, or at an earlier day, upon notice, and of interest in the meantime, the goods were to remain in the hands of the mortgagor; held, that the husband might maintain trover for the inventory in his own name, or might join the wife, inasmuch as in case of his death before the right to obtain possession might accrue, the title would survive to her. *Ayling v. Whicher*, 1 Nev. & P. (x. b.) 416.

4. Where upon an agreement under seal, by three persons, for the purchase of a foreign mine, a sum was deposited conditionally, to be repaid to the purchasers, should the property, upon inspection by an agent to be sent out by them, turn out to have been misrepresented; held, that the deed giving a right to sue for the money in covenant, one of them could not maintain an action for money had and received, although entitled by agreement, not under seal, between themselves; held also, that the agent to be sent out by the purchasers must be a person independent of the purchasers, and not one of themselves, although such an objection might be waived by some instrument under seal. *English v. Blundell*, 8 C. & P. (x. r.) 332.

5. In an action against *K.* and *S.* on an express contract to employ the plaintiff; held, that containing no intimation that they were carrying on business as members of a more extensive firm, he could not sue a dormant partner who was no party to the agreement. *Beckham v. Knight*, 4 Bing. N. S. (c. r.) 243.

6. Where the defendants hired a master porter to remove a barrel of flour from their warehouse, and the latter hired a carman, and both their men were engaged in loading it; in doing which it fell upon and injured the plaintiff, through the

defectiveness of the rope furnished by the porter; held, that the defendants were liable, it being immaterial whether they employed their own servants or engaged others more expert, and left the removal to their superintendence. *Randelson v. Murray*, 3 Nev. & P. (q. b.) 239.

7. Where a legatee assigned his interest in the share of premises devised to be sold, and the assignee gave a guaranty to the plaintiffs, the executors, and also to their attorney who managed the sale and paid over the money: the legatee being bankrupt, and the share claimed by his assignees, held, that the action upon the guaranty might be properly brought by the executors without joining the attorney, they having a separate interest. *Place v. Delegal*, 4 Bing. N. S. (c. r.) 426.

8. In an action for a reward, offered to "whomsoever should give information whereby the property taken on a robbery might be traced, on conviction of the parties;" held, that the party entitled was he who first gave such information, although not communicated immediately to the party robbed, but to a party authorized to receive it and act in the apprehension, as a constable. *Lancaster v. Walsh*, 4 Mees. & W. (xx.) 16.

9. Where the Act constituting a joint-stock company expressly directed that the money to be raised should be applied in the first instance in discharging the costs of obtaining the Act; held, that as soon as the sums subscribed came to the possession of the company, they became liable to pay those costs, and that the plaintiff, although a member of the company, might sue them in debt for the amount. *Carden v. General Cemetery Company*, 5 Bing. N. S. (c. r.) 253; and 7 Dowl. (r. c.) 275.

10. Upon a lease granted to the plaintiff and his wife, and the premises underlet to defendant, and by him underlet for a part of the term; held, that an action for an injury to the reversion was properly brought by the plaintiff alone; but, that if the objection were valid, the objection could only have been taken advantage of by plea in abatement. *Wallis v. Harrison*, 7 Dowl. (r. c.) 395.

11. Where, on a treaty for the sale of a public-house between the defendant and *B.*, the defendant made a false representation as to the profits, which *B.* afterwards, with the defendant's knowledge, communicated to the plaintiff, who became the purchaser in his stead; held, that the contract was as much vitiated by the fraud, as if actually repeated by the defendant to the plaintiff, and that the action was maintainable. *Pilmore v. Hood*, 5 Bing. N. S. (c. r.) 97; 6 Sc. 827; and 7 Dowl. (r. c.) 136.

And see *Langridge v. Levy*, 1 Mees. & W. 532; and *Hill v. Gray*, 1 Stark. (x. r. c.) 434.

And see DEED; PLEADING, (c. l.)

#### [C] FORM OF.

1. In case against the clerk to paying commissioners for non-payment of an annuity granted to the plaintiff out of the rates under the Local Act, for the purposes of the Act; held, first, that a plea that it was not the duty of the commission-



ers to pay, &c. was bad, as putting matter of law in issue; secondly, that the charge being made on the rates by virtue of the Act, the non-payment of it concerned an act done in pursuance of the Act, and the clerk therefore liable to be sued; and lastly, that the commissioners having neglected a duty in not disposing of the funds raised in the mode prescribed by the Act, and not being personally liable or contracting parties, the action was properly framed in *case*. *Cane v. Chapman*, 1 Nev. & P. (N. S.) 104.

And see *Wormwell v. Hailstone*, 6 Bing. 668.

2. Trespass held maintainable against husband and wife for their joint act. *Vine v. Saunders*, 4 Bing. N. S. (C. R.) 96; 3 Sc. 359; and 6 Dowl. (R. C.) 233.

3. Where an intestate, lessee of coal mines, had improperly worked parts expressly excepted, and sold with the proceeds of his own; held, that the lessor might waive the tort, and sue his representative for the value of the coals taken from such excepted places. *Powell v. Rees*, 7 Ad. & Ell. (Q. B.); and 2 Nev. & P. 571.

And see *Hambly v. Trott*, 1 Cowp. 371.

And see *Assumpsit*; *Debt*.

#### [D] NOTICE OF.

Where a gamekeeper was appointed and registered before the passing of 1 & 2 Will. 4, c. 32, held not entitled to notice of action under s. 47. *Lidster v. Borrow*, 1 Ferr. & Dav. (Q. B.) 447.

And see *Distress*.

### ACTION ON THE CASE.

#### [A] FOR INJURIES TO THE PERSON.

- (a) *By negligence.*
- (b) *Malicious arrest—prosecution.*
- (c) *Deceit—false representation.*
- (d) *Seduction—crim. con.*
- (e) *By noxious animals.*
- (f) *Nuisances.*

#### [B] TO REAL PROPERTY.

- (a) *By disturbances—obstructions.*
- (b) *Nuisances.*
- (c) *To reversion.*

#### [A] FOR INJURIES TO THE PERSON.

##### (a) *By negligence.*

1. The action held maintainable against a party making a rick so negligently, that, by heating, it caught fire, and also ignited the plaintiff's house adjoining thereto; and it is for the jury to say, in such cases, whether such caution has been used as would have been observed by a man of ordinary prudence. *Vaughan v. Menlove*, 3 Bing. N. S. (C. R.) 468; 4 Sc. 244; and 7 C. & P. (N. R.) 625.

And see *Tubervill v. Stamp*, 1 Salk. 13.

2. Where the plaintiff's vault was in part supported by the defendant's adjoining wall, held, that the action might be maintained for so negligently and carelessly pulling down the wall, as thereby, by the fall of materials, to injure the vault; and that a plea, alleging that the defend-

dant was not bound to use such precautions, as an issue of law and traverse of a duty not alleged by the plaintiff, was bad; so a plea, that the fall of materials was not occasioned by any default of defendant, or neglect of any duty cast upon him by law. *Trower v. Chadwick*, 3 Bing. N. S. (C. R.) 334; and 3 Sc. 699.

3. In case against commissioners of sewers for injury to the plaintiff's premises, by making a sewer, by tunnelling, which it was found was proper to be made, and was skilfully and properly made, but that by proceeding with the work by open cutting would have afforded a greater chance of escape from injury; held, that the Court could not balance possibilities, and that to fix the commissioners, it should have been shown that the injury would not have happened if the sewer had been constructed by the latter mode of working. *Grocers' Company v. Donne*, 3 Bing. N. S. (C. R.) 34; and 3 Sc. 356.

4. In case for injury by negligent driving a carriage let on hire, it is a question for the jury whether the party driving is the servant of the owner or of the hirer of the carriage. *Brady v. Giles*, 1 M. & Rob. (N. R.) 494; questioning *Laugher v. Pointer*, 5 B. & Cr. 547.

5. Where to the declaration for injury by negligent driving by the defendant, the general issue was pleaded; held, that the issue of negligent driving by the defendant was sufficiently made out by proof of his having permitted another to drive, by whose mismanagement the injury was occasioned. *Wheatley v. Patrick*, 2 Mees. & W. (X.) 650.

6. In an action for damages to the plaintiff's vessel, by collision with the defendants', through negligence of the defendants' servants; held, that the defendants were not entitled to deduct the amount of damage received by the plaintiff from insurers. *Yates v. Whyte*, 4 Bing. N. S. (C. R.) 272.

And see *Mason v. Sainsbury*, 3 Doug. 60.

7. In case for damage by the defendants' barge running down the plaintiff's boat, the barge being shown to be the defendants', it was *prima facie* evidence that the bargemen navigating it were their servants, until they explained it. *Joyce v. Chapel*, 8 C. & P. (N. R.) 370.

8. In case for injury by the negligent driving of the defendant's servant; held, that the plaintiff could not recover, where it appeared that the accident was partly occasioned by the plaintiff's own want of care, and negligence. *Woolf v. Beard*, 8 C. & P. (N. R.) 373.

9. The law of keeping on the right side of the road applies to horses as well as carriages; although if a party were coming furiously towards another, being on his right side, if the road were sufficiently wide, he would be bound to give way. *Turley v. Thomas*, 8 C. & P. (N. R.) 103.

10. In case for so negligently working mines, without duly propping, &c., so near to the plaintiff's houses that they thereby became weakened and shook, &c., it appearing that the land under part of the plaintiff's premises had been formerly excavated, but it was unknown to either party; held, that the plaintiff had not acquired any right



to have the land supported until after the lapse of twenty years since the owner of the adjoining land knew or had the means of knowing that the land had been so excavated. *Partridge v. Scott*, 3 Mees. & W. (xx.) 220.

11. In an action on the case for an injury occasioned by the negligence of the defendant's servant in driving, held that if the injury were attributable in any degree to the incautious conduct of the plaintiff herself in crossing the road, the defendant would not be liable. *Hawkins v. Cooper*, 8 C. & P. (n. p.) 473.

12. In case for injury to the plaintiff's horse by negligent driving, and after remaining six weeks at a farrier's it was found to be permanently injured to the amount of 20*l.*; held, that the proper measure of damage was the amount of the farrier's charges for keep and attendance, and the difference in the value at the time of the injury and at the end of the six weeks; but that the plaintiff could not claim the hire of another in the interval. *Hughes v. Quintin*, 8 C. & P. (n. p.) 703.

13. In an action by a patient against his medical man, for an injury by improper treatment; held, that the latter being bound to bring a reasonable and competent degree of art and skill, the question for the jury is whether the injury is to be attributed to the want of that degree of skill or not. *Lanphier v. Phipos*, 8 C. & P. (n. p.) 475.

14. Where the plaintiff was on the step of an omnibus, in the act of getting in, and sustained injury by the sudden going on by the driver, held, that there was sufficient to imply a consent to take the plaintiff as a passenger. *Brien v. Bennett*, 8 C. & P. (n. p.) 724.

And see *Action; Pleading*, (C. L.)

#### (b) *Malicious arrest—prosecution.*

1. In case for maliciously charging plaintiff before a magistrate without reasonable or probable cause; plea alleging the several facts out of which the charge arose, but no allegation that the defendant at the time of making the charge knew or had been informed of or acted in any manner on them, held bad on demurrer, held also, that the publishing observations made before the magistrate by any other than him could not be justified; and lastly, pleading that the proceedings in fact took place are not sufficient, unless the plea go on to allege that the charges made were true, or that the publication is a true and accurate report, containing the whole of what passed on the occasion; and the terms of the accusation must be stated, not merely the result of it. *Delegal v. Highley*, 3 Bing. N. S. (c. p.) 950.

2. Where it appeared from the facts that the defendant had reasonable and probable cause for giving the plaintiff in charge, but persisted in it after an explanation given by the officer, and the Judge had directed the jury that on such explanation the probable cause ceased, and that the only question was whether his subsequent conduct amounted to malice; held that such direction was wrong; the original facts remaining unaltered, the reasonable and probable cause

could not be taken away by such explanation, and a new trial granted. *Musgrove v. Newell*, 1 Mees. & W. (xx.) 582; and 1 Tyr. & Gr. 957.

And see the principles of these cases laid down in *Sutton v. Johnstone*, 1 T. R. 544.

3. In case for a malicious prosecution before a magistrate, of a charge of felony, it is not necessary to show an information, the gist of the action being the setting the magistrate in motion; but if the declaration allege an information, and the warrant granted thereupon, it must be proved, and the recital in the warrant is not sufficient. *Gregory v. Derby*, 8 C. & P. (n. p.) 749.

4. Where the defendant had, without a previous application to a magistrate, given the plaintiff into custody on a charge of felony, which was afterwards dismissed on the hearing; held, in an action for the imprisonment, that the defendant was bound to show clearly that a felony had been committed, and that the circumstances were such as would induce a reasonable and dispassionate person to suspect the plaintiff guilty thereof. *Allen v. Wright*, 8 C. & P. (n. p.) 522.

And see *Arrest*.

#### (c) *Deceit—false representation.*

1. In case for deceit in the warranty of a horse, held that under the new rules, the plea of the general issue put in issue both the warranty and unsoundness, and every thing but the bargain and sale. *Spencer v. Dawson*, 1 M. & Rob. (n. r.) 552.

2. In an action on the case for publishing in a newspaper a paragraph, alleging simply that the petition in a bill filed in Chancery against the plaintiff and others, as shareowners of a mine, for an account and injunction, had been granted, and that persons duly authorized had arrived in the workings; held, that the declaration showing no special damage, the action could not be maintained, and the judgment therefore arrested. *Malachy v. Soper*, 3 Bing. N. S. (c. p.) 371; and 3 Sc. 723.

And see *Lowe v. Harewood*, Sir W. Jones R. 196; *Tasborough v. Day*, Cro. Jac. 484; *Manning v. Avery*, Keb. 153; and *Cane v. Goulding*, Styl. 169. 176.

3. Where the defendant authorized his shopman to give the same representation of the character of a customer as he had himself received, held to be a representation within the 9 Geo. 4, c. 14, s. 6, and not being in writing, was not admissible in evidence in an action for a false representation of solvency. *Haslock v. Ferguson*, 2 Nev. & P. (x. s.) 269.

4. Where the representation made to the plaintiff, about to advance to J., was, "you may safely lend, I know he has property, the title-deeds are in my possession, and he cannot deal with them without my knowledge;" held to amount to a representation of *ability*, within the 9 Geo. 4, c. 14, s. 16, and to be made in writing. *Swan v. Phillips*, 3 Nev. & P. (q. s.) 447.

And see *Action; Agent; Sheriff*.



(d) *Seduction—crim. con.*

1. Where the plaintiff's daughter had been apprenticed as a milliner to the defendant's wife, and been during the term seduced by the defendant; held on demurrer, that not being constructively in the service of the father, the action could not be maintained, the declaration containing no averment on which a contract to take care of the morals of the child could be implied. *Harris v. Butler*, 2 Mees. & W. (x.) 539.

2. The plaintiff's daughter, residing at an adjoining farm of his, and with her brother, superintending the farm, held a sufficient service, although not immediately under the plaintiff's control; and being the *gist* of the action, the denial of service need not be specially pleaded. *Holloway v. Abell*, 7 C. & P. (N. P.) 528.

3. Where under extraordinary circumstances the verdict in an action of *crim. con.* found for the defendant appeared to the Court very greatly against the weight of evidence, a new trial granted on payment of costs. *Mellin v. Taylor*, 3 Bing. N. S. (c. r.) 109; and 3 Sc. 513.

4. In an action by a mother for the seduction of her daughter; held, that anxiety and distress of mind might be taken into consideration in the amount of damages; and that the party could not be contradicted by evidence of statements as to intercourse with others, to which she had not been cross-examined; but that she might be recalled and asked as to such statements, although tending to show intercourse with others. *Andrews v. Askey*, 8 C. & P. (N. P.) 7.

(e) *By noxious animals.*

In case for keeping a ferocious dog which bit the plaintiff, held that the defendant might under the general issue avail himself of the want of proof that he ever knew that the dog was accustomed to bite. *Hogan v. Sharpe*, 7 C. & P. (N. P.) 755.

(f) *Nuisances.*

In case against *A.* and *B.* for burning sulphur, &c. in a place where the plaintiff was, thereby choking and injuring him, plea that the plaintiff was wrongfully in the said place, and after being requested by *A.* to depart, *B.*, by command of *A.*, placed and lighted, &c. to cause him to depart; held, first, that to sustain the plea the request to depart, and *A.*'s authority to the defendant, must be proved; but that to entitle the plaintiff to a verdict on the general issue, the plaintiff must show that he had sustained some substantial damage. *Evans v. Lisle*, 7 C. & P. (N. P.) 562.

## [B] INJURIES TO REAL PROPERTY.

(a) *By disturbances—obstructions.*

1. In case for obstructing plaintiff in the use of a right to water, claimed for the purpose of watering cattle, and also for the more convenient use and enjoyment of a messuage; *semble*, not a *profit à prendre* from the soil of another, but a mere easement, and claimable by custom. *Manning v. Wadale*, 1 Nev. & P. (x. s.) 172.

2. In case for obstructing the plaintiff's right to use a cistern and dust-hole, by stopping up a door leading thereto, issue being taken on the right to the water, which was found by the verdict; held, that as the allegation that the defendant locked up the door, and thereby prevented the plaintiff's access to the cistern, did not necessarily import that the plaintiff had a right to go through that door, the judgment should be arrested; in such cases the obstruction must be charged on the pleadings in the thing itself to which the party claims the right. *Tebbutt v. Selby*, 1 Nev. & P. (x. s.) 710.

And see *Action; Pleading, (C. L.); Water-course; Way; Witness.*

(b) *Nuisances.*

In case for carrying on the business of a tallow-chandler in premises adjoining the plaintiff's house; held, on demurrer, that a plea alleging such business to have been carried on for three years next before the plaintiff's becoming possessed, was bad. *Bliss v. Hall*, 4 Bing. N. S. (c. r.) 183.

And see *Common.*

(c) *To reversions.*

1. A reversioner cannot maintain an action on the case for non-repair of a road, which might easily be repaired, although the value of the premises may be thereby deteriorated for the time, the injury not being of a permanent nature. *Hopwood v. Schofield*, 2 M. & Rob. (N. P.) 34.

2. Where the plaintiff had demised cottages, without any exception of mines, and the defendant, by excavating mines under the premises, had injured the walls; held, that the plaintiff was entitled to maintain case for the injury to his reversionary interest. *Raine v. Alderson*, 4 Bing. N. S. (c. r.) 702; and 6 Sc. 691.

And see *Wells v. Ody*, 1 Mees. & W. 452.

3. Where the declaration, in case against a tenant from year to year, charged a voluntary waste, and the evidence was of permissive waste only, the Court made a rule for a nonsuit absolute. *Martin v. Gilham*, 2 Nev. & P. (q. s.) 568; and 7 Ad. & Ell. 540.

And see *Action; Baron and Feme.*

## ADMINISTRATION.

1. Where in a suit for distribution, persons not parties appeared, and proved themselves next of kin; held that the ascertaining them being a question raised by the intestate, his estate ought to pay their costs. *Bennett v. Wood*, 7 Sim. (ch.) 522.

2. Where the testator dying in India, one of his executors proved his will there, and died, and his executor proved his will in England; held, that he was not the representative of the first testator. *Twyford v. Trail*, 7 Sim. (ch.) 92.

3. Where the claim as next of kin was not made until two years after the distribution of an intestate's estate, and having notice of the proceedings; yet held upon the evidence that they were



entitled to an inquiry whether the plaintiffs were such next of kin, and whether they had any notice of the suit in which the fund was distributed, with liberty to the Master to state special circumstances. *Sawyer v. Birchmore*, 1 K. (CH.) 825; reversing the decision of the M. R., *ib.* 391.

4. Where an administratrix became lunatic, an administration, limited during her lunacy, granted, the former letters being first impounded. *Bincke, In the Goods of*, 1 Curt. (PRER.) 286.

5. So where one of two executors became lunatic, a fresh probate granted, with power of making a like grant when the other should become of sound mind. *Marshall, In the goods of*, *ib.* 297.

6. Shares in the Chelsea Water Works Company held personal estate; and so wherever real property is held for the purposes of a trading company, although a corporation; and the shares assignable, and the proprietors not answerable for the acts of one another as to acts relating to the concern. *Bligh v. Brent*, 2 Younge (EX. EQ.) 263.

7. Real estate held for partnership purposes held to be in the nature of personal estate. *Morris v. Kearsley*, 2 Younge (EX. EQ.) 141.

8. Where part of the residue was an annuity for a term, which the executors could dispose of, held that they ought to invest the payments, the interest on which would belong to a tenant for life of the residue; held also, that the interest of sums set apart to answer contingent legacies, until the contingency arrived, would form part of the income of the residue; and that the interest of a fund directed to accumulate beyond the legal period, would after that period and until the time of payment form part of the capital of the residue. *Crawley v. Crawley*, 7 Sim. (CH.) 427.

9. Where the directors of an insurance company executed a life policy, with a covenant that they would pay the amount if the funds were inadequate; held, that as a personal contract, in the nature of a specialty debt, a probate of the diocese in which the specialty was at the time of the death was sufficient, although the stock and funds of the company were in London. *Gurney v. Rawlins*, 2 Mees. & W. (EX.) 87.

10. Where no actual assignment of the bond had been made, and over had been craved in a suit thereon by a creditor of the deceased, the Court held that it had no authority to order a copy to be given or inspection of it to be permitted at the Register-office, and an order for staying proceedings until the original were produced, discharged. *Canterbury, Archbishop, v. Tubb*, 3 Bing. N. S. (C. R.) 789; and 5 Dowl. (P. C.) 627.

11. Where a British subject having gone abroad, with the view of permanently domiciling himself and becoming naturalized there, came over to this country for a temporary purpose, and whilst here executed a will, of which probate was afterwards granted to one of the executors named, the Court refused to declare the effect as to the property, and held that it had no operation beyond that of appointing the executor. *Thornton v. Curling*, 8 Sim. (CH.) 310.

12. Where an administrator of an insolvent intestate executed a deed of composition with the creditors, including parties next of kin, and who renounc-

ed, and the administrator being possessed of a lease outstanding, and another renewed to the administrator after the intestate's death, under an agreement, both of which were conveyed to the defendants by way of mortgage; held, that the right to redeem was in the representatives of the original administrator, and not in the administrator, *de bonis non*, of the intestate. *Skeffington v. Whitehurst*, 3 Younge & C. (EX. EQ.) 1; supporting *Butler v. Bernard*, Freem. Ch. C. 139.

13. And the husbands of some of the next of kin, who had upon the arrangement covenanted to release the administrator of all claims on the estate, and who also joined in the conveyances for raising money, reciting the transactions, and for above thirty years all parties acquiesced in the dealing with the property by the administrator absolutely; held, that the husband must be presumed to have executed the release of the residue in right of his wife; held also, that the husband of another of the next kin who had been a partner with the intestate, having accepted a bond in satisfaction of a debt due from the intestate, and of all claims on the estate and effects, it amounted to a release of the wife's share in the residue, although not mentioned in the deed. *ib.*

14. Where a testator died, leaving a widow, but no next of kin; held, that undisposed of assets did not go to her, but to her and the Crown in equal moieties. *Cave v. Roberts*, 8 Sim. (CH.) 214.

15. Where the testator had agreed for the purchase of estates, but died, leaving the greater part of the purchase money unpaid; held, that on the ground of the vendor's lien, the assets of the purchaser were subject to be marshalled on behalf of a legatee. *Sproule v. Prior*, 8 Sim. (CH.) 189; overruling *Coppin v. Coppin*, 2 P. Wms. 291.

16. The case of *Sawyer v. Birchmore*, 1 Keene, 825, confirmed 2 Myl. & Cr. 611.

17. Where a testator dying in this country was possessed of bonds of foreign States, which came to the hands of his executor here, and being securities saleable and transferable by delivery, without any act to be done out of this country to render the transfer valid; held, that they were subject to probate duty. *Attorney-general v. Bouwens*, 4 Mees. & W. (EX.) 171.

18. The Court will not, on the mere non-delivery of an inventory, deliver out the bond to be put in suit; and the application refused where proceedings were pending in Chancery, and the party had not been cited to bring in an inventory. *Crowley v. Chipp*, 1 Curt. (PRER.) 456.

19. So, where the attorney of two had by their appointment taken out administration, with the will annexed, for their benefit, and entered into the usual bond, and they had given him three years to pay them the balance due to them under the administration, and in the interval he had died insolvent, no account or inventory having ever been called for, the application refused. *Murray and another v. M'Inkerheny*, 1 Curt. (PRER.) 576.

20. The Court will not grant administration to a third party, unless the party entitled, although having no interest, has been cited. *Barker, in the Goods of*, 1 Curt. (PRER.) 592.



21. Where the executor and universal legatee had assigned over to trustees all his interest, administration, with the will annexed, granted to the trustees, the party having been first cited. *Newstead, in the Goods of*, 1 Curt. (PRER.) 593.

22. Administration granted on a presumption of the death of a person who had sailed on board a vessel in July 1835, for Manilla, which had never since been heard of, and been paid for underwriters as on a total loss. *Hutton, in the Goods of*, 1 Curt. (PRER.) 595.

And see *Baron and Feme; Pleading, (Eq.) Will.*

#### ADVOUSON.

When four co-parceners agreed to present in succession, and upon the third turn arriving the co-parcener who would have been entitled had died, leaving A. and B. two co-heirs, who each claimed the right to present; A. presented, and on the next avoidance B., the second co-heir, presented; held, that both were usurpations on the rights of A. and of the fourth co-parcener respectively, and that on the seventh avoidance, A. would be again entitled to present. *Richards v. Earl of Macclesfield*, 7 Sim. (c. n.) 257.

And see *Charity; Church.*

#### AGENT.

1. Where the attorney and agent of the trustee previous to winding up the trust, paid the trust fund into his general account with his bankers, and informed the *cestui que trust* that it was there, lying idle, who took no notice of it, and shortly after the bankers failed; held, that not having distinct notice from the agent that the money was so placed to his own general account, the agent and trustee were liable to make good the fund. *Macdonnell v. Harding*, 7 Sim. (c. n.) 178.

2. Where by reference to the rules of a club, it appeared that the intention of the members was to provide funds to be administered by the committee, and to provide the means of carrying it on without the necessity of dealing on credit; held, that if the committee chose to enter into contracts without sufficient funds, they could not pledge the credit of the individual members, to render them liable for goods supplied for the use of the club. *Fleming v. Hector*, 2 Mees. & W. (ex.) 172.

3. Where factors sold goods to the defendant in their own names to cover advances, and afterwards upon other sales communicated their principals, and made out the invoices as factors, and the defendant made payments to them without appropriating to one or other of the sales; the jury found that the defendant had notice that the goods were the plaintiffs', but was not bound to make further inquiry; held that he was entitled to consider the payments to the factor as made on account of the plaintiffs, and to set them off in an action by the owners for goods sold and delivered. *Warner v. M'Kay*, 1 Mees. & W. (ex.) 591; and 1 Tyr. & Gr. 965.

4. Where a party being indebted to his own agent, authorizes him to receive money from his

debtor, intending that the agent should thereout pay himself his own debt, he does impliedly, to the extent of the agent's debt, authorize him to receive payment in any way he thinks fit, and the agent may set off his own debt due to the debtor; but if the agent be not a creditor of his principal, he must receive the debt in cash, without which he is not in a situation to pay it over and perform his duty to his principal; and the debtor not paying his debt in money, is bound to prove that the agent is in that situation. *Barker v. Greenwood*, 2 Younge & C. (ex. ex.) 414.

5. An agent to let and receive rents has authority to determine the tenancy; and held, that a party defending as landlord is bound by the same estoppel as the tenant. *Doe v. Mizem*, 2 M. & Rob. (n. r.) 56.

6. Where an acting manager conducted himself so indifferently and improperly as to make his continuance in the duties injurious to the success of the concern, held that he might be lawfully dismissed; held also, that the representation made by the stage manager to the audience, as to the success of the season, was admissible as to that issue. *Lacy v. Osbaldiston*, 8 C. & P. (n. r.) 80.

7. In case for falsely representing the extent of the weekly business, in an advertisement on the sale of the goodwill; held, that the defendant having made his wife his agent in the management of the business, he was bound by her statement, although he made no representations himself as to the state of the trade. *Taylor v. Green*, 8 C. & P. (n. r.) 316.

8. Where a distress, *damage feasant*, was made by the defendant's servant, which was wholly illegal; held, that to make the defendant liable, an express authority to distrain must be shown, and that it could not be inferred from his having taken distresses on lawful occasions. *Lyons v. Martin*, 3 Nev. & P. (q. b.) 609.

9. Where the defendants, upon an employment to manage the sale of a library, in their proposal as to terms, stated that they would be responsible with the auctioneers for the proceeds of the sales; and in a subsequent letter stated, the plaintiff had "of course the double security of ourselves and the auctioneers;" held, that their employment of an auctioneer recommended by the plaintiff did not prevent their being liable for him, and that the plaintiff's attorney having received, with consent of the defendant, notes from the auctioneer for part of the proceeds, was not an acceptance of them as payment, nor a giving time so as to vary the liability of the defendants. *Cholmondeley v. Payne*, 8 C. & P. (n. r.) 432.

10. Where an insurance broker or mercantile agent is employed to receive money for another in the general course of his business, and the known general usage is for the agent to keep a running account with the principal, and to credit him with sums received by credits in accounts with the debtors, with whom he also keeps running accounts, and an account is *bond fide* settled according to that known usage, the original debtor is discharged, and the agent becomes the debtor according to the intention and with the authority of the principal. *Stewart v. Aberdeen*, 4 Mees. & W. (ex.) 211.



11. In a declaration against the defendants as agents employed to effect an insurance on a vessel; held, that, it being a part of their duty to give notice in case of their failure in effecting it, it was properly alleged as a promise implied by the dealing between the parties. *Callander v. Oelrichs*, 5 Bing. N. S. (c. r.) 58; and 6 Sc. 701.

12. Where, in a suit to enforce a charge against the respondent's estate, which had been bought up by his professional agent in the transaction, at a less sum, the respondent by his answer agreed to pay a certain sum, and by the decree declaring the appellant entitled to a certain sum, and his taxed costs up to, and provided he should elect to accept the same, otherwise his bill to stand dismissed with costs; held, that although the parties might have made such a conditional arrangement, it could not properly be done by a decretal order; the equity which the respondent might have, that the purchase of the charge should be deemed to have been made on his behalf, not entitling him to refuse to pay anything in respect of the demand against his estate so charged; and decree reversed. *Carter v. Palmer*, 11 Bli. N. S. (r.) 397.

And see *Account; Action; Agreement; Assumpsit; Attorney; Bankrupt; Baron and Feme; Bill; Election of M. P.; Fraud; Indictment; Ship.*

#### AGREEMENT.

1. Where upon an agreement for work to be done at a specific sum, but "H.'s balance-rent to be deducted from that sum," H. being a weekly tenant to the defendant, and the agreement bore date in the middle of the week, at which time 2l. was only due, but before the work was completed another week's rent accrued; the Judge having stated to the jury that the term *balance-rent* was to be taken as what was due at the date of the agreement, the Court refused a new trial. *Edwards v. Bagster*, 2 Mees. & W. (xx.) 221.

2. Where a tenant having given notice to quit after a refusal to reduce the rent, the landlord proposed to acquiesce in letting for a year upon the reduced terms, if before the given day he could not obtain another tenant; held that if the tenant intended to accept the agreement, it was an implied condition that he should permit the farm to be looked over, and having refused to do so, the parties stood upon their original rights. *Doe d. Marquis of Hertford v. Hunt*, 1 Mees. & W. (xx.) 690; and 1 Tyr. & Gr. 1028.

3. On an agreement by the defendant to retake a public-house which the plaintiff had previously taken of the defendant, and pay for the good-will, stock, &c., if the landlord would accept him as tenant, and issue taken whether the defendant had requested or used any effort to cause them to do so, and it appeared that upon application by letter the landlord would not let, except at an increased rent; held that the plaintiff was rightly nonsuited. *Jeffries v. Clare*, 2 Mees. & W. (xx.) 43.

4. Upon an agreement for the sale of goods upon a valuation by A., held that a valuation by A.'s clerk was not binding unless it were shown

that it was agreed to substitute such valuation; and proof of seeing the clerk making such a valuation, without objecting, was not evidence to support such agreement. *Ess v. Truscott*, 2 Mees. & W. (xx.) 385.

5. Where a corporation having threatened opposition to a projected railway, the parties entered into an agreement with the corporation; held that the company having received the benefit of such agreement, were bound by it; and that such agreements are not illegal. *Edwards v. Grand Junction Railway Company*, 7 Sim. (cn.) 337; affirmed, 1 Myl. & Cr. 226. 650.

6. Where the defendant, a peer of Parliament, stipulated with the proprietors of an intended railroad to withdraw his opposition on their paying certain sums as compensation, and using their best endeavors after the passing of the Bill to obtain in the next session another, allowing a deviation from the original line; held that such agreement was illegal, and against public policy. *Simpson v. Lord Howden*, 1 K. (cn.) 583.

7. Upon an agreement for a certain rent for a house to be suitably furnished for a school; held, that the furnishing was a condition precedent to the right to demand rent or to distrain, and that the due compliance was a question for a jury. *Mechellin v. Wallace*, 6 Nev. & M. (x. n.) 316.

8. Where the ground of illegality appeared upon the face of the instrument, the Court would not assume jurisdiction to order it to be delivered up to be cancelled, and demurrer allowed. *Simpson v. Lord Howden*, 3 Myl. & Cr. (cn.) 97; 8 C. 1 Keene, 583.

9. An agreement to pay a sum in consideration of not proceeding on a petition against the return of a sitting Member, on the ground of bribery, held illegal; and that the memorandum, although unstamped, was admissible to prove such agreement; the statute applying only to instruments used as evidence of a binding agreement. *Cop-pock v. Bower*, 4 Mees. & W. (xx.) 361.

10. Where the lessee entered into an agreement to assign a lease of premises to B. upon payment of — l. by instalments, to indemnify A. from liability to the lessor, with a proviso for re-entry on nonpayment of any of the instalments; held to amount to an agreement only, and not an actual assignment; and that in an action by the lessor against the first lessee, B. was not incompetent as an interested witness; but that if it was equivocal, the objection should be taken on the *voire dire*, to give the witness an opportunity of explanation. *Hartshorne v. Watson*, 5 Bing. N. S. (c. r.) 477.

11. In *assumpsit* on an agreement to pay to the plaintiff a sum, in consideration of the plaintiff using his influence and securing an appointment to the defendant; pleas, alleging, first, that the plaintiff had procured the agreement through fraudulent representation; and, secondly, that the appointment was not in fact obtained and secured by the influence of the plaintiff: held, that, upon the first plea, the issue was, whether the representation was false to the knowledge of the plaintiff at the time; and on the second, if the jury were satisfied upon the evidence that the plaintiff had used such influence as that the situation was



secured by it. *Neeley v. Locke*, 6 C. & P. (N. P.) 527.

And see *Bills; Frauds, stat. of; Landlord; Lease; Partition; Specific Performance.*

### ALIEN.

Upon a devise of lands, in trust to sell and invest in the funds, in trust for parties, some of whom were aliens; held, that the interest of the latter being invested in the stock and not in the land, the Crown was not entitled by its prerogative to come into equity to have the trust executed and secured to the crown, or that it should not be executed as intended, but remain unconverted, and in that form be taken by the Crown, on the ground, that an alien could not so hold it. *Du Hourmelin v. Sheldon*, 1 Beav. (CH.) 79.

See *Foreign State.*

### ALIMONY.

1. As *semb.* the Ecclesiastical Court will allow a wife's executors to enforce arrears of alimony against the husband, the Vice Chancellor allowed a demurrer to a bill, and *quære* if such bill was sustainable. *Stones v. Cook*, 7 Sim. (CH.) 22.

2. Alimony being liable to be varied by circumstances, differs from separate property: where the wife, being separated with an allowance of alimony, accepted a bill for articles supplied to her, payable at the banker's who received the alimony, held, that it did not create a charge thereon. *Vandergucht v. De Blaquiere*, 8 Sim. (CH.) 315.

3. Where the husband suing for a divorce by reason of adultery, had been discharged under the Insolvent Act, and was entitled to no property but in reversion after the death of his father; held, that the Court could make no order for alimony, but under the circumstances suspended the proceedings until some small sum for maintenance should be afforded. *Bruere v. Bruere*, 1 Curt. (COVS.) 588.

And see *Baron and Feme.*

### ANNUITY.

1. Where the grantor, in consideration of the marriage and of the portion, covenanted to pay an annuity to the plaintiff in trust for the intended husband and wife; held that the deed did not require to be stamped, as upon the sale of an annuity, with an *ad valorem* stamp. *Massey v. Hanney*, 3 Bing. N. S. (C. P.) 478; and 4 Sc. 258.

2. Where by the deed of separation the husband covenanted to pay the wife an annuity, and the trustees covenanted to indemnify him against debts, &c.; held that no enrolment was necessary under 53 Geo. 3. c. 141. *Carter v. Smith*, 6 Nev. & M. (X. S.) 480.

3. Where an annuity was given by will, payable quarterly out of the rents and profits of lands devised to trustees, with power of distress; held that since the 2 & 3 W. 4, c. 27, the right to the annuity was barred by the lapse of twenty years from the time of the title to distress arising, and

that the avowant was limited to a claim for the last six years. *James v. Salter*, 3 Bing. N. S. (C. P.) 544; 4 Sc. 168; and 5 Dowl. (P. C.) 496.

4. Where an annuity was charged on lands converted into salt works, and a canal for receiving and loading in boats the salt manufactured and sold; held (*diss. Parke, B.*) that the boat of a purchaser of salt was not privileged from distress for the annuity. *Muspratt v. Gregory*, 1 Mees. & W. (EX.) 633; and 1 Tyr. & Gr. 1086.

5. In ejectment against the grantee of an annuity, to recover the premises on which it was secured; held that a covenant that the premises were of greater yearly value than the annuity, did not prevent the defendant from showing the contrary, in order to take the deed out of the exemption of the Act requiring enrolment. *Doe d. Chandler v. Ford*, 3 Ad. & Ell. (X. S.) 649.

6. Where in 1813 the defendant charged his benefice, a rectory, for the payment of an annuity by a demise for a term, which, in 1825, with other similar charges, were transferred to the plaintiff, and by the same deed he also demised the rectory and a vicarage for a term, with power to sequester, and a warrant of attorney was executed as a collateral security, but no power to sequester was therein given, either expressly or by reference to the deed of demise; the plaintiff afterwards brought ejectment and obtained possession of the rectory, and subsequently entered judgment on the warrant of attorney and sequestered the vicarage; held that the warrant of attorney not in terms charging the benefice, was not void, and that the plaintiff was entitled to apply the sequestration to satisfy the accruing annuities and keep alive the sequestration until the old arrears were paid. *Moore v. Ramsden*, 3 Nev. & P. (Q. S.) 180.

And see *S. C.*, 3 B. & Ad. 917.

7. Plea, in debt on an annuity bond, no sufficient memorial under 53 Geo. 3. c. 141, enrolled, stating the omissions; replication, that there was a memorial duly enrolled, containing the statements mentioned in the plea; rejoinder, that the memorial contained false statements material to the plea; *inter alia* that the consideration was paid in Bank of England notes, whereas, &c., negating it *modo et forma*, and so no such memorial as the Act requires; held, on demurrer, that the rejoinder was not a departure from the plea. *Hickes v. Cracknell*, 3 Mees. & W. (EX.) 72.

8. The case of *Muspratt v. Gregory*, (1 Mees. & W. 633) affirmed on error, 3 Mees. & W. (EX.) 677.

9. Upon a devise in trust for the testator's daughter for life, and after her decease for all and every her children as tenants in common in fee, and if any should die without leaving issue, then for the surviving brothers and sisters; and the daughter afterwards, in pursuance of a power of appointment, granted an annuity, being of less yearly value than the devised premises; held within the exception of 53 Geo. 3, c. 141, s. 10, and did not require any memorial. *Walford v. Marchant*, 3 Myl. & Cr. (CH.) 550.

10. In covenant on an annuity deed, breach of nonpayment of — *l.* of the annuity due on 15



June 1834; plea, judgment recovered for 2,000*l.* in Easter term, 1832, averring the causes of action to be identical; held bad on general demurrer; held, also, that a nominal consideration of 10*s.*, paid to the surety, need not be stated in the memorial, enrolled under 13 Geo. 3, c. 141, s. 2. *Few v. Backhouse*, 1 Perr. & D. (q. b.) 34.

And see *Bankrupt; Incumbrance; Interest; Legacy; Receiver*.

#### APOTHECARY.

1. The new rules of Hil. 4 Will. 4, do not affect the qualification under the 55 Geo. 3, c. 194, s. 21, which forms part of the plaintiff's case; in an action, therefore, for medicines, &c., held that he was properly nonsuited in failing to prove that he was in practice before 5th August, 1815, although the defendant had only pleaded the general issue. *Shearwood v. Hay*, 5 Ad. & Ell. (x. b.) 383.

2. And that a plea of tender as to part and *non assumpsit* as to the residue was not an admission that the plaintiff was entitled under the Act to recover charges in that character. *Wells v. Langridge*, ib.

3. The right to charge for visits as well as medicine, is not a question of law, but for a jury to say, whether, under all the circumstances a contract for reasonable compensation for attendance can be implied. *Morgan v. Hallen*, 3 Nev. & P. (q. b.) 498.

4. Where an apothecary, since the rules of Hil. 4 Will. 4, sues for medicine and attendance, he is bound to prove his certificate, or that he was in practice before the 5th August, 1815, although the plaintiff merely plead *nonq. indeb.* *Wagstaffe v. Sharpe*, 3 Mees. & W. (ex.) 521.

And see *Bankrupt*.

#### APPEAL.

1. Where an appeal was dismissed without costs on either side, the deposit, being considered in the nature of a security for them, ordered to be returned. *Dell v. Barlow*, 2 Russ. & M. (ch.) 686.

2. The decree below is not the less the final decree in the suit, although it may be adjudicated on by the House of Lords; but the court below has no jurisdiction over matters arising between decree and the judgment of the House, though connected with the suit, but not embraced by the decree. *Small v. Atwood*, 3 Younge & C. (ex. xq.) 105.

3. A right of appeal cannot be given by implication; where an Act empowered the Commissioners to do certain acts upon giving notice in the form prescribed by a previous Act, which applied to cases of appeal, and the latter Act was subsequently repealed; held, that it did not extend to repeal the procedure so referred to and directed by the former, but that there being no express clause giving an appeal, the Court could not supply the omission, whatever the legislature might have intended. *R. v. Stock*, 3 Nev. & P. (q. b.) 420.

4. Where the appellant did not appear on the day appointed for the hearing, as to its competency, and the respondent's counsel appearing at the bar prayed that the appeal might be dismissed, the House required him to open a *prima facie* case against the appeal before they would dismiss it. *Fraser v. Gordon*, 3 Cl. & Fi. (r.) 718.

5. Where the respondent not appearing to support the judgment below, it was reversed, but no costs given; *semb.* if the respondent were guilty of fraud, the House would relieve against it and give costs. *Hamilton v. Littlejohn*, 4 Cl. & Fi. (r.) 20.

6. Upon a mere question of practice, the House is not competent; where, therefore, the Court below has treated a proceeding as merely interlocutory and not final, it is decisive of the nature of the proceeding. If the Appeal Committee direct the question of competency to be argued before the House, it is in the discretion of the House to permit a reply. *Farrier v. Howden*, 4 Cl. & F. (r.) 25.

7. Where a decree on the equity side of the Exchequer was pronounced in Hil. 1821, but not enrolled until Hil. 1836, and the Appeal Committee received the petition of appeal; held, that the time of petitioning was from the enrolment, and not from the time of pronouncing the decree; the House having confirmed the order allowing the appeal, held, that such order could not be reheard without notice; and although, for convenience sake, the respondent might be allowed to argue against the decision of the Appeal Committee without such notice, it must be only on the understanding that he is to present a petition to be heard against the allowance of the petition of appeal. *Brooke v. Champernowna*, 4 Cl. & Fi. (r.) 247.

8. Although no appeal can be heard against any decree of a court of equity, after two years from the date of enrolment, yet where the appeal extended to subsequent orders in the same cause brought within that period, it was saved: and where the appellant was absent abroad from illness and embarrassment, for five years after the enrolment, although the appeal had been received and appointed for hearing, it could not be heard. *De Burgh v. Clarke*, 4 Cl. & Fi. (r.) 562.

9. Where after a day appointed for hearing and extended on terms, the party failed to comply with the terms imposed, the House dismissed the appeal with costs. *Mahon v. Irwin*, 4 Cl. & Fi. (r.) 559.

And see *Attorney; Bankrupt; Borough Rate; Costs; Poor; Practice; Sessions*.

#### APPRENTICE.

The justices at sessions have not power, under 5 Eliz. c. 4, s. 35, on discharging an apprentice from the indentures where the premium is above 25*l.*, to order any part of the premium to be refunded, or where not paid, withheld; and *semb.* the statute only applies to compulsory bindings without premium. *East v. Pell*, 4 Mees. & W. (ex.) 665.



## APPROPRIATION.

1. Where a party domiciled in England purchased real estate in Scotland, and pending the settlement of the title deposited the remainder of the purchase money at a banker's there, which was treated by him as expressly appropriated and referred to as such in a will, and also in a deed of trust of a testamentary nature, executed there; he subsequently made a will as to the residue of his property, which was duly admitted to probate in the English Court; in a suit instituted by the executor in Scotland, claiming the fund deposited, held, that the Scotch Court had a right to look to the first instrument, in order to discover the testator's intention as to such deposit, and that without looking to the will there was sufficient evidence from the deed of trust, of intention to appropriate the fund to the payment of the bond given for the remainder of the purchase money. *Yates v. Thompson*, 3 Cl. & Fi. (r.) 545.

2. Where the defendants, as commission agents to foreign houses, in which they were partners, but the foreign houses were not partners in the commission business, received a letter from *H. and I.*, authorizing them to pay a sum of money to *R. & Co.*, but which being unsatisfactory was revoked, and a second letter was written, which was desired to be acted upon, and the defendants thereupon gave an undertaking to *R. & Co.* to comply with it on being guaranteed by *R. & Co.*, which was given; held, that taken altogether, it amounted to an appropriation of the sum to *R. & Co.*, or else to an equitable assignment of it, and was not in either case revoked by the bankruptcy of *H. and I.*, and notice given by the assignees before the proceeds received, out of which the payment was to be made. *Hutchieson v. Heyworth*, 1 Perr. & Dav. (q. b.) 266.

And see *Account; Bankrupt; Partner.*

## ARREST.

- [A] WHEN LEGAL.  
[B] MALICIOUS.

## [A] WHEN LEGAL.

1. Where the officer, in making the arrest, had broken the outer door, the Court discharged the party out of custody on a summary application. *Hodgson v. Towning*, 5 Dowl. (r. c.) 410.

2. Where a foreigner was arrested for the residue of a debt from which he had been discharged in his own country upon proceedings analogous to our bankrupt law, the Court refused to interfere summarily, leaving his defence to the opinion of a jury. *Bretillot v. Sandos*, 4 Sc. (c. r.) 201.

3. It is only in extreme cases, and where the process of the Court has been clearly abused, that the Court will interfere to set aside an arrest upon the merits. *Mason v. Smith*, 5 Dowl. (r. c.) 179.

4. Where a party attending an arbitration staid to wait the event of an application to the Court in consequence of a revocation of the submission and want of pecuniary means of returning, held

an unreasonable delay, and not to privilege him from arrest. *Spencer v. Newton*, 5 Ad. & Ell. (k. b.) 818.

5. The Court refused to discharge the defendant out of custody, on the ground that the writ of *ca. su.* was not indorsed with his residence; *semb.* the rule is for the benefit of the sheriff only; at all events, the objection must be promptly taken. *Esdaile v. Davis*, 6 Dowl. (r. c.) 465.

6. Where the date was omitted in the copy of the writ served on the defendant, held, that being irregular, the arrest was bad. *Smart v. Johnson*, 6 Dowl. (r. c.) 90; and 3 Mees. & W. (xx.) 69.

7. The Court refused to discharge a party detained on a suit in one Court, although the arrest in a suit in another Court had been set aside as irregular. *Cogg, ex parte*, 6 Dowl. (r. c.) 461.

8. Where the party had been charged in execution, held, that it was too late to enter into the question as to the irregularity of the *mesne* process on which the arrest had been made. *Cross v. Marsh*, 6 Dowl. (r. c.) 280.

9. The court will always discharge a married woman from arrest, unless at the entering into the contract she represented herself to be a *feme sole*. *Hollingdale v. Lloyd*, 3 Mees. & W. (xx.) 416.

10. Arrest upon *mesne* process, except in certain cases, abolished, and remedies of creditors against the property of debtors extended, by 1 & 2 Vict. c. 110.

11. Where a solicitor who had retired from practice, while attending the hearing an appeal in the House of Lords as agent for the appellant, was taken on an attachment for nonpayment of costs in chancery; held entitled to be discharged, and that the application might be made to the Court out of which the process issued, or to the House of Lords. Attorney-general *v. Skinner's Company*, 8 Sim. (ch.) 377; and 1 Coop. (c. c.) 1.

12. Where it appeared that the defendant was in the army, and was going to join his regiment stationed in Ireland, held that it was not such a leaving the kingdom for a temporary purpose as not to subject the party to arrest in the discretion of a Judge. *Larchin v. Willan*, 4 Mees. & W. (xx.) 351; and 7 Dowl. (r. c.) 11.

13. A page of the presence, of the second class in ordinary, being bound to attend the Queen as an ordinary servant with fee, held entitled to the privilege from arrest. *Reynolds v. Pocock*, 3 Mees. & W. (xx.) 371; and 7 Dowl. (r. c.) 4.

14. Where the defendant was proceeding to the Court to receive judgment on an indictment for conspiracy, the court refused to discharge him on his own affidavit merely; but would grant a rule nisi, and upon the facts being admitted, would make it absolute only as to that case, and not as to other detainers, unless notice of the motion given. *Sharplin v. Hunter*, 6 Dowl. (r. c.) 632.

15. Where the plaintiff was arrested whilst returning from the Court of Chancery, where he had been engaged as a barrister in a cause, and he obtained a Judge's order for his discharge in



that suit only; held, that the sheriff was justified in detaining him on other writs at the suit of other parties, the Judge's order having reference only to the particular application: *semb.*, the action might be maintainable against the sheriff, if any oppressive conduct were shown. *Watson v. Carroll*, 4 Mees. & W. (xx.) 592; and 7 Dowl. (p. c.) 217.

16. Where the party, having been arrested by a sheriff's officer without any warrant, another officer obtained his name to be put in the warrant, which was directed to a different officer, it being in accordance with the practice of the office, and done without any collusion with the sheriff; held not to invalidate the arrest, nor entitle the party to his discharge from that warrant or other detainers. *Robinson v. Yewens*, 5 Mees. & W. (xx.) 149; and 7 Dowl. (p. c.) 377.

17. But where the defendant was arrested on a warrant from the late sheriff, but none from the present one, at the suit of M., by his officer S., there being at the time another writ against him at the suit of R., the warrant on which from the present sheriff was in the hands of N., who delivered it to S., and whose name was inserted in it by the under-sheriff, and the defendant was detained at the suit of the plaintiff; held, that the original caption of the defendant was illegal, and that he was entitled to be discharged, and was not precluded from showing the original illegality of the caption by his having removed himself from the original custody by suing out a *habeas corpus*. *Pearson v. Yewens*, 5 Bing. N.S. (c. p.) 450; and 7 Dowl. (p. c.) 451.

18. Where the defendant had been, under a Judge's order, on the 28th March, taken on a *capias*, the copy of which irregularly stated the writ to be returnable in four instead of one month, and no application made for his discharge until the 17th April; held too late, and if the delay be occasioned by a previous application at chambers, the rule must be drawn up on reading the summons or be shown by affidavit. *Sugars v. Concanen*, 5 Mees. & W. (xx.) 30; and 7 Dowl. (p. c.) 391.

19. In such cases the application should be to set aside the order, as, if the *capias* were set aside, the sheriff might be made a trespasser. *Hopkinson v. Salembier*, 7 Dowl. (p. c.) 403.

20. Where, after the commencement of 1 & 2 Vict. c. 110, a party arrested on mesne process was out on bail; held, that the bail were entitled to an *exoneretur* without being compelled to the circuitous course of a *render*: held also, that in order to obtain a detention under the proviso of sect. 7, the affidavit must show the belief of the deponent that the defendant is about to quit the country, and the probable causes for that belief. *Bateman v. Dunn*, 5 Bing. N.S. (c. p.) 49; 6 Sc. 739; and 7 Dowl. (p. c.) 105.

21. Where the defendant was taken on a *cap. utlag.* whilst in custody on an attachment for contempt in Chancery, which was afterwards set aside for irregularity; held, that the *cap. utlag.* being a process purely for the benefit of the party issuing it, he was entitled to be discharged as to it. *Hall v. Hawkins*, 7 Dowl. (p. c.) 200; and 4 Mees. & W. (xx.) 590.

22. Where the party, whilst in mesne custody, was taken after the return of the writ, in the gaoler's custody, to a distant place to attend before a revising barrister, and returned into gaol the same day; held to amount to an escape: but that the action was not maintainable without proof of some damage in fact or law. *Williams v. Mostyn*, 4 Mees. & W. (xx.) 145; and 7 Dowl. (p. c.) 38; questioning *Barker v. Green*, 2 Bing. 317.

And see *Plancke v. Anderson*, 5 T. R. 37.

And see *Bail*; *Bankrupt*; *Costs*; *Debt*; *Prisoner*; *Sheriff*.

### [B] MALICIOUS.

1. Where the declaration in case for a malicious arrest only alleged that the defendant wrongfully and injuriously procured the writ to issue, without the word "maliciously," which is the gist of the action, held bad after verdict and judgment arrested. *Saxon v. Browne*, 1 Nev. & P. (x. x.) 661.

And see *Scheibel v. Fairbairn*, 1 Bos. & P. 388.

2. Where the plaintiff was given in charge in the evening for a malicious trespass in pulling down a chimney on premises formerly his own and exchanged for others of which he had been dispossessed, but the plaintiff was liberated in the morning, a summons having been taken out for a hearing before magistrates; held that the statute allowing the apprehension of such offenders, the jury were to say if, in such imprisonment, the defendants acted *bonâ fide* and believing they had the power of taking into custody, and under color of right, and if so, there being no notice of action, that the defendants were entitled to a verdict. *Reed v. Cowmeadow*, 7 C. & P. (n. r.) 821.

3. In case for maliciously causing the defendant, an attorney, to be arrested, knowing him to be such, notwithstanding a good probable cause of action, held actionable; and knowledge that he was privileged, held an ingredient of malice. *Whalley v. Pepper*, 7 C. & P. (n. r.) 506.

4. Where a party had been discharged on the ground of the officer not having the warrant or the writ in his possession at the time of the arrest, held, that he might be again taken on the same writ. *Polmer v. Ball*, 5 Ad. & Ell. (x. s.) 823.

5. In case for maliciously arresting the plaintiff, in order to obtain from him the delivery of a ship's register, which he had mortgaged, and by agreement was to retain the command of the vessel for his own profit, the sheriff's officer having gone to him and told him, that unless he delivered the register or found bail, he must either take him or leave an officer with him, held to amount to an arrest; held also, that the delivery of the registry being no part of duty enjoined by the writ, it was an abuse of process of law, and immaterial whether the suit in which the process issued had been determined or not, or whether founded on reasonable and probable cause or not; held also, that if the taking of the register was wrongful, the taking itself was a conversion, and



no demand and refusal necessary to maintain the action of trover. *Grainger v. Hill*, 4 Bing. N. S. (c. r.) 212.

6. In case for maliciously arresting, and without reasonable or probable cause, the plaintiff having been discharged out of custody on a former arrest, without leave of any Judge, by reason of the defendant not having declared in due time; held, that the action was maintainable, and the declaration disclosing a sufficient cause of action, although the allegation of malice was general; (*dub. Denman, L. C. J.*) *Heywood v. Collinge*, 1 Perr. & Dav. (q. s.) 202.

7. It is a sufficient arrest to entitle the defendant to the relief under 43 Geo. 3, c. 46, s. 3, where the officer states to the party that he has a warrant, and takes him to his own house, and a bail-bond is executed; and the execution of the bond *semb.* is a holding to bail within the statute; *sed quer.* if the *capias* be afterwards set aside for irregularity? *Reynolds v. Matthews*, 7 Dowl. (r. c.) 580.

8. In case for a malicious arrest, held, that the wrongful act being independent of the subsequent continuance or discontinuance of the suit, it was not necessary to produce the judgment roll, but that the rule to discontinue on payment of costs, and proof that they were paid, was sufficient to support the averment of the discontinuance. *Watkins v. Lee*, 7 Dowl. (r. c.) 498.

And see *Action; Attorney; Costs.*

## ASSETS.

### MARSHALLING.

See *Administration; Executor; Legacy.*

## ASSIGNMENT.

See *Assumpsit.*

## ASSUMPSIT.

- [A] CONSIDERATION TO SUPPORT.
- [B] FOR MONIES—GOODS—WORKS.
- [C] PLEADINGS IN.

### [A] CONSIDERATION TO SUPPORT.

1. Where the plaintiff agreed to accept the bills of a party entitled to deeds in the defendant's possession, in order to enable him to assign them as a security; held a sufficient consideration for the defendant's promise to deliver them over to the plaintiff on the bills being paid. *Tipper v. Bicknell*, 3 Bing. N. S. (c. r.) 710.

2. In *assumpsit* for breach of promise of marriage, pleas alleging that the plaintiff was unchaste, &c., and had intercourse with *H. P.*; and, secondly, with persons unknown; held sufficient on demurrer. *Young v. Murphy*, 3 Bing. N. S. (c. r.) 54; and 3 Sc. 379.

3. Declaration that the plaintiff being about to proceed to *N.*, paid in to the defendants (bankers) money to be paid to him at *N.* on a certain day, and that in consideration the defendants promised to cause it to be paid to the plaintiff at *N.* on that day; held to disclose a sufficient consideration for the promise. *Shillibeer v. Glynn*, 2 Mees. & W. (ex.) 143.

4. Where a party kept an account with the defendant, and afterwards becoming lunatic, the account was continued by the family, and a balance stated in the pass-book to the credit of the lunatic; in an action by his representative after his death, to recover such balance, held that, there being no evidence of an accounting with him, nor with any one appointed by him, or competent to state it on his part, the action was not maintainable. *Tarback v. Bipham*, 2 Mees. & W. (ex.) 2.

5. Where a party remitted money to the defendant to be paid to the plaintiff, and which he promised the plaintiff to pay; held that there was a sufficient consideration moving from the plaintiff to maintain the action for money had and received. *Lilly v. Hays*, 1 Nev. & P. (x. s.) 26.

6. In *assumpsit* on a building agreement, and for extras, averring in the count on the former that the defendant had discharged, prevented, and hindered the completing it, on which issue was joined, and the particulars were for the materials under the agreement; held, that the denial by the defendant, on being applied to in the course of the work for money, that he would ever pay a farthing, was not evidence of the contract being abandoned by him, but that the plaintiff was entitled to recover for the extras, although not upon the agreement, which, not having been completed, he was not then liable to pay any thing. *Rees v. Lines*, 8 C. & P. (n. r.) 126.

7. In *assumpsit* by assignees of *I.*, alleging that before the bankruptcy, &c., defendant was indebted to *I.* in 200*l.*, and that in consideration *I.* would prove that sum under the commission issued against defendant, he promised to pay *I.* 200*l.* after the delay of a few months; held, on motion in arrest of judgment that the promise could not be supported, for want of consideration. *Brealey v. Andrew*, 2 Nev. & P. (x. s.) 114.

8. In *assumpsit* for money lent; plea, that it was lent for the purpose of playing at an illegal game, *viz.* hazard, held good, and that the money was not recoverable back. *McKinnell v. Robinson*, 3 Mees. & W. (ex.) 434.

9. Where the plaintiff, at the defendant's request, entered into a contract for the purchase of Spanish bonds, and afterwards paid the price, which the defendant promised to repay; held, in *assumpsit* for money paid, that the defendant could not object that the executory contract, on which the money had been paid, was not in writing, as required by the Statute of Frauds. *Pawle v. Gunn*, 4 Bing. N. S. (c. r.) 445.

10. Where horses were sold for 80*l.*, to allow 10*l.* if returned within a month, which was done; held, that the purchaser might maintain for the money as had and received to his use, it being



held by the defendant on the terms of giving it back if the plaintiff were eventually entitled to receive it. *Hurst v. Orbell*, 3 Nev. & P. (q. s.) 237.

11. Where the defendant, an attorney for A., who was really entitled, brought an action in the name of the plaintiff, and recovered, and the jury having found that it was received by him for A.; held, that the plaintiff could not maintain an action against the attorney for the money received on the settlement of the claim. *Clarke v. Dignam*, 3 Mees. & W. (ex.) 478.

12. Where, at the time of assignment of a lease by defendant to plaintiff, rent was in arrear, which the plaintiff paid under a distress; held, that the defendant having granted, by deed of assignment, the premises, with the usual covenant for quiet enjoyment, *assumpsit* would not lie on the implied contract to indemnify the plaintiff, nor on an express contract to repay without some new consideration. *Baber v. Harris*, 1 Perr. & Dav. (q. s.) 360.

13. Declaration stating that in consideration the plaintiff would allow defendant to weigh certain boilers, he undertook to return them, and breach, the non re-delivery; held, that as the plaintiff might have sustained some detriment by complying with the request, it was a sufficient consideration after verdict. *Bainbridge v. Firmston*, 1 Perr. & D. (q. s.) 1.

14. Where the plaintiff ordered specifically a machine of which the plaintiff was patentee, "to be put up in his brewhouse," which the plaintiff performed, but it was found not to answer the purpose of a brewhouse; held, that there being no fraud, and the contract containing no guarantee that it was fit for such purpose, the plaintiff was entitled to recover the stipulated price. *Chanter v. Hopkins*, 4 Mees. & W. (ex.) 399.

15. In *assumpsit* on the breach of a warranty of seed, to produce certain crops, with the common counts, the particulars being only of the price of the seed; held, that applying only to the common counts, evidence of the value of the crops was admissible, as applying to the damage stated in the first count. *Page v. Pavey*, 8 C. & P. (n. p.) 769.

16. Where, by a memorandum contained in a letter, the plaintiff agreed to enter into the defendant's service as manager, and "the amount of payment I am to receive I leave entirely to you to determine;" held, (*diss. Parke, B.*) to imply that, at all events, something was to be paid, and, on a *quantum meruit*, it was for the jury to decide the value of the services performed. *Bryant v. Flight*, 5 Mees. & W. (ex.) 114.

17. In *assumpsit* for work and labor, and materials, the defendants having employed the plaintiff to survey a parish and furnish a map, to be laid before commissioners of enclosure: held, that the jury having found the work to have been done, and satisfactorily, and the defendants having had reasonable time for ascertaining its correctness, in the absence of any contract for a specific price for the work, the plaintiff was not precluded from recovering what the jury might consider a reasonable remuneration, on the ground of his having refused the map, &c. except on payment of his own

demand. *Hughes v. Lanny*, 5 Mees. & W. (ex.) 183.

18. In an action on an agreement for not retaining the plaintiff in the defendant's service, with a count on a *quantum meruit* for services, to the first of which, amongst others, the defendants pleaded various acts of misconduct on the part of the plaintiff as justifying his dismissal; held, that it was sufficient to establish one good ground of discharge, and that the jury were justified in ascribing the discharge to the general nature of the plaintiff's conduct, and not to the formal reason assigned at the time; as to the second count, held that the defendant might, under the general issue, show the worthlessness of the services, and the jury take his conduct in such service into consideration in estimating the value of the service. *Baillie v. Kell*, 4 Bing. N. S. (c. r.) 638; and 6 Sc. 379.

And see *Chappell v. Hicks*, 2 Cr. & Mees. 214.

19. Where money paid into Court in lieu of bail, was, upon default in depositing the further sum as security for costs, under 7 & 8 Geo. 4, c. 71, s. 2, ordered by the court to be paid out to the plaintiffs, and a fiat afterwards issued upon an act of bankruptcy committed by the defendant prior to the payment of the money into court; held, that such payment was within the exception of payments made by the authority of a court of competent jurisdiction, and that the assignees could not recover. *Reynolds v. Wedd*, 4 Bing. N. S. (c. r.) 694; 6 Sc. 699; and 6 Dowl. (r. c.) 728.

And see *Belcher v. Mills*, 2 Cr. Mees. & R. 150.

And see *Action; Baron and Feme; Contract; Costs; Landlord; Lunatic; Parent; Pleading, (C. L.) Poor; Stamp; Wager.*

#### [B] FOR MONIES—GOODS—WORKS.

1. Where the bailee of a bill not due, deposited it with his bankers, and received money from them on the credit of it; held that it could not be considered as money had and received to the bailor's use until it was seen whether the bill was paid or not. *Atkins v. Owen*, 6 Nev. & M. (x. s.) 309; and 4 Ad. & Ell. 819.

2. In *assumpsit* for money had and received, alleged in the particulars to be sums deposited with the defendant as stakeholder of a wager which the plaintiff had won; held that the plaintiff failing in proof of this, he could not even recover the amount of his own deposit upon mere proof of having demanded back his stake before paid over, as upon a rescinding the wager, being a totally different issue. *Davenport v. Davies*, 1 Mees. & W. (ex.) 570; and 1 Tyr. & Gr. 931.

3. Where the plaintiff had been arrested upon a claim which the jury found that he knew not to be well-founded, and the plaintiff not being prepared with bail, had paid a sum to the defendant, and agreed to put in bail to the action, which was not afterwards proceeded in; held that it was not a payment in the ordinary sense under process of law, and might be recovered back, and would not prevent the plaintiff also maintaining an action for the malicious arrest. *Duke de Cadaval v. Collins*, 6 Nev. & M. (x. s.) 324; and 4 Ad. & Ell. 858.



4. Where the defendant, a certificated bankrupt, was arrested for a debt provable under the commission, which he paid under protest; held that if the sheriff were not entitled to take it, it might be recovered back. *Payne v. Chapman*, 4 Ad. & Ell. (x. s.) 364.

5. Where the plaintiff, being present at an order given by the defendant for goods, said he would pay if the latter did not, and which he afterwards did; held that it must be taken to have been made with the defendant's authority, and no countermand being shown, the plaintiff was entitled to recover the amount as for money paid to the defendant's use. *Alexander v. Vane*, 1 Mees. & W. (ex.) 511; and 1 Tyr. & Gr. 865.

6. Where the plaintiff, a broker, sold for the defendant foreign bonds, which turned out, for want of a proper stamp, to be unmarketable, and the plaintiff, according to the usage of the Stock Exchange, took them back; held, that having paid over to the plaintiff the proceeds, he was entitled to recover back the amount as for money had and received; having an authority to sell, he had an implied one to sell also according to the usage, and to rescind the sale upon the bonds turning out not to be what they were represented to be. *Young v. Cole*, 3 Bing. N. S. (c. r.) 724.

7. Where, after a refusal by the Court of Chancery to compel performance of an oral agreement for a lease by testator with the defendant, part of the consideration being paid, his executors consented to grant one upon the same terms, and a lease was accordingly prepared by the attorney of the plaintiff's lessors, and his bill paid, but the lease was not delivered over, the remainder of the consideration not having been paid; held that the plaintiffs were entitled to recover the amount of charges for preparing the lease, as for money paid to the defendant's use, and to sue in their personal character. *Grissell v. Robinson*, 3 Bing. N. S. (c. r.) 10; and 3 Sc. 329.

8. Where a party, to whom a bill was given to get discounted, received and misapplied the proceeds, held that he could only be sued for the amount as money had and received, and not in trover for the bill. *Palmer v. Jarman*, 2 Mees. & W. (ex.) 582.

9. Where a bill appeared on the face of it to have been drawn by the defendant, the captain of the plaintiff's ship, or his agent; held that, without evidence of the money coming into the defendant's hands, the action for money had and received could not be maintained against him. *Scott v. Miller*, 3 Bing. N. S. (c. r.) 811.

10. Upon a contract entered into in June for work to be paid for in January, 1837, on condition of its being completed in a proper and workmanlike manner on the 10th of October previous, the work having been completed by the 15th of October; held that the plaintiff was not bound to declare on the special contract, but might recover on the general count for work, labor and materials. *Lucas v. Godwin*, 3 Bing. N. S. (c. r.) 737; and 4 Sc. 301.

11. Where the plaintiff with others was employed as land agent to sell the defendant's estates, and a party inquiring of the plaintiff as to

one estate, was told that it was out of the market, but mentioned that of the defendant, being to be sold, and gave him a particular, and the party afterwards concluded a bargain for it with another agent; held, that the plaintiff might be said to have found the purchaser, and was entitled to such commission as the jury should think proper. *Murray v. Currie*, 7 C. & P. (n. r.) 584.

12. Where the jury found the usage for architects employed to provide plans and estimates, to be assisted by surveyors to make out the quantities, who were paid by the successful competitor; held, that the defendant's employing an architect, and making no objection to the charge, having, by declining to go on with the work, prevented competition, were liable for the surveyor's charges on the implied authority of their architect to employ him. *Moon v. Witney Guardians*, 3 Bing. N. S. (c. r.) 814.

13. Where the defendant removed his sons from the plaintiff's school on the ground of alleged ill-treatment; held, that questions could not be asked as to his conduct towards other scholars; held also, that a letter containing a prospectus of the terms, and a stipulation added, that in consideration of sending two, certain extra charges should be waived, required an agreement-stamp; and the letter having been produced on notice, held to be in the custody of the Court, and an officer allowed to go with it to the Stamp-office to get it stamped whilst the trial was going on. *Clements v. May*, 7 C. & P. (n. r.) 678.

14. Where an article was lent, and an undertaking that if damaged the defendant was to have it and pay a stated sum; held, to be a contract for a conditional sale, and upon the condition broken, the plaintiff entitled to recover the price as for goods sold. *Bianchi v. Nash*, 1 Mees. & W. (ex.) 545; and 1 Tyr. & Gr. 916.

15. Where evidence was only offered on a count for work and labor; held, that the plaintiff could not recover for materials, and upon a plea of *nung. indeb.*, except as to £—, and as to that judgment by default; and the jury having found that less than that sum was due for work and labor, the defendant was properly nonsuited on the remaining issue. *Heath v. Freeland*, 1 Mees. & W. (ex.) 543; 1 Tyr. & Gr. 918; and 5 Dowl. (r. c.) 166.

16. Where a party being insolvent, assigned over his stock to his brother, carrying on a different trade, in consideration of his securing 2s. 6d. in the pound of a composition of 5s. made with the creditors; he continued to manage the business for the brother, whose name was over the door, and upon an application by a creditor for payment of the composition, offered a bill, exceeding the amount, with his brother's name, as indorser, on it, but put without authority, and an agreement was made that the balance should be made up in goods to be supplied for the shop; the brother's wife, who occasionally went to the shop, being a consenting party: upon the dishonor of the bill, and an action against the brother on the bill and for goods, the jury finding that there was a general authority to buy goods for the shop, and that the goods were not sold on the credit of the bill alone, but on that of the brother; held, that the value of the goods might be recovered, al-



though the jury negatived the indorsement on the bill being the defendant's, and that he had ever had notice of the dishonor: *Rose v. Edwards*, 1 Mees. & W. (ex.) 734; and 1 Tyr. & Gr. 975.

17. A schoolmaster cannot recover for wearing apparel supplied to a pupil without the sanction, express or implied, of the parents or guardian. *Clements v. Williams*, 8 C. & P. (n. p.) 58.

18. Where a father, on the marriage of his daughter, executed an appointment of a sum which was settled on the marriage, the expense of the settlement was paid by the husband, but he refused to pay for the expense of the deed of appointment; held, not a matter of usage, but for the jury to say to whose credit the business was done. *Hayward v. Fiott*, 8 C. & P. (n. p.) 59.

19. Where stock, the trust property of the wife, was improperly sold out by the authority of the husband and wife; held that it still remained a trust fund in the hands of the agent receiving it, and that the husband could not maintain an action for money had and received, it never having been his money. *Mileham v. Eycke*, 3 Mees. & W. (ex.) 407.

20. A real assignment, putting an end to the liability of the assignee, which continues only so long as the privity of estate, the motive of assigning or receiving it does not make it fraudulent, if it really operates as intended, although made to a beggar; but although the legal remedy may be gone, yet equity will give relief as to antecedent breaches of covenant committed at the time the party was liable for them. *Fagg v. Dobie*, 3 Younge & C. (ex. ex.) 96.

21. Where the defendant obtained payment of an entire demand on a false representation of default in the plaintiff's agent honoring a bill given for the amount; held, that it was not necessary for the plaintiff previously to tender back the bill, the right of action accruing on the payment of the money upon the misrepresentation of the facts. *Pope v. Wray*, 4 Mees. & W. (ex.) 451.

22. Where the agents of the plaintiff in England were directed by him to pay, through the defendants, money to be placed to his credit in India, which was done, and an entry made in the defendants' books to the credit of their correspondent, to whom they sent advice to account for it to the plaintiff; before the letter of advice reached their correspondent, the latter had failed, having drawn on the defendants, between the date of such letter and the failure, bills which the defendants had accepted to an amount exceeding the amount paid in by the plaintiff; held, that the defendants having only acted as directed, and the situation in which they stood towards their correspondents altered, the plaintiff could not maintain *assumpsit* against them for the money so paid in. *M'Arthy v. Colvin*, 1 Perr. & Dav. (q. n.) 429.

23. Where a party carrying on the wine and spirit business assigned his premises by way of mortgage, with all licenses, &c., to the plaintiff, which was shortly afterwards forfeited on account of some irregularities by the occupier; the plaintiff afterwards sold the mortgaged premises, un-

der a power in the mortgage deed, without obtaining a new license, and which the defendant, the assignee of the mortgagor, afterwards obtained, which he sold to a subsequent occupier; held, that the license so obtained by the defendant was not the license conveyed to the plaintiff, and that the interest having ceased when the premises were sold in discharge of the mortgage, the sum received by the defendant on the sale of the license was not money received to the plaintiff's use. *Manifold v. Morris*, 5 Bing. N. S. (c. r.) 420.

24. Where, at a meeting of the plaintiff and defendant to settle the account, the clerk of the former made the entries into one book which the defendant copied in another, but no admission was made as to the correctness of the items, but the defendant admitted that the balance against him as stated by the clerk was correct, but added, that as he had done many things, there would not be much, if any thing, between them; held, that the plaintiff's book would not bind the defendant so as to require its production, or its absence to be accounted for: held also, that the defendant's admission was evidence of something due on the account stated. *Rigby v. Jeffry*, 7 Dowl. (r. c.) 561.

#### [C] PLEADINGS IN.

1. Where the declaration was for "money lent, and on an account stated," and the particulars contained only one item for money lent, and it appeared that the debt arose out of a bet; held that, on the plea *non assumpsit*, the question of illegality did not arise, and that the plaintiff might consistently recover on the latter count. *Stevens v. Willingale*, 7 C. & P. (n. p.) 702.

2. Pleas in *assumpsit* of part payment and a set-off which the plaintiff consented to allow; held that he was entitled to a verdict on the count for goods sold, but that the amounts allowed should be indorsed on the *postea*. *Butt v. Burke*, 7 C. & P. (n. p.) 806.

3. Under the general issue in *assumpsit* for goods sold, the defendant may be allowed to show that they were sold on a credit not expired. *Broomfield v. Smith*, 1 Mees. & W. (ex.) 542; and 1 Tyrw. & Gr. 929.

4. A defendant can only be made chargeable for a breach of the promise laid, and the Court will not pick out of various parts of the record a different cause of action from that for which the plaintiff proceeds; where, therefore, the promise laid was to pay a debt before due, and also the price of goods to be delivered, by an acceptance for the whole amount, and the plea showed a failure of part of the consideration for the promise; held, on demurrer, to be an answer to the declaration. *Head v. Baldrey*, 2 Nev. & P. (x. n.) 217; and 6 Ad. & Ell. 459.

5. So, where the declaration was on an agreement for a demise of a house, to be furnished, &c.; held, on demurrer to a plea that the promise related to an interest in land, and no note in writing, that the action was not maintainable. *Mechellen v. Wallace*, 2 Nev. & P. (x. n.) 224.



6. In *assumpsit* on an agreement to assign the lease of premises, the furniture to be taken at a valuation, the declaration averring that the plaintiff was ready and willing to assign, &c.; plea, traversing that the plaintiff was ready, &c.; the completion of the agreement was by subsequent indorsement, postponed from the 1st to the 6th of January, and on the evening of the day on which it was signed, the premises were partly destroyed by fire; the plaintiff was the widow of a sublessee, and had not then taken out administration, but did so before the 1st of January; held, 1st, that the party being bound to complete the contract in the terms stipulated, which it was out of her power to do, the contract could not be carried into effect by the parties: 2dly, that the postponement, under the change of circumstances, was a new contract, requiring a new stamp, (*Parke, B.*, dub. whether the Court could assume it to be a subject of agreement of the value of 20*l.*); and *semb.*, the contracting party not being able to make a good title at the time the contract was to be carried into effect, the issue whether the plaintiff was lawfully possessed of the interest at the time of making the contract, was an immaterial issue. *Bacon v. Simpson*, 3 *Mees. & W.* (xx.) 78.

7. In *assumpsit* on an executory consideration, which in the declaration was alleged to have been performed; held, that it could not come into question on the general issue, but that if the defendant meant to insist that any part of the consideration was unperformed, the point should have been raised on the pleadings. *Gibson v. Harrie*, 8 *C. & P.* (n. f.) 378.

8. Declaration in *assumpsit*, stating that the plaintiff, as author, &c., had composed, &c., and had right to, &c., and would sell the copyright to the defendant, the latter promised to buy of the plaintiff his said right; plea, that defendant did not promise in manner, &c.; held, that the defendant must be taken, as regarded the jury, to have admitted that the plaintiff did sell, and had the right, and was the author, which, if intended to be disputed, should have been put in issue by specially pleading. *De Pinna v. Polhill*, 8 *C. & P.* (n. f.) 78.

9. In *assumpsit* for work and labor by the plaintiff's testator, as an attorney; plea, denying that the defendant had had the benefit of the testator's skill, but that the business was done by another in his name, and the transaction illegal; held, that not consisting of mere matter of excuse for non-performance of the contract declared on, the general replication *de injuria*, was bad, but that the objection could only be taken advantage of as a cause assigned on general demurrer. *Parker v. Riley*, 3 *Mees. & W.* (xx.) 230; and 6 *Dowl.* (r. c.) 375.

#### ATTAINDER.

Where the plaintiffs were equitable mortgagees of leaseholds, the legal title in which became vested in the Crown by the conviction of the mortgagor of felony; held, that the only decree which could be made, was to declare the plaintiffs to be equitable mortgagees in respect of their lien, and to direct an account to be taken, and that they might hold possession until their lien should

be satisfied. *Hodges v. Attorney-General*, 3 *Younge & C.* (xx. eq.) 342.

#### ATTESTATION.

See *POWER*.

#### ATTORNEY.

- [A] EXAMINATION—ADMISSION—RE-ADMISSION.
- [B] LIABILITY—AUTHORITY OF COURT OVER.
- [C] BILL—TAXATION OF.
- [D] PRIVILEGES—LIEN.

#### [A] EXAMINATION—ADMISSION—RE-ADMISSION.

1. Appointment of examiners, 1 *Nev. & P.* (x. s.) 575; and 5 *Dowl.* (r. c.) 1.

2. Where the omission to insert the name in the Master's list did not arise from the party's own neglect, the Court allowed it to be introduced on the first day of term, although the three days' notice under 5 *Reg. Hil.* 6 *W.* 4, had not been given. *Blunt, ex parte*, 5 *Dowl.* (r. c.) 231.

3. The Court will in future require the notice to be delivered at the Master's office three clear days before the commencement of the term preceding the admission. *Prangley, in re*, 6 *Nev. & M.* (x. s.) 421; and 4 *Ad. & Ell.* 781.

4. Sunday is to be reckoned as one of the three clear days for delivery of the notice at the Master's office. *Bumps, ex parte*, 5 *Dowl.* (r. c.) 713.

5. The Court will not admit of the excuse of ignorance for not complying with the rules laid down by the examiners for transmitting the answers: where it had arisen from the neglect of the agent, permission given to send them in on payment of costs of application by the agent. *Holland, ex parte*, 5 *Dowl.* (r. c.) 681.

6. Where shortly before applying for admission the party duly changed his name and the notice had been in the new name, the Court allowed the admission on the terms of the notice being up until the end of the term with both names. *Ridley, ex parte*, 6 *Nev. & M.* (x. s.) 436; and 4 *Ad. & Ell.* 780.

7. Where the party having paid the higher duty on the articles of clerkship had been admitted in the Court of Great Session in Wales before 11 *Geo.* 4, and 1 *W.* 4, c. 70, held entitled to be admitted in *K. B.* without examination, although he had never taken out his certificate or practiced. *Williams, ex parte*, 5 *Ad. & Ell.* (x. s.) 140; and 5 *Dowl.* (r. c.) 236.

8. Where he had been admitted of the Court of *K. B.* and Court of *C. P.* Lancaster, but had ceased practicing and became a superintendent of collieries, and afterwards been re-admitted of the latter court upon the usual notices there previously to the 6 rule of *Hil.* 4 *W.* 4, held entitled to be re-admitted in *K. B.* without the affidavit required by that rule. *Miller, ex parte*, 4 *Ad. & Ell.* (x. s.) 1006.



9. Where the articles expired only on the day after the period fixed by the examiners for depositing them pursuant to the Reg. East. 6 W. 4, the Court ordered them to be received. Cooper, *ex parte*, 5 Dowl. (r. c.) 703.

10. A party about to sail for India before the regular period would expire, allowed to be admitted without giving a full term's notice. Hancock, *ex parte*, 4 Ad. & Ell. (x. s.) 779.

11. Where under peculiar circumstances his name had only been off the roll for two days, allowed to be re-admitted on payment of 20s. and arrears of duty. Minchin, *ex parte*, 5 Dowl. (r. c.) 253.

12. Where an attorney who had been duly admitted and taken out certificates for several years, but omitted to take them out during three years in which he had practiced in the County Court, held not to be liable to the penalties imposed by 12 Geo. 2, c. 13, s. 7. Hodgkinson v. Mayor, 1 Nev. & P. (x. s.) 397.

13. Where the party had only practiced in a borough court, and served process for other attorneys, allowed to be re-admitted without fine or arrears. Thomson, *ex parte*, 5 Dowl. (r. c.) 275.

14. Where he had ceased taking out his certificate, and practiced only in the hundred court, he was allowed to be re-admitted only on terms of paying all arrears of duty. Binns, *ex parte*, 4 Ad. & Ell. (x. s.) 1005.

15. Where after obtaining a rule for re-admission he was prevented from practicing from ill health, the court allowed his re-admission in the subsequent year upon the usual terms, without giving the usual notices. French, *ex parte*, 5 Dowl. (r. c.) 374.

16. After thirty years' discontinuance of practice, the court refused to allow him to be re-admitted. Billings, *ex parte*, 5 Dowl. (r. c.) 395.

17. The Court refused to allow a clerk under 21 to be examined, with a view to admission after attaining full age. Cragg, *ex parte*, 6 Dowl. (r. c.) 256.

18. Notice for admission allowed to be amended by inserting the name of one of the parties with whom he had served, which had been accidentally omitted. Collins, *ex parte*, 6 Dowl. (r. c.) 495.

19. Where the notice in Hil. was for admission in Trin. Term, but the application was not made until Mich. Term, the Court refused to admit him, but, under the circumstances, allowed the period during which the certificate was to be in force, to be enlarged, and notice to be given for admission on the last day of Hilary Term. Southern, *ex parte*, 1 Dowl. (r. c.) 26.

20. A certificate omitted by accident to be entered at the Master's office, allowed to be entered *nunc pro tunc*. Graddon, *ex parte*, 6 Dowl. (r. c.) 5.

21. Where the master died shortly before the expiration of the articles, and the clerk subsequently completed the term with the agent of a party to whom he was assigned, the Court allowed him to be examined for admission. Tomkins, *ex parte*, 6 Dowl. (r. c.) 3.

22. Where the plaintiff, an attorney, (upon motion for setting aside a judgment obtained by him

for business done) appeared to have been admitted, and taken out his certificate until 1820, when he ceased to do so, and in 1823 obtained a rule for his re-admission, but omitted to take out his certificate for three years, although in that time it was sworn he had not practiced; held that, upon the construction of 37 Geo. 3, c. 90, s. 31, and uniform practice in respect of it, he was bound, on such re-admission, to have taken out his certificate forthwith; and that, not having done so, his re-admission became null and void, and that he could not avail himself of the judgment and securities obtained for business done in the character of an attorney during that period. Wilton v. Chambers, 2 Nev. & P. (q. s.) 303.

23. The Court refused to allow the name of an attorney on the roll to be altered in consequence of his having assumed an additional one. Ware, *ex parte*, 6 Dowl. (r. c.) 311 but afterwards allowed it to be added to that on the roll. Ib. 463.

24. Where the examiners have doubt as to the validity of the service under the articles, they ought to examine the party *de bene esse*, in order to raise the question of the sufficiency. Examiner's Case, 5 Bing. N. S. (c. r.) 70; and 6 Sc. 782. S. C. Masterman, *ex parte*, 7 Dowl. (r. c.) 156.

25. Where the delay in returning the answer pursuant to Reg. Easter, 6 Will. 4, had been occasioned by the unexpected absence of the attorney with whom the articles had been served, the Court allowed them to be sent *nunc pro tunc*. Lyons, *ex parte*, 6 Dowl. (r. c.) 517.

26. Where the first day of Easter Term, as constituted by 11 Geo. 4, and 1 Will. 4, c. 70, s. 6, was on a Sunday, which fell on the 15th April, and the notices required by 5 Reg. Gen. Hil., 6 Will. 4, were delivered on the 18th; held sufficient. Bayley, *ex parte*, 6 Dowl. (r. c.) 516.

27. Where, after notice, the party having passed one examination, had failed in obtaining his certificate of fitness; held, that he must give a fresh term's notice to the examiners of his intention to apply to be again examined. Henry, *ex parte*, 1 Perr. & D. (q. s.) 71.

28. Where the master became insane, and the clerk been articulated anew, the Court allowed the latter articles valid, and to be enrolled. Darbell, *ex parte*, 6 Dowl. (r. c.) 505.

29. The case of Fussell, *ex parte*, reversed by the Lord Chancellor in Frideaux, *ex parte*, 3 Myl. & Cr. (ca.) 327.

30. Fees on admissions, distribution of amongst the Judge's clerks and ushers by Reg. Mich. 2 Vict., 4 Mees. & W. (x.) 342; and 5 Bing. N. S. (c. r.) 160.

31. Where an attorney omitted to take out his certificate for more than a year after admission; held, that admission *de novo* was not necessary, but that having been re-admitted without fraud, he was restored to a capacity of acting; but the objection to an order for taxation of his bill on the ground of his being incapable of acting, is a ground of application by *petition*, and not by *motion*. Chambers, *ex parte*, *in re* Wilton, 2 Keene (ca.) 497.



32. The Court refused to allow his name to be altered on the roll by adding one for which he had obtained the royal license. *Hayward, ex parte*, 5 Sc. (c. p.) 712.

33. Where the party was duly admitted in 1814, but never took out his certificate for a period of 24 years; held, that he need not be re-admitted, but might at once take out his certificate. *Marshall, ex parte*, 6 Dowl. (r. c.) 526.

34. An attorney who has been re-admitted is thereby within the 1 & 2 Vict. c. 45, s. 3, and entitled to practice in the other courts. *Thompson, ex parte*, 5 Bing. N. S. (c. p.) 380. *S. P. Martin, ex parte*, 7 Dowl. (r. c.) 334.

And see *Arrest; Execution, and infra*, (B) 4.

#### [B.] LIABILITY—AUTHORITY OF COURT OVER.

1. Where the defendant being employed to raise money for the plaintiff on mortgage, disclosed defects of title, whereby plaintiff was put to expense by actions brought by the proposed lender, and delayed in obtaining the loan, and obliged to pay higher interest; held to be an injury arising from a gross breach of defendant's duty, and subjecting him to an action at law; and it was immaterial that the plaintiff knew him to be engaged also as the attorney of the lender. *Taylor v. Blacklow*, 3 Bing. N. S. (c. p.) 235; and 3 Sc. 614.

2. In *assumpsit* on an attorney's bill, plea that the defendant conducted the business negligently and unskillfully, that his labor was useless, and that it was upon an undertaking to indemnify the defendant against costs; held bad on general demurrer, as amounting to the general issue. *Hill v. Allen*, 2 Mees. & W. (ex.) 283; and 5 Dowl. (r. c.) 471.

3. In a declaration on *concessit solvere* in a manor court, it cannot be inferred from a mere promise that the consideration for it arose within the jurisdiction, and held gross negligence in the attorney prosecuting such plaint, without other evidence than such bare promise, and the cause of action clearly arising out of the jurisdiction for which he was liable. *Williams v. Gibbs*, 5 Ad. & Ell. (x. a.) 208.

4. An articulated clerk held an apprentice within 6 Geo. 4, c. 16, s. 49, and upon the bankruptcy of his master as a scrivener, entitled to a return of part of the premium. (*Erskine, C. J. diss.*) *Fussell, ex parte*, 2 Dec. (a.) 158; and 3 M. & Ayr. 67.

5. Where an action for negligence and for money had and received was brought against an attorney, who pleaded the Statute of Limitations as to the former, when a juror was withdrawn, and the cause was referred, as to the pecuniary accounts, with power to have the defendant's bill taxed, and that "no question of liability was to be raised," the arbitrator having awarded a sum due to the plaintiff, in consequence of charges having been excluded upon evidence that the defendant was not an attorney of the superior courts, the Court directed the award to be set aside, unless the plaintiff would consent to go

before the arbitrator, and have the balance ascertained upon the whole account. *Harries v. Thomas*, 2 Mees. & W. (ex.) 32.

6. The Court will not in the first instance grant a rule *nisi* for an attachment against him for not delivering up papers, but only after a previous rule for such delivery. *Roscoe v. Hardman*, 5 Dowl. (r. c.) 157.

7. So, for payment over of money. *Twiss v. Fry*, *ib.* 157.

8. And where he was specially retained as attorney to prepare deeds, and received the money raised by the mortgage, the Court would compel him summarily to account for it. *Cripwell, ex parte*, 5 Dowl. (r. c.) 689.

9. The Court made an order for his accounting for money received on behalf of his client, plaintiff in a suit, notwithstanding the lapse of nine years. *Sharpe, ex parte*, 5 Dowl. (r. c.) 717.

10. Under circumstances, service of a rule, calling on an attorney to pay money, allowed to be made on his agent. *Burrell v. Seaton*, 5 Dowl. (r. c.) 601.

11. After payment of the debt to the attorney's clerk after the issuing of the writ, held that he ought to have proceeded no further, and proceedings stayed on payment of the costs of the writ. *Wyllie v. Phillips*, 5 Dowl. (r. c.) 644.

12. The Court has no authority to compel an attorney not admitted in that court to pay over money received in a cause conducted by him in another Court. *Sharp v. Hawker*, 3 Bing. N. S. (c. p.) 66; 3 Sc. 396; and 5 Dowl. (r. c.) 186.

13. Where the misconduct arose at the time of the party acting only in the court of Great Sessions, although he had, after the 11 Geo. 4, and 1 Will. 4, c. 70, become an attorney of K. B.; held that the court had no jurisdiction over the matter. *Williams, in re*, 5 Dowl. (r. c.) 236.

14. The court refused summarily to compel the attorney to fulfil an undertaking to indemnify against costs a party whose name he had used, the proper remedy being by action on his contract to indemnify. *Clifton, ex parte*, 5 Dowl. (r. c.) 218.

15. Nor to require him to answer the matters in the affidavit on the ground of his having hired insufficient bail. *Clifford v. Parker*, 5 Dowl. (r. c.) 226.

16. Where a defendant is made party by an attorney without authority, the Court will not interfere, unless it appears that the attorney is insolvent. *Stanhope v. Firmin, &c.*, 3 Bing. N. S. (c. p.) 301.

17. But where execution had issued against a party made a co-defendant, and the defence conducted without his authority or knowledge, the Court, upon being satisfied of the insolvency of the attorney, made absolute a rule for restoring the amount levied. *S. C.* 4 Sc. (c. p.) 39.

18. Where a rule for answering matters is to be made absolute, he must be called in Court. *Whicher, ex parte*, 5 Dowl. (r. c.) 715.

19. There is no implied contract on the part of the attorney, on subpoenaing witnesses, to pay their expenses; held, therefore, not liable to an action at the suit of a witness for such expenses.



*Robins v. Bridge*, 6 Dowl. (P. c.) 140; and 3 Mees. & W. (zx.) 114.

20. Where the jury are satisfied that no debt was due, and that the attorney arresting the plaintiff had the means of knowing that the debt was not due, but put the law in force from some improper motive; held, that the action for a malicious arrest was maintainable against the attorney; and any improper or sinister motive would be sufficient evidence of malice. *Stockley v. Hornidge*, 8 C. & P. (N. r.) 11.

21. Where the attorneys merely gave the precept to the bailiff, without directing or authorizing it to be executed in any particular place, and the bailiff executed it without his jurisdiction; held that, although the defendants might not be entitled, at the close of the plaintiff's case, to an acquittal, yet that the Judge was bound to have directed the jury that there was no evidence implicating them, although they might have had reason to know where the bailiff would levy, and that the co-operation of the defendants in the unlawful entry, was not to be assumed from their having alleged the lawfulness of the Act as done within the jurisdiction, in their special pleas. *Sowell v. Champion*, 6 Ad. & Ell. (q. s.) 412.

22. The affidavits on a motion requiring an attorney to deliver up a bill, the subject of claim in an action, held, properly entitled in such action, and that he could not be allowed to object that he had ceased to be an attorney of the Court. *Simes v. Gibbs*, 6 Dowl. (P. c.) 310.

23. An affidavit in support of a motion for an attachment against an attorney for a contempt, held sufficient, although not in terms describing him as such. *Downton v. Stiles*, 4 Bing. N. S. (C. r.) 122; and 6 Dowl. (P. c.) 189.

24. The Court enforced a Judge's order for an attorney (one of the trustees) to deliver to the *cetui que trust* the draft of the trust deed for which he had paid. *Holdsworth, ex parte*, 4 Bing. N. S. (C. r.) 386.

25. Where the plaintiff was arrested on a *ca. sa.* which was set aside for irregularity, held that the attorney issuing it was liable in trespass. *Codrington v. Lloyd*, 3 Nev. & P. (q. s.) 442.

26. The Court refused to interfere against an attorney, on the ground of perjury in the affidavit for increased costs, where there was nothing amounting to an admission by him, rendering the interposition of a jury unnecessary. In re, 3 Nev. & P. (q. s.) 389.

27. Although an authority may be given to file a bill by parol, yet the solicitor must abide by the consequence, if he omit to take a written authority; where there was assertion against assertion, order made to take the bill off the file. *Martindale v. Lawson*, 1 Coop. (Ch. c.) 83.

28. Where a bill was filed without the authority of one of the co-plaintiffs, his name ordered to be struck out, after replication, and the costs of suit and of the application to be paid by the solicitor filing the bill. *Tabbarnor v. Tabbarnor*, 2 Keene (Ch.) 679.

29. Where the attorney refused to proceed in the suit unless he were paid the costs then in-

curred, and also the costs of an action at law, held that he was not justified in the demand of both, and that it amounted to a discharging himself: he was therefore ordered to deliver over the papers to another solicitor, but subject to his lien, and to be returned after the hearing. *Heslop v. Metcalf*, 8 Sim. (Ch.) 622.

30. Where an undertaking was given by a solicitor in a suit pending in Chancery, the Court refused summarily to interfere to enforce it. *Garland, in re*, 6 Dowl. (P. c.) 512.

31. So, where the attorney gave an undertaking to enter an appearance for the defendant, the Court refused to compel him to give security for the debt and costs. *Morris v. James*, 6 Dowl. (P. c.) 514.

32. The Court refused to make the attorney pay the costs of an application for a criminal information against magistrates for having corruptly refused to examine witnesses for the defendants on a charge of perjury, he not appearing to be a party to the act, nor actually shown to have signed the notice of the application. *R. v. Thomas*, 7 Ad. & Ell. (q. s.) 608.

33. An attorney receiving an offer of compromise, if not communicated to his client, goes on at his own risk, and cannot charge his client with subsequent costs; but as it is his duty to communicate such offer, it will be presumed he did so, unless the negative be shown. *Sill v. Thomas*, 8 C. & P. (N. r.) 762.

34. Where there was no attorney for the defendant on the record, but after an appearance had been entered by the plaintiff for him, according to the statute, an attorney accepted the declaration for him, and took out a summons to plead several matters; held that another attorney could not act without a rule for changing the former. *Hay v. Pike*, 4 Mees. & W. (zx.) 197; and 6 Dowl. (P. c.) 667.

And see *Bankrupt; Fraud; Trustee*.

#### [C] BILL—TAXATION OF.

1. Where the attorney was employed on the joint retainer of two plaintiffs, one of whom obtained an order for taxing the bill upon the usual affidavit and on his own undertaking alone, held irregular, and the order set aside. *Aliter* if the application had been made on special grounds, to give an opportunity of answering them. *Hobby v. Pritchard*, 2 Mees. & W. (zx.) 125.

2. Charges for attending to advise as to proceedings subsequent to the conclusion of an action; held not to be items rendering it necessary to deliver the bill, pursuant to the statute. *Pepper v. Yeatman*, 5 Dowl. (P. c.) 155.

3. Charges for taking the acknowledgments of married women since 3 & 4 W. 4, c. 74, being now only statutory conveyances; held not taxable items within the statute for taxing attorney's bills. *Brandon, in re*, 3 Bing. N. S. (C. r.) 783; and 5 Dowl. (P. c.) 623.

4. The Court will allow the costs of one letter only before commencing the suit. *Capel v. Staines*, 5 Dowl. (P. c.) 770.



5. In *assumpsit* on an attorney's bill, the non-delivery of it must be now pleaded. *Moore v. Dent*, 1 M. & Rob. (N. P.) 462; and see *Beck v. Mordant*, 2 Bing. N. S. 140.

6. The 10th rule of Mich. 1 W. 4, is express that a copy of the bill of costs and affidavit of increase shall be delivered with the notice of taxation, and unless the objection is expressly waived by attendance, the Court will set aside the taxation. *Wilkins v. Perkins*, 2 Mees. & W. (ex.) 315.

7. The Court has no jurisdiction to order agents' bills with their attorney to be taxed, although an actual suit pending. The 12 Geo. 2, c. 13, s. 6, expressly exempting such from the operation of 2 Geo. 2, c. 23, s. 23. *Weymouth v. Knipe*, 3 Bing. N. S. (c. r.) 387; 3 Sc. 764; and 5 Dowl. (r. c.) 495.

8. Where the London agent's name is indorsed on the proceedings, and the plaintiff has recovered a verdict, it is no ground for disallowing his costs that the country attorney's name is not on the roll. *Semble*, the 2 Geo. 2, c. 23, does not apply to the case of a country attorney employing an agent in London to conduct the business of the suit there. *Jones v. Jones*, 2 Mees. & W. (ex.) 323; and 5 Dowl. (r. c.) 474.

9. An order to refer the plaintiff's bill for taxation, upon the application and undertaking of one only of two defendants, discharged, although, upon special application, the Court might have granted it. *Hoby v. Pritchard*, 5 Dowl. (r. c.) 301.

10. Where the business was done in a Court of which the attorney was not admitted; held, that he could not recover such part as was prior to the passing of 1 Vict. c. 56. *Newton v. Spencer*, 4 Bing. N. S. (c. r.) 174; and 6 Dowl. (r. c.) 431.

11. Where an attorney became a prisoner after a suit commenced, but the client had the means of constant communication with him; held, that the attorney was not precluded from recovering his bill. The original suit against a sheriff having failed, the execution creditor moved for a new trial, which was obtained and succeeded; held, that if the jury were satisfied that the defendant was the party who originally employed the plaintiff in the latter business, he was entitled to recover, although no authority or guarantee in writing was given. *Noel v. Hart*, 8 C. & P. (N. P.) 230.

12. Where on a reference of the bill, the parties waived the delivery of a signed bill; held, that they also waived the operation of the 2 Geo. 2, c. 23, so far as it gives authority to order the attorney to pay the costs. *Gerrard v. Arnold*, 6 Dowl. (r. c.) 336.

13. Where in an action on an attorney's bill, the general issue only was pleaded; held, that the objection that no proper bill duly signed had been delivered, could not be taken advantage of, such defence being matter of special plea; held, also, that the term "impleaded," in the writ of trial, is to be taken to mean that the action was commenced on the day in which the defendant is said to have been impleaded. *Robinson v. Roland*, 6 Dowl. (r. c.) 271.

14. The objection to an action on an attorney's

bill, that no bill duly signed had been delivered, must be specially pleaded. *Lane v. Glenny*, 2 Nev. & P. (X. S.) 258.

15. Where upon the client requiring the attorney's bill to be taxed, the latter intimated that he should make out a fresh account, and charge full fees, which he did, and the new accounts contained fictitious charges, but which before the auditor were abandoned, the Court having required the auditor to report specially as to the attorney's knowledge of the insertion, and one-fourth of the bill having been taxed off, it was without objection confirmed with costs; held, that the client not having lodged objections in writing against the report, it could not be made the subject of appeal to the House of Lords; although an appeal upon mere costs does not lie, yet, if there is an appeal brought upon a substantial question, not colorable, the House will deal with the costs. *M'Aulay v. Adam*, 3 Cl. & F. (r.) 385.

16. Where a solicitor refused to deliver up papers, &c. until payment of his bill, the Court ordered taxation of it, and the delivery of the papers, upon payment of the taxed amount, notwithstanding the business was for conveyancing, and other matters not relating to any suit or action. *Rice*, in re, 2 Keene (ch.) 181.

17. So, where in an action against him for negligence, and plea of the Statute of Limitations and a set off, the action was referred, with power to tax the defendant's bills, but the award was afterwards set aside; held, that the plaintiff was not deprived of his right to obtain his deeds and papers on payment of what was due to the defendant, or to have the amount ascertained by taxation. *Jones v. James*, 5 Keene (ch.) 184.

18. An item for searching for a judgment, and advising as to its revival, held not taxable. *Rice*, in re, 4 Sc. (c. r.) 416.

19. Where, although less than one-sixth had been taken off on taxation, but the bill contained items which the attorney must have known ought not to have been charged, the costs of taxation refused. *Holderness v. Barkworth*, 3 Mees. & W. (ex.) 341; and 6 Dowl. 392.

20. Where a balance is found on taxation due from the client, payment must be first demanded before applying for the four-day order, which when served and payment refused, the order for commitment is granted without notice, but on affidavit of the service of the order, and demand and refusal. *Stocken v. Dawson*, 7 Sim. (ch.) 547.

21. Where after a new solicitor employed, the bill of the former had been examined and paid by the latter, although the whole of the papers were not delivered over, the Court after a lapse of 15 months, and no case of errors amounting to evidence of fraud established, nor any notice of intention to dispute the charges, discharged an order for taxation; upon such an application on the ground of errors, they must be distinctly stated and proved in the petition. *Horlock v. Smith*, 2 Myl. & Cr. (ch.) 495.

22. So, where the business was commenced 28 years, and concluded 18 years ago, and various bills had been delivered, and in 1817 a security



given, which was afterwards given up, and a new one taken on other property, and all papers delivered over, and no errors or improper charges amounting to fraud were allowed or proved, but the application was made by an assignee of the client, the Chancellor dismissed it with costs. *Waters v. Taylor*, 2 Myl. & Cr. (ch.) 526.

23. Where payment is sought out of a fund in Court, it will direct the taxation as between the party claiming, and the party representing the fund. *Ib.*

24. The statute does not apply to the case where an attorney does not act as such for fee or reward, and his bill is not therefore taxable. *Quar.* If a sum paid by him on taking out a rule to discontinue is a taxable item? *Sparrow v. Jackson*, 3 Mees. & W. (ex.) 600.

25. A bill of charges for business in the Central Criminal Court held taxable by order of a Judge of one of the superior courts. *Curling v. Sedger*, 4 Bing. N. S. (c. r.) 743; 6 Sc. 678; and 6 Dowl. (r. c.) 759.

26. In *assumpsit* by the plaintiff, as attorney and agent for the defendant (a country client of the plaintiff), for work and materials, and for fees, &c.; held, that the plaintiff was not the attorney of the defendant within the statute requiring the delivery of the bill a month before action; but the Court would not limit the term "monies in the first count mentioned" to the fees. *Hill v. Weight*, 5 Sc. (c. r.) 662.

27. An attorney cannot file a bill in equity for his costs; but when, having commenced proceedings at law, he had been restrained by injunction, and it was afterwards, by arrangement, ordered that his bill should be taxed at law; held, that he might maintain a bill in equity to rectify the order of the Court, alleged to have proceeded on mistake; and the delay, by the proceedings, of the plaintiff's legal remedy would not bar the remedy in equity, and demurrer overruled. *Fyson v. Pole*, 3 Younge & C. (ex. eq.) 266.

28. Where a charge was made in the bill for entering satisfaction of a judgment on the roll, which he had omitted to do, the Court ordered him to do it at his own expense; but as such a motion should have been made at chambers, no costs given. *Oram v. Parker*, 6 Sc. (c. r.) 245.

29. The Court has jurisdiction to direct the taxation of an agent's bill on the application of the solicitor employing him, on payment of the amount into Court. *Jones v. Roberts*, 8 Sim. (ch.) 397.

30. The Court has power, independently of 2 Geo. 3, c. 23, to order the bill to be delivered and taxed; and the assignee, where the client becomes bankrupt, have the same right. *Clarkson v. Parker*, 7 Dowl. (r. c.) 87; and 4 Mees. & W. (ex.) 532.

31. The Court has no authority under 2 Geo. 2, c. 23, to make an order for taxing the bill against his personal representatives. *Maddeford v. Austwick*, 3 Myl. & Cr. (ch.) 423.

32. After a settlement between attorney and client, it cannot be got rid of by the common order for the taxation of costs; and the Court will not go into the merits on the discussion of the

regularity of such an order of course, but only on a separate application of the client for the purpose of a special order. *Gregg v. Taylor*, 1 Beav. (ch.) 123.

33. Whether a country attorney attending a reference in town shall be allowed his expenses, besides his town agent, is entirely in the discretion of the Master, and the Court will not interfere. *Archer v. Marsh*, 7 Dowl. (r. c.) 541.

34. Where one-sixth of the bill had been taken off on taxation, the Court refused, on a motion for the costs of taxation, to open the question as to the mode in which the *allocatur* was obtained, or fresh items to be brought forward. *Swinburn v. Hewitt*, 7 Dowl. (r. c.) 315.

35. Where the party applying to have the bill taxed was not amenable to the jurisdiction of the Court; held, that unless the solicitor held sufficient security in his hands, the client must give security for costs. *Passmore*, in re, 1 Beav. (ch.) 94.

36. The month to elapse before action brought on the bill must consist of 23 days, exclusive both of the day of delivery and of commencing the action. *Blunt v. Healop*, 3 Nev. & P. (q. s.) 553.

And see *Arrest*; *Bankrupt*; *Costs*; *Ejectment*; *Interpleader*; *Witness*.

#### [D] PRIVILEGES—LIEK.

1. The object of the Uniformity of Process Act being merely to give a new mode of proceeding by summons; held, that the privilege of an attorney to be sued only in his own court, is not taken away. *Lewis v. Kerr*, 2 Mees. & W. (ex.) 226; and 5 Dowl. (r. c.) 327, 447.

2. The time of pleading in actions by attorneys seems not to be affected by the Uniformity of Process Act, which applies only to the form of commencing the action; and a London attorney has therefore only four days for pleading. *Brennton v. Lawrence*, 5 Dowl. (r. c.) 506; *Lowder v. Lander*, *Ib.* 684.

3. Where the defendant, an attorney, appeared in reality in person, but in his own name as attorney; held, that the plaintiff could not treat the plea as a nullity, on the ground of no order for change of attorney having been given. *Kerrison v. Wallingborough*, 5 Dowl. (r. c.) 565.

4. A writ of privilege merely amounts to notice that the party is entitled to the privilege of the Court, and does not operate as an injunction; held therefore irregular to move to set it aside, although the party may not be entitled to it. *In re Thompson*, 2 Mees. & W. (ex.) 644; and 5 Dowl. (r. c.) 745.

5. Appearing for a prisoner before a judge on summons does not constitute him attorney in the suit. *Spencer v. Newton*, 5 Ad. & Ell. (x. s.) 823.

6. Where, by the terms of a memorandum for a lease for a term, if lessor should so long live, made by the lessor's attorney, the plaintiff, it was stipulated that the lease was to be prepared by the plaintiff at the expense of the lessee; the les-



not dying before the lease was signed, held that the jury were justified in finding a retainer by the defendant for the plaintiff to perform the work. *Webb v. Rhodes*, 3 Bing. N. S. (c. r.) 732.

7. In trover, by assignees, to recover a lease, alleged to have been brought to the witness, an attorney, for the purpose of raising money; held, that the employment being so connected with the character of an attorney as to raise a presumption that it formed the ground of the communication, it was privileged. *Turquand v. Knight*, 2 Mees. & W. (ex.) 98.

And see *Greenough v. Gaskell*, 1 Myl. & K. 98; and *ex parte Aitken*, 4 B. & Ald. 49.

8. Where an attorney, examined as a witness, demurred on the ground of his having been the solicitor of one of the defendants, and that the interrogatory required the disclosure of confidential communications; held that, being the subject of letters from collateral quarters, they were not protected, and the demurrer being over-ruled, held that the witness was liable to pay the taxed costs occasioned by the demurrer, under the 32 New Ord. 1828. *Sawyer v. Birchmore*, 3 Myl. & K. (ch.) 572.

9. Where the attorney acted on the part of the lender and borrower; held that he could not be allowed to disclose communications made to him in the capacity of attorney for the latter. *Doe d. Peter v. Watkins*, 3 Bing. N. S. (c. r.) 421; and 4 Sc. 155.

And see *Taylor v. Blacklow*, 3 New Cas. 35.

10. Where the knowledge acquired was by the document being shown to the witness as attorney for the party; held, that he could not be admitted to prove that it was at the time unstamped. *Wheatley v. Williams*, 1 Mees. & W. (ex.) 533; and 1 Tyr. & Gr. 1043.

11. Where an attorney, being town-clerk, does the business as attorney for the corporation, he has a lien on the muniments in his custody with respect to which he has performed such service. *Rex v. Sankey*, 5 Ad. & Ell. (x. s.) 423.

12. An attorney has a lien for the fees upon deeds coming into his possession whilst acting as commissioner for taking acknowledgments under 3 & 4 Will. 4, c. 74; but not for the fees of his co-commissioner, unless he can show a joint authority. *Grove, ex parte*, 5 Dowl. (r. c.) 355.

13. Where the client was *bonâ fide* indebted in a sum for business done, and with the assistance of other attorneys afterwards executed a mortgage upon a further loan by the former attorney, which was also agreed to be a security for the debt, the Court refused to set aside the lien on payment of a specific sum. *Chealyn v. Darby*, 2 Younge (xx. xq.) 170.

14. Where estates were devised in trust for life for the widow and son's maintenance, and after her death to the son in fee, the trustees having been obliged to raise suits in carrying the trusts into effect, and deposited the title-deeds with the attorney; held that, being the personal debt of the trustees, the attorney acquired no right of lien upon them as against the son on the death

of the widow. *Lightfoot v. Keene*, 1 Mees. & W. (ex.) 745; and 1 Tyr. & Gr. 1004.

15. The town agent of an attorney has only a lien upon the sum recovered, and upon the papers in his hands, in the particular cause, for the amount due to him by the attorney in that cause only; and if he parts with them, although by mistake, he loses his lien; but, if they are obtained from him improperly and wrongfully, his lien remains, and he may maintain trover for them. *Dicas v. Stockley*, 7 C. & P. (n. r.) 587.

16. Where a solicitor had been retained by A., in the negotiation of an agreement with B., and his bill taxed and reduced, and with his partner he afterwards became the solicitor to set aside the very transaction so conducted to maturity whilst he was acting for A.; the Court held that it had power to interfere and restrain him and his partner from acting in the latter suit, and from communicating any information relating to the agreement which had come to his knowledge confidentially as the attorney of A., and ordered the plaintiff to pay the costs of the motion. *Davies v. Clough*, 8 Sim. (ch.) 262; and affirmed by the Lord Chancellor.

17. In an action for work and labor for agency business in the Court of Chancery by the two plaintiffs, partners; held, that the objection that one had not been admitted a solicitor of that Court could only be taken advantage of on being specially pleaded. *Hill v. Sydney*, 3 Nev. & P. (q. s.) 161.

18. The effect of 1 Vict. c. 56, s. 4, held not to extend to deprive an attorney of the privilege of being sued in the Court of which he is admitted, but only to subject him to the jurisdiction of another Court in which he has acted; and a plea of privilege cannot be treated as a nullity: if by any act he has waived the privilege, it must be made matter of reply. *Prior v. Smith*, 6 Dowl. (r. c.) 299.

19. Where a solicitor withdrew from the cause, the Court ordered him to deliver to the new solicitor the briefs, opinions, office copies of answers and documents connected with the cause, as upon inspection he might deem necessary for the hearing, without prejudice to the lien of the former, and undertaking to return them undefaced within 10 days after the hearing. *Heslop v. Metcalfe*, 3 Myl. & Cr. (ch.) 183.

And see *Costs*.

20. Where the attorney was shown to be the real party in the cause, the plaintiff having succeeded against one defendant and failed against the other; held, that the successful defendant's costs might be set off against the costs of the plaintiff without regard to the lien of the attorney. *Pocock v. Shaugnessy*, 6 Ed. & Ell. (x. s.) 807.

21. Attornies admitted of one Court allowed to practice in any other one, on merely entering their names on the roll of such Court. 1 & 2 Vict. c. 45, s. 3.

22. The lien of the solicitor on a fund in Court for his costs, is not affected by the bankruptcy of his client pending the suit, and he is entitled to the immediate benefit of such lien without waiting the result of process to compel the payment



of costs ordered to be paid to the client. *Pounsey v. Humphreys*, 1 Coop. (ch. c.) 142.

23. The Court will not allow the lien of the solicitor to interfere with the equities between the parties; and held, also, that a party having a lien or right of set-off for costs, was not deprived of it by issuing a writ of attachment for such costs. *Bawtree v. Watson*, 2 Keene (ch.) 713.

24. The privilege of being sued only in the court in which he is admitted is not taken away by 1 & 2 Vict. c. 45, s. 3, and he is not, for any purpose, considered an attorney of the Court in which he is not admitted, until he has signed the roll: but that is a fact which must come by way of replication to the plea of privilege on the other side. *Percival v. Cook*, 7 Dowl. (c. p.) 501.

25. Where the party's solicitor became a trustee under a deed for the benefit of the client's creditors, held, that communications subsequent thereto were privileged. *Pritchard v. Foulkes*, 1 Coop. (ch. c.) 14.

26. On a bill by the A. Insurance Company, against the directors, actuary and solicitor of the E. Insurance Company, to have a policy on the life of C. cancelled, the solicitor having been present when an agent of the E. Company communicated an unfavorable medical report upon the life; held not a privileged communication, and being made, defendants were not protected from discovery. *Desborough v. Rawlins*, 3 Myl. & Cr. (ch.) 515.

27. Where one of two solicitors in partnership obtained an order in the name of a client, and after the dissolution of the partnership the other partner and the client came to discharge the order and for other relief; held a misjoinder, for the uniting such partner with the client in such a petition, and that such partner was only entitled to the usual stop-order to prevent the payment of costs *ad interim*, and that for ulterior relief he must have recourse to an original bill. *Sangar v. Gardiner*, 1 Coop. (ch. c.) 119.

And see *Bankrupt*.

#### ATTORNTMENT.

See *Stamp*.

#### AUCTION.

1. In *assumpsit* for goods bought at an auction, held that the defendant might prove that, by a special contract with the plaintiff, the sum at which the goods were knocked down by the defendant might be set off against a legacy payable to him by the plaintiff, and that there was, in fact, no sale between the parties. *Bartlett v. Parnell*, 6 Nev. & M. (x. s.) 299; and 4 Ad. & Ell. 792.

2. Where one of the conditions of sale of a leasehold shop and good will was, that, on failure to comply with any of the previous conditions, the deposit should be forfeited as *liquidated damages*, to be retained by the vendor, who was to be at liberty to rescind the contract or re-sell; held, that it was to be regarded as liquidated damages only, in case of breach of any of the particular

conditions; and that, where the defendant renounced the contract altogether, the plaintiff might sue for general damages. *Icely v. Grew*, 6 Nev. & M. (x. s.) 467.

3. In an action by the assignees of a bankrupt for goods sold by the defendant; held, that the auctioneer was entitled to deduct rent paid, and the expenses of sale, but not of removing the goods, nor commission on the sale. *Grimshaw v. Atterwell*, 8 C. & P. (n. r.) 6.

And see *Specific Performance; Vendor and Purchaser*.

#### AWARD.

- [A] CONSTRUCTION—VALIDITY OF.  
[B] HOW ENFORCED.

#### [A] CONSTRUCTION—VALIDITY OF.

1. Where, before declaration, the cause and all matters in dispute were referred, and the arbitrator, by award, averring that he had heard the allegations and proof of the parties touching the matters in difference between them, awarded concerning the same that the defendant should pay — i. to the plaintiff in full of all demands in the cause; held sufficiently final, although not expressly negating that there were other matters in difference. *Day v. Bonnin*, 3 Bing. N. S. (c. r.) 219; and 3 Sc. 597.

2. Upon a verdict and reference of all matters, with power to reduce or vacate the verdict; the arbitrator having awarded a sum due to the plaintiff in respect of the causes of action, and of a sum due to the defendant in respect of the matters in his plea of set-off, and that he should deliver up certain securities to the plaintiff; held, that the award was sufficiently certain; held also, that the affidavit, verifying the *paper writing* to be a copy of the award, the rule for entering the verdict pursuant to the award being drawn up on reading the affidavit and the paper writing thereunto annexed, was sufficient. *Platt v. Hall*, 2 Mees. & W. (xx.) 391; and 5 Dowl. (r. c.) 582.

3. Plea as to 30*l.* parcel, &c., payment in satisfaction; replication, that the sum was paid for another cause of action, and traversing the acceptance of it in satisfaction of the sum mentioned in the declaration: the cause being referred, the arbitrator having found as to 3*l.* parcel of the sum in the plea mentioned, for the defendant as to part, and for the plaintiff as to the residue; held to be in substance assessing the amount of damage on that issue to 27*l.*, and the award sufficiently certain. *King v. Earl of Dundonald*, 5 Dowl. (r. c.) 689.

4. Where a cause and all matters in difference were referred, and by the order the arbitrator was to ascertain the true amount of damages, if any, in the cause, the costs to abide the event, and there being other matters claimed, he awarded an entire sum to be paid to the plaintiff; held bad. *Gyde v. Boucher*, 5 Dowl. (r. c.) 127.

5. And where he had made a separate adjudication, held that the defendant was not precluded



by the reference of other matters from moving for his costs under 43 Geo. 3, c. 46, s. 3. *Jones v. Jehu*, 5 Dowl. (r. c.) 130.

6. Where three causes were referred, and the arbitrator awarded specific sums in each and a *set processus*; held, that he had exceeded his authority in the latter respect, as he can only order a *set processus* when he has power over the costs; held also, that where his intention is clear, he need not adjudicate specifically on the issues, yet, if it be uncertain, it is a ground for setting the award aside. *Hunt v. Hunt*, 5 Dowl. (r. c.) 442.

7. Where arbitrators had, in the absence of one of the parties, asked of the other whether such and such items were admitted or disputed, and having expressly received an authority to call in a valuer as to shares of the partnership; held, that neither objections were grounds for impeaching the award: arbitrators, by adopting the opinion of competent judges, do not thereby constitute them umpires, but merely make such opinions their own. (Affirming the judgment below.) *Anderson v. Wallace*, 3 Cl. & F. (r.) 26.

8. Where arbitrators directed an undertaking to be given by the defendant not to pirate certain inventions of the plaintiff (the subject of the reference), and which was accordingly signed by him; held to be a sufficient recognition of the arbitrators' authority and of the submission. *Stuart v. Nicholson*, 3 Bing. N. S. (c. r.) 113; and 3 Sc. 536.

9. Where disputes as to the amount of compensation for the surrender of a lease were referred, and with the knowledge of a party having a claim of lien on the lease; held, that he was bound by the award. *Govett v. Richmond*, 7 Sim. (cs.) 1.

10. Where in an action for work, &c., the amount of a builder's bill claimed, by the particulars, was 104*l.* 12*s.*, to which the defendant pleaded payment as to 50*l.*, and brought into Court 45*l.*; the cause being referred to a party to certify for what amount the verdict was to be entered, and who certified that 74*l.* 7*s.* was a fair and proper sum to be paid by the plaintiffs; held to amount to a verdict for the defendant, and the Court would not set aside the certificate, on the ground that it was not made until after the jury process was returnable, the plaintiff not having withdrawn from the reference on that ground. *Salter v. Yates*, 2 Mees. & W. (zx.) 67; and 5 Dowl. (r. c.) 291.

11. It is no objection that one party to the reference is bound by deed, and the other not. *Tomlin v. Fordwich*, 6 Nev. & M. (x. s.) 594.

12. Where an action of trespass, in which issues were joined on three pleas, was referred, and the arbitrator decided two of the issues in favor of the plaintiff, and one in favor of the defendant, adding, that if there had not been such issue, he should have awarded 1*s.* damages to the plaintiff on the other issues; held, that the plaintiff could not apply to the Court for judgment *non obst. vered.* on the third issue. *Steeple v. Bonsall*, 4 Ad. & Ell. (x. s.) 950.

13. In debt on an award, the declaration alleging a previous and last settlement of accounts,

and that the arbitrator had awarded a sum with interest from the said last settlement; it appearing that the date of such settlement was not disputed, held, that the award was sufficiently certain. *Plummer v. Lee*, 2 Mees. & W. (zx.) 495; and 5 Dowl. (r. c.) 755.

14. And upon one plea, that the day mentioned was not the day of the last-mentioned settlement next before the making of the award, held an immaterial issue. 1*b.*

15. Where accounts of long standing between parties were referred, but the arbitration failed by the death of the arbitrator; held, that upon an application to the Court of Equity to compel a reference to the Master upon the same terms, (a conditional waiver of the Statute of Limitations), the Court could not, in referring the case to judges not of the party's appointment, deprive him of the defence he otherwise would have had. *Cheslyn v. Dalby*, 2 Younge (zx. xq.) 170.

16. Where the arbitrators directed premises to be put into repair to the satisfaction of a surveyor, no party to the reference; held to vitiate the whole, being inseparable from the rest of the award. *Tomlin v. Mayor, &c. of Fordwich*, 6 Nev. & M. (x. s.) 594; and 5 Ad. & Ell. 147.

17. Where a verdict was taken for the damages in the declaration, subject to be reduced upon a reference of all matters in difference between the parties, and the arbitrator awarded that a verdict should be entered for the plaintiff, and that the defendant should pay a certain sum to the plaintiff; held bad, for uncertainty as to the sum applying to the verdict in the action, or the other matters in difference. *Martin v. Burge*, 6 Nev. & M. (x. s.) 201; and 4 Ad. & Ell. 973.

18. Where disputes on a building contract, as to defects and extra works and omissions, were referred to an arbitrator, who was to award and determine "of all such alleged defects and imperfections," and he simply awarded the payment of a gross sum to the builder, without any decision as to such defects, or how much he awarded in respect thereof, held bad. In re *Rider and Fisher*, 3 Bing. N. S. (c. r.) 874.

19. Where the umpire had been personally objected to by the arbitrators, who afterwards consented to decide the choice by tossing up; held, an invalid appointment, although the attorney, not knowing of such objection, proceeded in the reference before him. In re *Jamieson and Binns*, 4 Ad. & Ell. (x. s.) 945.

20. Where a cause had been referred *ad nisi prius* upon a verdict taken by consent; held, that the court had no power to amend the record, being in effect the substitution of a totally different issue agreed to be referred. *Cross v. Metcalf*, 1 Nev. & P. (x. s.) 232.

21. Upon a reference of an ejectment cause, and all matters in difference between the parties, the arbitrator having directed the verdict to be entered for the lessor of plaintiff, but awarded two sums to be paid by the plaintiff to defendant, as compensation for buildings erected on the premises; held that, subject to the lien of the defendant's attorney, the sums awarded might be



set off against the claim of the plaintiff for costs. *Doe v. Sinclair*, 3 Sc. (c. r.) 42; and 5 Dowl. (r. c.) 26.

22. Upon a reference by the parties in a cause of all matters in difference, with power to direct how the verdict should be entered, and although he should direct a nonsuit, or verdict to be entered for the defendant, to order him to pay any sum which should be just and equitable, costs to abide the event; and the arbitrator directed a nonsuit, but ordered the defendant to pay a certain sum to the plaintiff; held, that the latter was entitled to the costs of the reference, but the defendant to the costs of the suit. *Chittenden v. Walker*, 3 Ad. & Ell. (x. s.) 691.

23. Where the costs were to abide the event, and the arbitrator directed payment of a sum found to be due, and also a sum for the costs; held, that he exceeded his jurisdiction in fixing the amount, but that the award was good as to the former direction, which was within the scope of his authority. *Kendrick v. Davies*, 5 Dowl. (r. c.) 693.

24. The 3 & 4 Will. 4, c. 42, s. 39, held not to extend to the reference of criminal but of civil matters only; where, therefore, an indictment for a conspiracy had been referred, held that the submission might be revoked. *Rex v. Bardell*, 1 Nev. & P. (x. s.) 74.

25. So where an indictment for conspiracy had been referred, and the authority afterwards revoked, and the defendants refused to proceed to the reference; held not a case within the 3 & 4 Will. 4, c. 42, s. 39, requiring the leave of the Court or a Judge to revoke. *Rex v. Shillibeer and others*, 5 Dowl. (r. c.) 238.

26. Where, in covenant, the first plea alleged that the works had not been done; and the second, that the instalment had been paid when due; on which issues having been joined and the cause referred, the arbitrator found for the plaintiff on the first, with damages 1s.; and also on the second, damages 13s. 4d.; held sufficiently certain, and that he was not bound to award a single sum on the entire breach. *Smith v. Festiniog Railway Company*, 4 Bing. N. S. (c. r.) 23; 3 Sc. 255; and 4 Dowl. (r. c.) 190.

27. Where the arbitrator recited the power, and that he had enlarged the time, and the Court would presume the rule for the attachment to have been drawn up on proper affidavits, held, that no affidavit of the due enlargement was necessary; the arbitrator having stated the facts found by him, and his opinion thereon; held, that the award was sufficiently final, although he went on to refer that conclusion to the opinion of the Court, the latter part might be rejected. *Barton v. Ransom*, 3 Mees. & W. (x. s.) 322; and 6 Dowl. (r. c.) 384.

28. Where an action of trespass, and all matters in dispute at law or in equity were referred, so that the arbitrator should make his award by a certain day, with power of enlargement, and of making one or more awards at his discretion, to be delivered to the parties, or if dead, to their representatives; there were equity suits pending, in which also infants were concerned: the arbitrator awarded the verdict to be entered for the plaintiff, damages——l. and also that the defendant

should pay him——l. for grievances not included in his declaration; held sufficiently final, although not disposing of the equity suits, and notwithstanding infants were parties thereto, and that the authority of the arbitrator was not revoked by the death of one of the parties. *Wrightson v. Bywater*, 6 Dowl. (r. c.) 359; and 2 Mees. & W. (x. s.) 199.

29. Where four actions between distinct parties were referred, and all matters in difference, and there was also pending an action of ejectment as to part of the subject in dispute, of which the arbitrator had notice, but omitted any mention of it in his award; held, that the award was bad in toto. *Stone v. Philipps*, 4 Bing. N. S. (c. r.) 37; 3 Sc. 275; and 6 Dowl. (r. c.) 247.

30. An arbitrator to whom a cause is referred to certify for whom and what amount the verdict is to be taken, may find the verdict as the jury might have done, and on the several issues. *Wood v. Hooper*, 4 Bing. N. S. (c. r.) 449.

31. In *assumpsit* for goods sold, with counts for work, money paid, and on an account stated; pleas to the whole declaration, 1st, of the general issue, and 2nd, a set-off, to which latter plea the plaintiff replied *nil debet*, and the cause and all matters in difference were referred; the arbitrator directed a verdict to be entered for the defendant on both pleas, as regarded the count for money paid, and as far as they related to the residue of the declaration, for the plaintiff, with——l. damages; held, on motion to set aside the award, that the issue on the plea of set-off was not divisible, and that the plaintiff was entitled to a verdict on it, unless the defendant proved a set-off equal to, or exceeding the aggregate of the plaintiff's demands; but although the arbitrator had been mistaken in his view of the pleading, the defendant was not entitled to avail himself of it to set aside the award, and the Court would discharge the rule on plaintiff's paying the costs of the issue so wrongly found for the defendant. *Moore v. Butlin*, 2 Nev. & P. (q. s.) 436.

32. Where one action for two calls on a proprietor of shares in a joint stock company, and another action by him against the directors for the value of the shares, on the ground of their having by certain acts dissolved the company, were referred to arbitration; it appeared that the two calls had been made on the same day, against the express provisions of the charter of incorporation, one only therefore being exigible, and the arbitrator had directed the payment of both, and that the party should receive from the company a compensation on transferring or surrendering his shares as the company should appoint; but there was no direction binding the party obligatorily to transfer or surrender, and the award also reserved all future claims by the company in respect of future calls: held, that the award was not conclusive, and could not be supported. *Baillie v. Edinburgh Gas Company*, 3 Cl. & Fi. (r.) 640.

33. Where on an agreement of purchase the title was to be made out to the satisfaction of a third person, and upon a dispute as to the validity of the title it was referred to an arbitrator, who by his award ordered that the title should be taken with a bond of indemnity; held bad, as not deciding the point referred, and for excess, as such bond



was quite unauthorized by the submission, and was in fact setting on foot the means of future litigation. *Ross v. Boards*, 3 Nev. & P. (q. n.) 382.

34. Where in an action of ejectment on two demises, "all matters in difference in the cause," were referred, costs of suit and of the reference to abide the event, the successful party to sign judgment and proceed for the costs as if the action had been tried; the arbitrator awarded that the plaintiff was entitled to a certain part of the lands, which he set out by metes, &c., and judgment was entered up, without any attempt to set aside the award; held, on motion to set aside the judgment, that the defendants were to be confined to objections on the face of the award, as if showing cause against an attachment, but that the award was bad, as dealing only with part of the subject matter in dispute, and also for not stating on which of the demises the plaintiff had succeeded as affecting the costs. *Doe v. Horner*, 3 Nev. & P. (q. n.) 344.

35. Where the award finds a certain sum to be due, but no express order to pay it, there being no contempt, the payment cannot be enforced by an attachment, but only by action on the award. *Seaward v. Howey*, 7 Dowl. (r. c.) 318.

36. Where a set-off was pleaded of a sum not due at the commencement of the action, and the cause and all matters in difference were referred, "including the claim alleged in the plea," and the award found for the plaintiff in the action, and that the sum claimed in the plea was due, and ordering it to be paid; held sufficient. *Petch v. Conlan*, 7 Dowl. (r. c.) 426.

37. So, where the defendant pleaded by way of set-off, a claim not payable until a future day, but the consideration of which had been received by the plaintiff before commencement of the action, and all matters in difference, "including the claim of the defendant in the set-off," were by a Judge's order referred; held, that the arbitrator properly included the claim, although not payable until after the date of the action, and of the order of reference. *Petch v. Fountain*, 5 Bing. N. S. (c. r.) 442.

38. Where on a claim for past services and sums due on a contract, and for prospective damages on account of the breach of contract, all matters in difference were referred to arbitrators, who found that there was justly due and owing a certain sum, which was awarded to be paid; held, that such finding was not improper, although the several claims were not distinctly arbitrated on, or that the award was not expressed to be made of and concerning the premises. *Croydon Canal Company*, in re, 1 Perr. & Dav. (q. n.) 391.

39. Where an action of debt, to which the general issue and a set-off were pleaded, was referred, "the costs of the reference and of the award to abide the event," and the arbitrator found that the plaintiff had no cause of action, and not entitled to recover in the action, but the award was silent as to the set-off; held, that the award was final, and the defendant entitled to recover the costs; the event, being taken to mean the event as to the action, and not as to the determination of particular issues, which the arbit-

trator was not distinctly required to do. *Duckworth v. Harrison*, 4 Mees. & W. (xx.) 439; and 7 Dowl. (r. c.) 71.

40. Where on reference of an action in which several issues were joined, the arbitrator found for the defendant on some issues, but not going to the whole cause of action, and for the plaintiff on the others, but omitted to award damages; held, that the award was insufficient, as it was impossible to say how the verdict was to be entered. *Howard v. Duncan*, 7 Dowl. (r. c.) 91.

41. But where one plea covered the whole cause of action, which the arbitrator found in favor of the defendant, held, that he had done right in awarding no damages on those issues which he found for the plaintiff. *Savage v. Ashwin*, 4 Mees. & W. (xx.) 530.

42. Where evidence had been taken at a meeting irregularly convened, and at which the parties did not attend, but it was afterwards struck out, and the arbitration proceeded, the Court refused to set the award aside. *Kingwell v. Elliott*, 7 Dowl. (r. c.) 423.

43. Where the arbitrator having power to enlarge by indorsement on the order, indorsed, "I direct that a rule of Court shall be applied for to enlarge, &c.," and the parties proceeded in the reference, but no order was ever applied for; held, that it was of itself sufficient, but if not, that the irregularity had been waived. *Hallett v. Hallett*, 5 Mees. & W. (xx.) 25; and 7 Dowl. (r. c.) 339.

44. Where the order of reference directed the parties and witnesses to be examined, if the arbitrator should think fit, upon oath, to be sworn before a Judge or Commissioner; held, that it did not restrain the arbitrator, under 3 & 4 Will. 4, c. 42, s. 41, from himself administering the oath. *Hodson v. Wilde*, 7 Dowl. (r. c.) 15; and 4 Mees. & W. (xx.) 536.

45. Appointment of the umpire by lot consented to by the attorneys' clerks, and not by the attorneys or their clients, held bad, although the parties, ignorant of the fact, attended before him. *Hodson & Drewry*, in re, 7 Dowl. (r. c.) 569.

46. Where the arbitrators having each named an umpire, one of the two was chosen by ballot; held, that the approval by the parties of the person elected did not make the election good, unless they did so with the full knowledge of the mode in which he had been elected. *Greenwood & another*, in re, 1 Perr. & Dav. (q. n.) 461.

47. Where a verdict was taken and the cause referred, and the arbitrator found a reduced sum to be entered for the plaintiff, subject to the opinion of the Court on facts, upon which, if the Court should be of that opinion, the amount was to be still further reduced, and a rule for setting aside the award as not final was ultimately discharged; held that an application made after the second term after making the award, to have the judgment entered for the lesser sum, was in fact an application to set aside the award, and too late. *Anderson v. Fuller*, 4 Mees. & W. (xx.) 470; and 7 Dowl. (r. c.) 51.

48. Although the award be good upon the face



of 2. part of the arbitrator, were wrong and that it was necessary to make the judgment supported against it. In consequence of that, the arbitrator was ordered to give the award on the 1st day of the month of June, 1877, and 5 Dowl. p. c. 228.

### [B. How awarded]

1. To send a motion for an attachment for non-performance of an award under an order of nisi prius, the order of attachment must appear to have been previously made a rule of Court. *Ball v. Mayor, &c. v. Ketch, 4 Sc. c. 19, 20.*

2. Where the defendant at the time of service refused to take the copy of the award and rule, held, that the attachment in full was, the costs being being exempted with. *East v. Glen, 5 Dowl. p. c. 250.*

3. The Court overruled an objection to the affidavit of service of the award, stating it to be of "T. Ward," instead of "T. Word," the document served being correct; and also that there was no affidavit of the fact of the several enlargements by the arbitrator; having been incorporated in the rule of Court, and made by agreement of the parties, the Court would mind that what was necessary to be done as a foundation for the rule had been done. *Smith v. Reeves, in re, 5 Dowl. (p. c.) 513.*

4. The Court refused to refer back to the arbitrator an award made on a reference of the cause and all matters in difference, on the ground of his having omitted to decide as to one subject, where the application was not made within the first four days of the following term. *Lyng v. Sutton, 3 Sc. (c. p.) 187; and 5 Dowl. (p. c.) 39.*

5. Where, before the cause had been entered, articles of agreement to refer were executed, and the submission was not made a rule of Court until the second term after the publication of the award; held too late to move to set it aside; unless there appear clear and sufficient grounds for the delay, the Court in cases not under the statute will not interfere. *Reynolds v. Askew, 5 Dowl. (p. c.) 652.*

6. Where in an action of covenant by landlord against tenant, assigning several breaches, the cause and all matters were referred, and by the order of nisi prius the jury were to find a verdict and damages on the first breach, subject, &c., but no power was given to the arbitrator to enter a verdict on the other breaches; held, that he could not do so, as an indirect mode of ordering money to be paid by the defendant to the plaintiff; held also, that an application might be made to set aside the award at any time within the next term; and a mere application by the defendant's attorney for time, when the costs were taxed and execution about to be taken out, to which the defendant was no party, was not a waiver of the objection to the award. *Hayward v. Phillips, 1 Nev. & P. (N. S.) 288.*

And see *Donlan v. Brett, 5 Ad. & Ell. 344.*

7. Where a cause was referred to two arbitra-

tors, with power to appoint a third, the award to be made by a third day, or such other day as they or any two of them should appoint, and the two original arbitrators continued the time before the third was named, held, that such enlargement was valid, and that an award subsequently made by a third day be enforced by attachment. *Reade v. Burton & Jones & W. 11 32.*

8. A rule for setting aside an award must be served by or for the party, it will be discharged. *Barrett v. Bamford, 5 Dowl. p. c. 397.*

9. Where the award directed costs to be paid in equal proportions by three persons; held, that there must be rules for separate attachments. *Gulley v. Summerfield, 5 Dowl. p. c. 401.*

10. Where by the order of reference the party was directed to be at liberty to sign final judgment for the award, and to tax his costs; held, that the award being found for the defendant, he is not sign judgment for his costs. *Maggis v. Yorks, 6 Dowl. p. c. 431.*

11. Upon a reference of several actions, costs of the several actions, matters, &c., to abide the event, and the arbitrator in each case awarded costs to the successful party; held good, although he did not succeed in all; held also, that after the award made, no objection can be made as to infants having been made parties, or that others interested were not. *James v. Powell, 6 Dowl. (p. c.) 453.*

12. Where two actions relating to a right of way had been referred, and the arbitrator directed that the defendant should undertake not to use it, which was given; on an application for an attachment for breach of the undertaking by the defendant's servants, he swearing that he had neither himself used the way, and that the acts complained of were without his knowledge or consent, the Court refused to grant it. *Russell v. Yorke, 4 Sc. (c. p.) 422.*

13. Where an action had been brought on a right of water, as limited by an award, which was referred, and the second award regulating the use was moved to be set aside, as founded on a misconstruction of and at variance with the former one, which the Court considered it not to be; held, that the defendant was not entitled to the costs of the motion, the award being supported. *Hocker v. Greenfell, 4 Bing. N. S. (c. p.) 103; 2 Sc. 391; and 6 Dowl. (p. c.) 250.*

14. The affidavit of execution of a power of attorney demanding performance of the award, held, to be entitled in the cause. *Doe v. Stillwell, 6 Dowl. (p. c.) 305.*

15. Where an action against a pawnbroker for not complying with the requisites of the 39 & 40 Geo. 3, c. 39, s. 6, on receiving a pledge, was referred to an arbitrator, who was to state a case for the Court; and who having stated only one fact, and on reference to him he was unable to state whether the defendant had made the requisite inquiries or not, the Court directed a new trial, unless the parties would consent to its going back to him to find affirmatively or negatively whether the proper inquiries had been made by the defendant. *Fer-*



guson v. Norman, 4 Bing. N. S. (c. r.) 52; and 3 Sc. 304.

16. Where the award upon the face of it purported, and was attested to have been made in due time, the Court would presume it to have been so made: held, also, that the award being for one party to make a surrender of premises, and the costs of it having been offered on making it, it lay upon the party who was to make the surrender to do the first act; an affidavit more than a year old allowed to be used on the application for an attachment. *Doe v. Stillwell*, 3 Nev. & P. (q. s.) 701.

17. Where the parties have intentionally allowed the time to expire without enlargement, the Court has no power under 3 & 4 Will. 4, c. 42, to compel the parties to proceed with the reference. *Doe d. Jones v. Powell*, 7 Dowl. (r. c.) 539.

18. Where an action on a note, and on an account stated, was referred, and the award found the sum, being the amount of the note mentioned in the declaration, to be due; held bad, as not disposing of the issue on the account stated; held, also, in an action on the award, that the production of the rule of Court and award, was sufficient *prima facie* evidence to sustain the issue on the fact of the award. *Gisborne v. Hart*, 5 Mees. & W. (xx.) 50; and 7 Dowl. (r. c.) 402.

19. Where the agreement for an arbitration stipulated that the award, and not the submission, should be made a rule of Court, held that the Court had, notwithstanding, jurisdiction under 9 & 10 Will. 3, c. 15. *Storey, ex parte*, 2 Nev. & P. (q. s.) 667; supporting *Pedley v. Westmacott*, 3 East, 603; *Powell v. Phillips*, 2 Tidd, Pr. 821, note (h), ed. 9; and 7 Ad. & Ell. 602.

20. Where an attachment was obtained for non-performance of an award which was ordered to remain suspended, to await the result of an inquiry, and to be discharged on certain conditions which were not complied with; held, that the costs of such inquiry were to be considered as incidental to, and to be considered as part of, the costs of the attachment. *Tyler v. Campbell*, 5 Bing. N. S. (c. r.) 192.

21. Upon reference of a cause at *nisi prius*, with power to certify whether the cause was a proper one to be tried before a Judge of assize; and a certificate was given in the affirmative, but the learned Judge died before the certificate made known to him; held, that having exercised no opinion thereon, the Court had no authority to direct the master to tax full costs. *Astley v. Joy*, 1 Perr. & Dav. (q. s.) 460.

22. Where, after a cause referred, the award was set aside, and the cause again tried, and the plaintiff obtained a verdict; held that the master properly refused the costs of the first trial. *Wood v. Duncan*, 7 Dowl. (r. c.) 344.

23. Where an action, and a cross bill in equity for an injunction to restrain the suit, were referred, the costs of the action and suit "to abide the event," and of the reference, to be in the discretion of the arbitrator; the arbitrator found some of the issues for the plaintiff, with 5*l.* damages,

and the others for the defendant, but that they, having a defence in law, should not proceed in the suit in equity as regarded them; held, that the arbitrator, by having directed that the plaintiff should not proceed in the action for his damages or costs, although he had thereby indirectly exercised a jurisdiction over the costs of the action, had not exercised such a discretion as the reference meant to exclude, but that the costs were still left to abide the event as the parties intended. *Reeves v. MacGregor*, 1 Perr. & Dav. (q. s.) 372.

24. Where, upon a cause being referred before trial, an arbitration bond was executed, but the reference being abortive, the cause was tried; held that the costs of the reference were not costs in the cause, but only recoverable under the bond. *Doe v. Morgan*, 4 Mees. & W. (xx.) 171.

25. Where the language of the award, on the reference of an action on a special contract, and for goods sold, was as much referable to the special as to the general count, and the award was treated as valid, the Court refused to direct the taxation of the master of the general costs to be reviewed. *Rennie v. Miles*, 5 Bing. N. S. (c. r.) 249; and 7 Dowl. (r. c.) 205.

26. Where the reference was to two arbitrators and an umpire, and the agreement to perform the award of the said arbitrators and their umpire, and it was made by the arbitrators only, the Court refused an attachment. *Heatherington v. Robinson*, 7 Dowl. (r. c.) 19; and 4 Mees. & W. (xx.) 608.

And see *Costs*.

## BAIL.

[A] AFFIDAVIT OF.

[B] DEPOSIT IN LIEU OF.

[C] JUSTIFICATION.

(a) *When allowed.*

(b) *Notice of.*

(c) *Affidavit of—in person.*

(d) *Time, when given—effect.*

[D] RENDER.

[E] BAIL-BOND—PROCEEDINGS ON—WHEN STAYED—SET ASIDE.

[A] AFFIDAVIT OF.

1. The affidavit merely stating the debt, "on an account stated between them;" held insufficient, and leave to arrest a second time refused. *Hooper v. Vestris*, 5 Dowl. (r. c.) 710.

2. Affidavit by a party describing himself manager to the R. branch of the Y. bank, and that the defendant was justly, &c. to J. S., as one of the registered public officers of the Y. bank, for £—— for money lent to the deponent as such manager, held irregular, as not showing the authority to lend; but not a nullity, and that an application to be discharged made three days after



term, the affidavit being made fourteen days before the end of term was too late. *Speneer v. Newton*, 7 Nev. & P. (x. b.) 823.

3. Affidavit for the agistment of cattle, must allege that they were so at the request of the defendant. *Smith v. Heap*, 5 Dowl. (r. c.) 11.

4. The affidavit of bail need not show the connexion between the plaintiff and defendant. *Holiday v. Lawes*, 3 Bing. N. S. (c. r.) 541; 4 Sc. 354; and 5 Dowl. (r.) 485, 636.

5. An affidavit not entitled in any court, but sworn in Scotland before a party stating himself to be a commissioner by virtue of a commission from the Courts of C. P. and Ex., held sufficient. *White v. Irving*, 2 Mees. & W. (xx.) 127; and 5 Dowl. (r. c.) 289.

6. Affidavit that the defendant was indebted in £— for the hire of a berth in a vessel of the plaintiff, let by the plaintiff to the defendant at his request, held sufficient. *Shepherd v. O'Brien*, 1 Mees. & W. (xx.) 601; and 1 Tyr. & Gr. 913; 8 C. 5 Dowl. (r. c.) 173.

7. Affidavit of debt "for money had and received by defendant for and on account of the plaintiff," but not going on to say to the plaintiff's use, held insufficient. *Kelly v. Curzon*, 1 Nev. & P. (x. b.) 622.

8. Affidavit for £— "for principal monies due upon a bill of exchange," not stating the amount of the bill, held bad; but where the application was made 19 days after the arrest, held an unreasonable delay, and the application to discharge the party refused. *Fowell v. Petre*, 1 Nev. & P. (x. b.) 227; and 5 Dowl. (r. c.) 276.

9. Affidavit for money "on the balance of an account stated," not going on to say, "and settled between plaintiff and defendant," held sufficient. *Tyler v. Campbell*, 3 Bing. N. S. (c. r.) 675; 4 Sc. 384; and 5 Dowl. (r. c.) 632.

10. The affidavit by indorsee, in an action against the maker of a note, need not describe himself so, if he traces the title to the note from the maker to himself, nor need he allege the default of the maker. *James v. Trevanion*, 5 Dowl. (r. c.) 275.

11. Affidavit stating the defendant to be indebted on a bill, drawn and accepted by him, held sufficient. *Harrison v. Rigby*, 6 Dowl. (r. c.) 93; and 3 Mees. & W. (xx.) 66.

12. Where it stated the defendant to be indebted on a note drawn by him, payable to F., and by F. indorsed to the plaintiff, and the declaration stated an intermediate indorsement; held, not a substantial variance as to the cause of action. *Luce v. Irvin*, 6 Dowl. (r. c.) 92; and 3 Mees. & W. (xx.) 27.

13. The affidavit for money due on an account stated, held sufficient, without going on to allege that it had been "settled" or a balance struck. *Balmanno v. May*, 6 Dowl. (r. c.) 306.

14. Where the affidavit in an action by holder against the drawer of a bill merely stated that the acceptor made default in payment, when due, held

insufficient, not showing a refusal to pay on presentment; but the affidavit being good as to another claim, sufficient to hold the party to bail, and indorsed on the *capias*, held sufficient as to that part. *Caunce v. Rigby*, 3 Mees. & W. (xx.) 67.

15. In case for injury to the plaintiff's reversionary interest in premises, held sufficient that the affidavit to hold to bail was by the plaintiff's attorney, and the amount of damage stated according to his information and belief. *Hodgson v. Dowell*, 6 Dowl. (r. c.) 344; and 3 Mees. & W. (xx.) 284.

16. Where no bail was put in and the time of putting it in expired; held, that the subsequent payment of the sum deposited with the sheriff in lieu of bail, and of a further sum of 10*l.* for costs, were not equivalent to putting in and perfecting bail, and the plaintiff having obtained a rule for payment over of the money to him, the Court refused, even on an affidavit of merits, to interfere. *Hannah v. Willis*, 4 Bing. N. S. (c. r.) 310; and 6 Dowl. (r. c.) 417.

17. The application by defendant to be discharged on putting in common bail, on the ground of a defect in the affidavit to hold to bail, must be made within the time limited for putting in an appearance in ordinary cases; and held, that personal indisposition was not an excuse to take the case out of the strict rule. *Daly v. Mahon*, 4 Bing. N. S. (c. r.) 8; 6 Dowl. (r. c.) 193; and 3 Sc. 299.

18. And a variance in the copy of process served on the defendant, where the original is correct, held merely an irregularity, and requiring the application to be made within the time for putting in bail. *Brashour v. Russell*, 4 Bing. N. S. (c. r.) 31; and 6 Dowl. (r. c.) and 3 S. C. 268.

19. But where the affidavit alleged the debt to be due to the plaintiffs and their late co-partner; and an affidavit showed that he was still alive, the bond ordered to be cancelled. *Morrell v. Parker*, 6 Dowl. (r. c.) 123; and 3 Mees. & W. (xx.) 65.

20. Affidavit by a party describing himself as "acting as managing clerk to Messrs. —, attorneys," not stating their place of business, held insufficient. *Graves v. Browning*, 6 Ad. & Ell. (x. b.) 805.

21. The chief and one judge of any court empowered to authorize commissioners, not being attorneys, to take bail recognizances, and the cognisors or bail may justify before such commissioners. By 1 & 2 Vict. c. 45, s. 4.

22. Where a party is held to bail upon a special affidavit, the Court *seem* will entertain an application for discharging or reducing the amount, upon counter affidavits. *Hutt v. Capelin*, 5 Sc. (c. r.) 415.

23. Where the affidavit stated a sum to be due for principal and interest upon a bond for —*l.*, held, that the amount of each was sufficiently alleged: but the affidavit stating also a further sum of —*l.* for the balance of an account between the parties, held insufficient for not alleg-



ing that it was a stated and settled account: but held, that the causes of action being distinct and separate, and one properly sworn to, the affidavit was not bad *in toto*, but that the defendant must give bail for the amount rightly sworn to. *Jones v. Collins*, 4 Dowl. (p. c.) 526.

24. In an action by indorsee against indorser of a bill; held, that the affidavit ought to state expressly the default of the acceptor, and that the allegation was not supplied by a statement that the amount "is now due and unpaid." *Jones v. Collins*, 6 Dowl. (p. c.) 520.

#### [B] DEPOSITE IN LIEU OF.

1. The rule for taking money out of Court deposited in lieu of bail, under 7 & 8 Geo. 4, c. 71, s. 2, is only *in nisi* in the first instance. *Lover v. Tolmin*, 5 Dowl. (p. c.) 388.

2. Where money was deposited in lieu of bail, and an order for better particulars, with stay of proceedings, not complied with, the Court refused an application allowing the defendant to take the money out of Court. *Harden v. Harbours*, 7 Dowl. (p. c.) 546.

3. And where money had been deposited in lieu of bail, as he could not be considered at all in custody, held, that he was not entitled, on an equitable construction of the statute, to have the money returned to him. *Harrison v. Dickenson*, 4 Mees. & W. (ex.) 355; and 7 Dowl. (p. c.) 6.

4. The Court refused a rule for the return of money deposited in lieu of bail, on the ground of an omission of one of the defendant's christian names in the writ. *Rossett v. Hartley*, 7 Ad. & Ell. (q. b.) 523 n.

#### [C] JUSTIFICATION.

##### (a) When allowed.

1. Where the defendant had inserted the debt in his schedule, and was imprisoned under the order of the Insolvent Court, the Court refused to allow him to justify bail in respect of such debt. *Stone's Bail*, 5 Dowl. (p. c.) 667.

2. A defendant not in custody cannot justify at chambers in vacation, unless required to do so by the plaintiff. *Semble* the 11 Geo. 4 & 1 Will. 4, c. 70, s. 12, relates to the place where bail may justify under all circumstances; the rule 1, Hil. 2 Will. 4, s. 17, to the time in particular cases. *Barra v. James*, 5 Dowl. (p. c.) 123.

3. The defendant cannot justify one bail without consent of the plaintiff. *White's Bail*, 5 Dowl. (p. c.) 133.

4. Where, after a demurrer (attempted to be set aside as frivolous), an order was obtained to join in the demurrer; held, that the bail could neither be opposed nor allowed to justify. *Bolton v. Johnson*, 2 Mees. & W. (ex.) 42.

5. It is sufficient for the plaintiff to except to one of the bail to compel the justification of both,

and the defendant cannot treat the exception as a nullity. *Feltham v. King*, 5 Dowl. (p. c.) 658.

##### (b) Notice of.

1. The notice in stating the residence of the bail, must state "resident there for the last six months." *Hollings' Bail*, 5 Dowl. (p. c.) 229.

2. The notice of justification of town bail need not state whether they will justify in person or by affidavit; and where they justified as to the property stated, the Court refused to disallow the costs of justification. *Norton's Bail*, 1 Mees. & W. (ex.) 632; 1 Tyr. & Gr. 847; and 5 Dowl. (p. c.) 85.

3. The rule of Trin. 1 Will. 4, s. 1, requiring four days' notice of justification, held not to apply to the case of bail added by leave of a Judge. *Key v. M'Intyre*, 2 Mees. & W. (ex.) 347; and 5 Dowl. (p. c.) 453. 463.

4. Where the same bail justify at chambers, one day's notice is sufficient. *Wilson v. Hawkins*, 2 Dowl. (p. c.) 437.

5. Two days' notice of bail in the case of a prisoner good, notwithstanding the new rule, and it need not appear on the face of the notice that the defendant is so. *Pierce's Bail*, 5 Dowl. (p. c.) 257.

6. But the two days' notice of justification must state that the defendant is a prisoner. *Poole's Bail*, 2 Mees. & W. (ex.) 312; and 5 Dowl. (p. c.) 449.

7. In all cases, special bail may be justified before a Judge at chambers, in term or vacation, annulling 17 Reg. Hil., 2 Will. 4. Reg. Gen. 4 Bing. N. S. (c. r.) 366; and 3 Mees. & W. (ex.) 154.

8. Notice of justification at chambers must insert the hour; but the omission does not entitle the plaintiff to treat it as a nullity, and commence proceedings on the bail-bond before the time for justifying has expired; and held that, under the circumstances, the defendant was not too late in applying to set aside the proceedings by the lapse of eight days. *Smith v. Webb*, 2 Mees. & W. (ex.) 879.

##### (c) Affidavit of—in person.

1. An affidavit must comply with the requisites of Reg. Hil. 2 Will. 4, s. 19; but if not in conformity therewith, the objection, where the bail justify in person, only goes to deprive the defendant of the costs of justification. *Stevens v. Miller*, 2 Mees. & W. (ex.) 368; and 5 Dowl. (p. c.) 602.

2. The omission to state the addition of bail in the affidavit of justification held fatal. *Benbow's Bail*, 5 Dowl. (p. c.) 714.

3. The rule of Hil. 2 Will. 4, applies to affidavits made by bail, and if the addition be omitted will be bad; the Judge allowed it to be amended,



but refused the defendant his costs of justification. *Brown's Bail*, 5 Dowl. (r. c.) 220.

4. Where bail, not being able at the time to answer as to his debts and credits, was disallowed but not rejected, he was allowed to justify on coming again prepared to answer sufficiently. *Clarke v. Vestris*, 4 Sc. (c. r.) 391.

5. It is no objection to bail in an action against the acceptor, that he is the drawer of the bill on which his principal is sued. *Prime v. Beesley*, 3 Bing. N. S. (c. r.) 391; 4 Sc. 37; and 5 Dowl. (r. c.) 477.

6. Town bail allowed to justify in person where the affidavit of justification is insufficient; but the plaintiff may oppose without the risk of costs. *Shane v. Spode*, 2 Mees. & W. (ex.) 42.

7. Where bail, of whom notice has been given, are rejected, new bail cannot be put in without leave of a Judge or the Court; but they are not obliged to disclose at whose request they justify. *Jones v. Vestris*, 3 Bing. N. S. (c. r.) 677; 4 Sc. 394; and 5 Dowl. 622.

8. The affidavit of justification, stating the bail to be worth ———, "over and above all their just debts," omitting the words, "will pay," held insufficient. *Edmunds v. Keats*, 6 Dowl. (r. c.) 359.

9. Where an affidavit of sufficiency of country bail attempted to describe the property; held, that it must strictly pursue the form prescribed by Reg. Trin., 1 Will. 4. *Weller's Bail*, 6 Dowl. (r. c.) 612.

10. Where the bail are sufficient, but the property is misdescribed in the affidavit, they will be admitted without payment of costs, and those of opposition will be costs in the cause. *Brown Ahrenfeldt*, 4 Mees. & W. (ex.) 76; and 7 Dowl. (r. c.) 46.

11. Where the affidavit stated that the bail were not security for any defendant except the above defendant, allowed to be amended by adding, except in this action. *Warren v. De Burgh*, 7 Dowl. (r. c.) 96.

12. Where the affidavit stated the amount of the debt less than the sum indorsed on the writ, the bail-bond ordered to be cancelled, and a common appearance entered. *Cook v. Cooper*, 2 Nev. & P. (q. b.) 607; and 7 Add. & Ell. 605.

#### (d) Time, when given—effect.

1. Where it appeared that the plaintiff could not under the circumstances possibly have inquired into the sufficiency of the bail, time allowed on payment of costs, and putting the defendant in the same situation as if the bail had justified. *Dicas v. Smith*, 3 Sc. (c. r.) 601.

2. The effect of a Judge's order for time to put in bail, is that within that time the bail shall be put in, transmitted, and filed, notwithstanding the rule 1, Hil. 2 Will. 4, s. 14. *Craig v. Evans*, 5 Dowl. (r. c.) 664.

3. Where after time given, without consent of the bail, one of them afterwards requested "further time;" held to amount to a waiver of the original ground of discharge. *Spyer v. Carper*, 5 Dowl. (r. c.) 448.

4. Where bail attempted to justify, and were rejected on a preliminary technical objection, the Court refused to allow fresh bail to be added. *Elliott v. Gutteridge*, 6 Dowl. (r. c.) 255.

5. Where an order was made for further time to justify, "without prejudice to the question of the sheriff being in contempt;" held to mean, his being so at the time of the order being made, and having the whole of the day to bring in the body, the attachment was irregular. *Reg. v. Midd. Sh.*, 6 Dowl. (r. c.) 164; 3 Mees. & W. (ex.) 64.

6. In future, special bail in all cases may be justified in term or vacation before the Judge at chambers, annulling Reg. Hil. 2 Will. 4, art. 17. *Reg. Gen.* 3 Nev. & P. (q. b.) 1.

#### [D] RENDER.

1. The Palace Court is not in the nature of a superior court of record within 11 Geo. 4 & 1 Will. 4, c. 70, s. 21, so as to enable the defendant's bail to render for the removal of the cause. *Scaith v. Brown*, 5 Dowl. (r. c.) 412.

2. After notice of render served, proceedings against the bail held irregular, although the writ previously sued out. *Lewis v. Grimstone*, 5 Dowl. (r. c.) 711.

3. Render is no stay of proceedings under Reg. Trin. 3 Will. 4, unless the costs of the writ and service be paid. *Horn v. Whitcombe*, 5 Dowl. (r. c.) 328.

4. Where bail were put in and excepted to, but did not justify, and the defendant afterwards rendered; held, that so long as the names of the bail remained on the bail-piece, they were entitled to render and enter an exoneretur. *Roxburgh v. Cresawell*, 5 Ad. & Ell. (x. b.) 829.

5. By the rule of Hil. 2 Will. 4, s. 81, the application to a judge for signing judgment for non-appearance to the *sci. fa.* after eight days from the return of one writ is substituted for the old practice, and it is sufficient if the render of the bail be made within that time, when notice on country bail is served before the return day of the writ; but since the rule, notice, or something equivalent, must be served on the bail, before leave will be given to sign judgment against them. *Saunderson v. Brown*, 2 Nev. & P. (x. b.) 84; 6 Dowl. (r. c.) 9.

#### [E] BAIL-BOND—PROCEEDINGS ON—WHEN STAYED—SET ASIDE.

1. The plaintiff in the action cannot be a witness to the assignment of the bail-bond, the statute implying two indifferent persons. *Wright v. Barrett*, 5 Dowl. (r. c.) 64.



2. An alteration in the name, with the initials of the officer taking it, held immaterial, and the bail allowed to justify, although an attachment obtained against the sheriff for not bringing in the body. *Haywood's Bail*, 5 Dowl. (r. c.) 269.

3. Upon an application to set aside the bail-bond for irregularity, the party is not entitled to take objection to the process, as, a defect in the indorsement of the writ. *Yeates v. Chapman*, 3 Bing. N. S. (c. r.) 262; and 3 Sc. 648.

4. The affidavit for staying proceedings on the bail-bond must state that the application is made at the expense of the bail, and for their indemnity only. *Key v. McIntyre*, 5 Dowl. (r. c.) 463.

5. It is no ground for setting aside the *ca. sa.* in the original action, or subsequent proceedings against the bail, that the damages and costs recovered exceed the damages laid in the declaration. *Kempeneers v. Holding*, 5 Dowl. (r. c.) 374.

6. Where upon the defendant having justified bail, and taking short notice, there was time to go to trial at the last sitting in term, the Court stayed the proceedings on the bail-bond, allowing it to stand as a security. *Clarke v. Vestris*, 4 Sc. (c. r.) 391.

7. Where a second arrest was made without a Judge's order, held that the defendant's undertaking to put in bail was a waiver of the objection. *Holliday v. Lawes*, N. S. (c. r.) 541; 4 Sc. 354; and 5 Dowl. (r. c.) 485. 636.

8. Where, after the *ca. sa.* had been returned *non inrent*, the defendant obtained a rule *nisi* for a new trial, with a stay of proceedings; held that, on the discharge of the rule, the right to issue the *sci. fa.*, which had been only suspended, revived, and that no fresh entry of judgment or *alias ca. sa.* was necessary; held also, that half-holidays at the office are to be counted as searching days, and that it is discretionary in the Judge to direct notice to be given to the bail before leave granted to sign judgment against them. Where the residence was unknown, judgment signed without notice held regular. *Armitage v. Rigbye*, 5 Ad. & Ell. (x. s.) 76.

9. Upon motion to set aside a regular bail-bond or attachment, if it appear that by the default of the defendant the plaintiff has been prevented from trying his cause, the attachment will be allowed to stand as a security, notwithstanding the rule to set it aside might have been disposed of in time to have enabled the plaintiff to have entered and tried the cause. *Casley v. Binns*, 2 Mees. & W. (ex.) 285.

10. Where pending the cause, by an arrangement, time was given, but not extending it beyond the period at which, according to the course of the Court, judgment and execution might have been obtained; held, that the bail were not discharged. *Whitfield v. Hodges*, 1 Mees. & W. (ex.) 679; and 1 Tyr. & Gr. 1061.

11. Where, after bail put in, the declaration was amended by adding new counts on other causes of action, and the plaintiff recovered on all; held that the bail were not liable to the costs

on the added counts, and that the onus of separating the liability on taxation lay on the plaintiff. *Taylor v. Wilkinson*, 1 Nev. & P. (x. s.) 629.

12. In order to stay the proceedings, it is not necessary to show that a rule has been obtained for the allowance of bail, if it be sworn that they have been put in and justified; and held also, that an affidavit of merits, as the deponent (the defendant) "has been advised and believes," was sufficient; and in order to obtain the bail-bond to stand as a security, it must appear that a trial has been lost at the time of moving the rule to stay the proceedings. *Crossby v. Innes*, 5 Dowl. (r. c.) 566.

13. The rule Hil. 2 Will. 4, s. 14, as to the time for transmitting the bail-piece in the case of country bail does not affect the time allowed for putting in bail, where the assignment of the bond has been taken, and proceedings will only be stayed on payment of costs. *Day v. Greenway*, 5 Dowl. (r. c.) 243.

14. Where the defendant, a bankrupt, had obtained his certificate under a third commission, not having paid 5s. in the pound under either of the former, the court refused to cancel the bail-bond given upon an arrest for a debt provable under the last, but left him to plead his certificate or general plea of bankruptcy. *Summers v. Jones*, 6 Dowl. (r. c.) 139.

15. In an action by the assignee of the bond, held sufficient to allege the assignment to have been made according to the form of the statute, under which averment it must be proved to have been assigned under the hand of the sheriff, and in the presence of witnesses. *Lewis v. Parker*, 6 Dowl. (r. c.) 93; and 3 Mees. & W. (ex.) 133.

16. Where the party had been held to bail on a sufficient affidavit for money lent, held that it was no ground for cancelling the bail-bond, that in an affidavit, on a subsequent application, the plaintiff stated facts inconsistent with the claim for money lent. *Vaughan v. Goadby*, 6 Dowl. (r. c.) 96; and 3 Mees. & W. (ex.) 143.

17. To entitle the plaintiff to have the bond stand as a security, a trial must have been lost at the time of moving for the rule; and held, that where the application to stay proceedings on the bond is at the instance of the bail, terms will not be imposed on the defendant. *Gale v. Hayworth*, 6 Dowl. (r. c.) 823.

18. Since 1 & 2 Vict. c. 110, the Court will stay proceedings on the bail-bond without any affidavit of merits, or driving the bail to the expenses of render. *Norris v. Bracken*, 5 Bing. N. S. (c. r.) 114; 6 Sc. 752; and 7 Dowl. (r. c.) 144.

19. But where the principal was out of the country, and the bail in no condition to render, the rule refused. *Dalton v. Gib*, 5 Bing. N. S. (c. r.) 143; 6 Sc. 751; and 7 Dowl. (r. c.) 143.

20. So where at the time of the Act coming into operation, the defendant was out on bail, and had quitted the kingdom, and it was sworn he intended to remain abroad, the Court refused to enter an *exoneretur*. *Lewis v. Ford*, 7 Dowl. (r. c.) 85; and 4 Mees. & W. (ex.) 361.



21. So where, after arrest, the defendant escaped before the Act came into operation, but after it did so he was re-taken on an escape warrant; held not entitled to his discharge, as being either in custody at the time of the act coming into operation, or as having been arrested on *mesne process* after that period. *Nyas v. Milton*, 4 Mees. & W. (ex.) 359; and 7 Dowl. (p. c.) 90.

22. Where, previous to 1 & 2 Vict. c. 110, the defendant had been arrested on *mesne process*, and given a bail-bond, and subsequently to the passing the Act final judgment was obtained, and a *ca. sa.* lodged with the sheriff; held that as he was liable to be immediately placed in custody on final process, the Court could not consider him within the equity of 1 & 2 Vict. c. 110, so as to entitle his bail to be exonerated. *Jackson v. Cooper*, 4 Mees. & W. (ex.) 358; and 7 Dowl. (p. c.) 5.

23. Where, after bail given to the sheriff, an order was obtained for staying proceedings on payment of the debt and costs forthwith, otherwise the plaintiff to be at liberty to sign judgment; default having been made, the plaintiff took an assignment of the bail-bond, and proceeded against the bail; held, that the order not obliging the bail to justify above, and the plaintiff being enabled thereby to sign judgment upon entering a common appearance, and so no trial lost, the bail were, upon the death of the defendant, entitled to have the proceedings stayed on payment of costs only. *Isaac v. Rickardo*, 4 Mees. & W. (ex.) 382; and 7 Dowl. (p. c.) 94.

24. A party brought up on *hab. corp.* is not in custody on *mesne process*, so as to be entitled to his discharge upon entering a common appearance under 1 & 2 Vict. c. 110, s. 7. *Reynolds v. Simmonds*, 7 Dowl. (p. c.) 85.

25. Where the *ca. sa.* was lodged on 24th October, and proceedings commenced against the bail on 3d November; held, that it was too late to move to set aside the proceedings for irregularity on the 13th Nov.; held also, that the affidavit on which the rule was moved might be intitled in the original action or in that against the bail. *Pocock v. Cockerton*, 7 Dowl. (p. c.) 21.

And see *Sheriff*.

#### BANK OF ENGLAND.

1. Upon a gift of stock to A. and B. for life, and after the death of the survivor to their children; and upon the death of the wife, leaving one child, the husband and executors, by collusion and fraudulent representation that there was no child, obtained a transfer, but an indemnity was required by the Bank, and given; held, that in the absence of notice of claim the Bank were not liable as trustees, the notice to them being only of the trust being at an end. Generally speaking, the Bank is in the character of a public servant, and bound to transfer to the party in whom the fund is vested, and only liable after notice of the claim of another. *Humberstone v. Chase*, 2 Younge (ex. eq.) 209.

2. A co-partnership, consisting of more than six persons, carrying on the trade of bankers within sixty-five miles of London, under the statutes relating to the Bank of England, cannot by law, in the course of such business, accept a bill of exchange payable at less than — months from the time of giving such acceptance. *Bank of England v. Anderson*, 3 Bing. N. S. (c. p.) 589; and 4 Sc. 50.

3. Where the London and Westminster Bank guaranteed the payment of all bills drawn by a colonial bank, to a given extent, and their bills, payable at 60 days' sight, were accepted by the managing clerk, not a partner of the bank; held to be a violation of the privileges of the Bank of England, under the Acts relating thereto, and an injunction granted against the bankers and their agents. *Bank of England v. Booth*, 2 Keene, (ch.) 466.

#### BANKER.

1. Where the plaintiffs (bankers) at first refused to discount a bill for the holder on a proposed loan, which they did afterwards, amongst many others, to a party indorsing them; held, that as they might well infer that he had full authority to do so, there was not such want of due caution as to prevent their recovering it against a prior indorsee who had received no consideration. *Cunliffe v. Booth*, 3 Bing. N. S. (c. p.) 821.

2. Letters by a customer to his bankers to remit, written beyond the distance limited by the Stamp Act, held not to be orders for payment of money within the 13th section. *Iwan, ex parte*, 1 Deac. (B.) 746; and 2 M. & Ayr. 656.

And see *Ecclesiastical Persons*; *Indictment*.

#### BANKRUPT.

- [A] TRADING.
- [B] ACT OF BANKRUPTCY.
- [C] PETITIONING CREDITOR.
- [D] FIAT—OPENING—AMENDING—ANNULING.
- [E] COMMISSIONERS—POWERS OF—COMMITMENTS BY.
- [F] ASSIGNEES.
  - (a) *Choice—removal.*
  - (b) *Duties and liabilities of—protection.*
  - (c) *Official assignees.*
  - (d) *What passes under the assignment to—what within bankrupt's order, &c.*
  - (e) *In case of trusts.*
  - (f) *In case of mortgages.*
  - (g) *In case of partners.*
  - (h) *Mutual set-off.*
  - (i) *Actions and suits by and against.*
- [G] PROOF—DIVIDENDS.
- [H] SURRENDER.
- [I] CERTIFICATE.
- [K] SUPERSEDEAS.



[L] BANKRUPT, RIGHTS OF—OF WIFE.

[M] COURT OF REVIEW—JURISDICTION—APPEALS.

[N] PRACTICE ON PETITIONS—COSTS.

[O] SOLICITOR.

## [A] TRADING.

1. The proof of one single act of trading, without evidence of a general intention to trade, held insufficient, and the petitioning creditor is bound to establish the affirmative. *Wilkes, ex parte*, 2 Deac. (s.) 1; and 2 M. & Ayr. 667.

2. A purchase of shares in a banking company, without any intention of following the business of a banker, held insufficient. *Brundrett, ex parte*, 2 Deac. (s.) 219; and 3 M. & Ayr. 50.

3. Where a party exercising the profession of a proctor was made bankrupt as a bill-broker, the evidence being, of his having once been employed to get a bill discounted, not naming the parties, or the particulars of any one bill, held insufficient to support the proof of trading. *Harvey, ex parte*, 1 Deac. (s.) 571.

4. A surgeon and apothecary selling drugs, not merely to patients, but to any who might apply, held a trader within the bankrupt law. *Daubney, ex parte*, 2 Deac. (s.) 72; and 3 M. & Ayr. 16.

5. Letting furnished lodgings, held not to constitute a trading, although the furniture is purchased for the purpose of being let. *Bowers, ex parte*, 2 Deac. (s.) 99; and 3 M. & Ayr. 33.

6. Where an auctioneer was shown to be continually in the habit of buying and selling goods, as well as of bidding at auctions; held a trading within the bankrupt law: *sed quare*, if all auctioneers are traders? *Moore, ex parte*, 3 M. & Ayr. (s.) 131.

7. A mere dealing in accommodation bills, without proof of any place of business or capital, and no proof of any specific bill discounted, held insufficient to establish a trading as a bill broker. *Phipps, ex parte*, 2 Deac. (s.) 487.

8. The mere buying of hay and corn by a livery-stable keeper, to be used merely by the horses of particular persons taken in, and not generally, held, not a trading within the Act. *Lewis, ex parte*, 3 M. & Ayr. (s.) 199; and 2 Deac. 318.

9. Where the bankrupt was not merely a shareholder, but an active manager of the business of a joint stock banking company, held a sufficient trading. *Hall, ex parte*, 3 Deac. (s. c.) 406.

10. Where a farmer was in the habit of purchasing more sheep than required to stock his farm, and selling immediately the excess without shearing or any pasturing on his farm; held to amount to a trading as a sheep-salesman within the bankrupt law. *Newall, ex parte*, 3 Deac. (s. c.) 339.

## [B] ACT OF BANKRUPTCY.

1. An act of bankruptcy is to be proved, and not presumed; where the possession of the stock was shown in the bankrupt only down to July, and the fiat was in the January following, and no proof of any assignment; held, that there was no evidence of an act of bankruptcy to go to the jury, and a nonsuit proper. *Ody v. Cookney*, 1 Tyr. & Gr. (ex.) 537.

2. Where a trader assigns all his property, held that it is an act of bankruptcy, and not a question for a jury whether fraudulent or not. *Siebert v. Spooner*, 1 Mees. & W. (ex.) 714; and 1 Tyr. & Gr. 1075.

3. Where one of an insolvent banking firm communicated to a customer (who was also a director of an insurance company, having also an account,) the state of affairs, which the jury found was with the intention of inducing the individual to withdraw his balance, and not of informing the company, but which upon the suggestion of the director, also withdrew its balance; held, that as to them, it was not a case of fraudulent preference to enable the assignees to recover. *Belcher v. Jones*, 2 Mees. & W. (ex.) 258.

4. Where a voluntary payment is made by a party to a creditor at the time his circumstances are such as must end in bankruptcy, and the belief of which must be operating on his mind at the time of payment, it is void as a fraudulent preference; *aliter*, if he has a reasonable and bona fide expectation that he may still be extricated from the impending bankruptcy: being a question peculiarly for the jury, the Court will reluctantly interfere with their finding, and *semb.* only where the preponderance of evidence is strong, and it is clear that injustice has or may be done. *Gibson v. Boutta*, 3 Sc. (c. f.) 229.

5. An order to deny, not followed by a shutting up the house, or withdrawing from it, *semb.* would not amount to an act of bankruptcy. *Hare v. Waring*, 3 Mees. & W. (ex.) 376.

And see *Fisher v. Boucher*, 10 B. & Cr. 705.

6. Where under no circumstances the bankrupt could have brought the action, *semb.* the depositions will not be evidence. *lb.*

7. And although they might be conclusive of the facts recited, yet that would not exclude the defendant from showing that although true, the plaintiff could not avail himself, as being a party to a concerted act of bankruptcy. *lb.*

8. Where the bankrupt left this country for a colony, where he had a house of business, and gave a general power of attorney to his clerk to act for him in his absence, but without making provision for bills falling due, held an act of bankruptcy. *Kilner, ex parte*, 2 Deac. (s.) 324.

9. A party, on an execution put in on his goods, shutting up his shop, and leaving home for two days, without making any provision or directions as to any creditors who might call in his absence, held an act of bankruptcy; and *semb.* would be so, whether any creditor were delayed or not. *Austen, ex parte*, 2 Deac. (s.) 533.



10. Where the bankrupt, on going abroad, left with his clerk a power to act, but without making any provision for bills becoming due, and the inevitable consequences must be to delay his creditors; held to be an act of bankruptcy: *semb.* also a creditor cannot petition to reverse the adjudication. Kilner, *ex parte*, 3 Mont. & Ayr. (s. c.) 722.

11. The 7 Geo. 4, c. 46, s. 9, and 1 & 2 Vict. c. 96, are to be taken together; and held that the public officer thereby authorized to sue any member of a joint stock banking company may sue out a *fiat* in bankruptcy against such member. Hall, *ex parte*, 3 Deac. (s. c.) 405.

12. And the affidavit of the officer that he was duly nominated, and that the company were then actually carrying on business, was sufficient. *Ib.*

13. An affidavit to support an act of bankruptcy under 1 & 2 Vict. c. 110, s. 8, (Abolition of Arrest) may be sworn before a Master Extraordinary in Chancery, and filed in the register's office of the Court of Bankruptcy. *Ib.*

14. A creditor assenting to an act of bankruptcy, cannot avail himself of it to support a *fiat*. Upon a petition impeaching the validity of such affidavit and notice, and praying to supersede, the advertisement of adjudication being stayed; held, that it was irregular to file a supplemental petition stating new facts, but that the application ought to be to amend the original petition. *Ib.* *Quar.* if the affidavit of debt under the statute need state the consideration, or if it be defective to state a debt larger than the creditor can establish, or if one partner can avail himself of the statute against a copartner, unless a balance has been struck, and a debt ascertained?

15. Where the creditor, making an affidavit under 1 & 2 Vict. c. 110, s. 8, at the time of giving the notice to the debtor, stated that it was only matter of form, and subsequently an agreement was entered into, within three days before the expiration of the 21 days from the date on the notice, for the conveyance by him of all his estate, and not to be entitled to a release unless all should be given up, and the parties proceeded in drawing up the necessary deeds; held, to amount to a waiver of the default which would have constituted the act of bankruptcy, and that no valid *fiat* could be sustained as on an act of bankruptcy under the statute; and superseded with costs: and where the *fiat* issued upon such default under the statute, held, that on a petition to supersede, and showing that the affidavit and notice had been made and given as required, it was for the petitioner, upon whom the *onus* lay, to impeach the effect of such notice. Brown, *ex parte*, 1 Mont. & Ch. (s.) 177.

16. Filing an affidavit by creditors, and personal service of copy on the debtor, and non-payment within 21 days, or securing same, when to be deemed an act of bankruptcy; by 1 & 2 Vict. c. 110; 3 Deac. (s.) Ap. 710.

17. Filing petitions by parties in custody; by s. 39.

18. Where a creditor filed an affidavit of debt

against a trader under the 1 & 2 Vict. c. 110, s. 8, but the notice was irregular, the Court refused to order the affidavit to be taken from the file, as it might be followed up by another creditor, or a more regular proceeding. Gibson, *ex parte*, 3 Deac. (s. c.) 531.

19. Where a creditor filed an affidavit of debt under 1 & 2 Vict. c. 110, s. 8, (Arrest Abolition Act), and afterwards a second, increasing the debt, the court refused to order the former one to be taken off the file. Rose, *ex parte*, 1 Mont. & Ch. (s.) 149.

### [C] PETITIONING CREDITOR.

1. Where the agent of the petitioning creditor after, but on the same day the *fiat* issued, in pursuance of previous engagements, received a sum in the course of business from the bankrupt, which was entered in the pass-book in the usual course, which was delivered to the assignees, showing an absence of all fraud; the petition by the assignees, under s. 8, for forfeiture of the debt, dismissed with costs. Gardner, *ex parte*, 2 Deac. (s.) 142; and 3 M. & Ayr. 46.

2. Where the petitioning creditor had incurred law charges which were beneficial to the creditors; held, that they might be allowed to the assignees under "just allowances." Hadfield, *ex parte*, 2 Deac. (s.) 115; and S. C. Christy, *ex parte*, 3 M. & Ayr. 90.

3. Where the Court directed a reference as to the petitioning creditor's debt, at the instance of the bankrupt, upon petition to annul the *fiat*; held, that he was liable to the costs of the inquiry. Neiricks, *ex parte*, 12 M. & Ayr. (s.) 542.

4. Personal attendance of the petitioning creditor at the opening of the *fiat* dispensed with, he living at a distance of 110 miles. Freeman, *in re*, 3 M. & Ayr. (s.) 33.

5. S. P. where he resided 130 miles. Marshall, *ex parte*, *lb.* 133.

6. The petitioning creditor's solicitor may himself petition that the assignees may pay the amount of the petitioning creditor's costs. (*Diss.* Cross, J.) Benson, *ex parte*, 2 M. & Ayr. (s.) 582.

7. An I. O. U., bearing date before the bankruptcy, held no evidence of a petitioning creditor's debt, unless shown to have been in existence before that time. Wright v. Lainson, 2 Mees. & W. (xx.) 739.

8. Costs of substituting a new petitioning creditor's debt, allowed out of the estate in a case of mistake. Whalley, *ex parte*, 3 M. & Ayr. (s.) 206.

9. Where an action had proceeded as far as plea, and notice been given of disputing the validity of the petitioning creditor's debt, an order to substitute another made without prejudice to the defence in the action. Watson, *ex parte*, 3 Deac. (s.) 310; and 3 Mont. & Ayr. 609.

10. Where the petitioning creditor found that he could not sustain the debt, held, that before the



time expired for opening the *fiat*, he might petition to annul it, if no collusion with the bankrupt shown. Rogers, ex parte, 3 Mont. & Ayr. (s. c.) 506.

11. Where the petitioning creditor was party to a deed of assignment for the benefit of creditors, held, that he could not set up the deed as an act of bankruptcy, or any other. Bunn, ex parte, 3 Deac. (s. c.) 119.

12. A solicitor may take out a *fiat* on his bill before taxation, but if, upon taxation, it is reduced below 100*l.*, the *fiat* will be superseded. Ford, ex parte, 3 Deac. (s. c.) 494; and 1 Mont. & Ch. 97.

#### [D] FIAT—OPENING—AMENDING—ANNULLING.

1. Where the time for opening expired in consequence of the absence of the quorum commissioners, a new one allowed to issue, directed to other commissioners. Bartrup, in re, 2 Deac. (s.) 97; and 3 M. & Ayr. 29.

2. The Court will not stay the issuing a *fiat* on an *ex parte* motion, but a country *fiat* allowed to issue, notwithstanding the docket for a town *fiat*, on giving notice to the creditor striking it. Ings, ex parte, 2 Deac. (s.) 8; and 2 M. & Ayr. 671.

3. Where A. and B., father and son, the latter a minor, were living together, and the son taking an active part in the father's business, his name was put over the door; the father afterwards, without any communication with B., entered into an agreement with C. for becoming partners in a separate trade, but the only evidence of B. being a partner was the agreement signed by the father, and B.'s name being over A.'s door, but not over that of C.; held, that B. might petition to annul the *fiat* issued against the three, after his attaining majority. Lees, ex parte, 1 Deac. (s.) 705.

4. *Fiat* allowed to be altered in the direction, where all the creditors, except four, resided at another place. Johnston, ex parte, 3 M. & Ayr. (s.) 132.

5. New docket papers allowed to be filed to rectify a mistake in the *fiat*. Wing, ex parte, 3 M. & Ayr. (s.) 61.

6. The Court refused to amend by altering the date of the *fiat*, so as to let in the petitioning creditor's debt. Shaw, ex parte, 2 Deac. (s.) 74; and 3 M. & Ayr. 17.

7. Where two of the commissioners were creditors, but consented to release, the Court refused to annul the *fiat* on the petition of the bankrupt; the general order still leaves it entirely in the discretion of the Court to supersede or not. Hill, ex parte, 2 Deac. (s.) 236; and 3 M. & Ayr. 56.

8. Where the commissioners in the district where the *fiat* was intended to be worked being creditors, the number could not be completed; held, that it must be directed to another list to which the objection did not apply. Bonnell, ex parte, 2 Deac. (s.) 98; and S. C. Foster, in re, 3 M. & Ayr. 32.

9. On a petition to annul the *fiat*, held a sufficient *prima facie* ground of throwing the burthen of showing a petitioning creditor's debt, that the bankrupt swore he did not owe 50*l.*; but that on proof of acknowledgment by the bankrupt of the existence of the debt, and no challenge of it when before the commissioner on his last examination, it lay on him to show payment of any part; at any rate, the Court would leave him to his action, and refused to annul the *fiat*. M'Intosh, ex parte, 2 Deac. (s.) 35.

10. Where a *fiat* was annulled, the country commissioners having declined to act, and a new one taken out in town; held, that it was not a case within the s. 17, and that payment of the fees as on a renewed *fiat* could not be dispensed with. Smith, ex parte, 4 Deac. (s.) 810.

11. A creditor applying to annul a *fiat*, on the ground that he could not prove an act of bankruptcy, must show that the *fiat* was issued *bona fide*, and that the application is without any compromise with the bankrupt. Catchpole, in re, 2 Deac. (s.) 98.

12. Assignees having been chosen after a petition to annul by the bankrupt, the petition ordered to stand over until they could be served. *Semb.* a bankrupt cannot petition for such purpose before adjudication. Platt, ex parte, 2 Deac. (s.) 227; and 3 M. & Ayr. 62.

13. Where the bankrupt was described as of the place where he resided, which was at a distance from the place where he carried on the business, *fiat* annulled at the costs of the petitioning creditor. Morris, ex parte, 1 Deac. (s.) 498.

14. Where the bankrupt, seeking to annul it, does not apply promptly, terms will be imposed, and the fact of his having offered to the solicitor a sum to obtain his certificate, held not to amount to acquiescence. Bowers, ex parte, 2 Deac. (s.) 99; and 3 M. & Ayr. 33.

15. On an application to stay adjudication, the depositions must be produced, but the party applying has no right to inspect them. Bryant, in re, 2 Deac. (s.) 140.

16. So, an application to reverse adjudication, there being no affidavit in support of the petition, the court refused inspection. Whalley, ex parte, 2 M. & Ayr. (s.) 722.

17. Direction of the *fiat* altered to another place, where the great majority of creditors resided. Johnston, in re, 2 Deac. 290.

18. Where the petitioning creditor's debt had been reduced by set-off, the Court refused to allow him to issue a new *fiat* with another creditor before the time for opening the original one had expired. Ward, ex parte, 3 Mont. & Ayr. (s.) 394.

19. The Court refused a second application to extend the time for opening, where no sufficient excuse shown for the delay; but where notice was given of the opening of the *fiat* on the twentieth day after application made, but before an order to annul the former *fiat* and issue a new one was delivered out, the Court, in the absence of



*mala fides*, allowed the first one to be proceeded in, on payment of the costs of the second *fiat* and of the motion. *Saunders, ex parte*, 3 M. & Ayr. (s.) 206; and 2 Deac. 216. 317.

20. Nor will the time be extended on the ground of a proposal for a compromise pending, unless under special circumstances. *Stirk, ex parte*, 3 M. & Ayr. (s.) 209; and 2 Deac. 328.

21. Where the time for opening having expired, an order was obtained on the nineteenth, on the ground of some defect in the affidavits, for a new *fiat*, but which order was not acted upon within the twenty-eight days under Lord Loughborough's Order of 1793, after the issuing of the original *fiat*; held, that a second creditor, who had issued a *fiat*, was entitled to the preference, and the first petitioning creditor, occasioning the application, liable to the costs. *Scott, in re*, 3 M. & Ayr. (s.) 239; and 2 Deac. 406.

22. The Court will order the third meeting to be adjourned, in the absence of the *quorum* commissioners. *Williams, ex parte*, 3 M. & Ayr. (s.) 154.

23. *Fiat* transferred to London, on an affidavit that most of the creditors and witnesses lived there, and that it would be most beneficial for the estate. *Snelling, in re*, 2 Deac. (s.) 557.

24. Upon a petition by the bankrupt, to reverse the adjudication, the Court looks at the proceedings, and, if the depositions are insufficient, and the parties have no other evidence, it will annul the *fiat* at once; but if there is a sufficient act on the face of the proceedings, further investigation will be required, and an opportunity given to the bankrupt of controverting the depositions. *Field, ex parte*, 3 Mont. & Ayr. (s.) 375.

25. After two meetings, although the second held before the forty-second day, the Court, with consent, annulled the *fiat*. *Foulkes, ex parte*, 3 Mont. & Ayr. (s.) 366.

26. The Court will not interfere to annul a *fiat* concocted in fraud between the bankrupt and others, although within three days before it issue the bankrupt abandons it, and the others proceed to issue it. *Nainby, ex parte*, 3 Mont. & Ayr. (s.) 452.

27. A petition to annul on the ground of fraudulent concert and preference, under circumstances inducing strong suspicion that it was the bankrupt's petition, dismissed with costs. *Sayer, ex parte*, 2 Deac. (s.) 491.

28. *Fiat* annulled on the petition of the assignee, on the ground of the petitioning creditor's debt being fictitious, and by collusion, the commissioner not having admitted proof of the debt, and no appeal from his decision. *Biggs, ex parte*, 2 Deac. (s.) 549; and 3 Mont. & Ayr. 328.

29. Where the petitioner in July, gave notice of a petition to annul the *fiat*, on the ground of fraudulent concert, and that the party was not a trader, and in September opposed the sale of the estate, but did not present his petition until the following February, two days after the certificate obtained, and after sales effected; held, that the delay did not preclude the right to a *viva voce* examination, on an issue to be tried by a jury. *Lewis, ex parte*, 3 M. & Ayr. (s.) 120.

30. A slight difference in the spelling the name of the bankrupt's place of residence, held not to amount to such misdescription as to vitiate the *fiat*; and the bankrupt having also a warehouse at S., for the sale of goods manufactured at H., of which he was described, held an immaterial omission, it not appearing that any creditor was misled. *Magee, ex parte*, 2 Deac. (s.) 553.

31. Where the petitioning creditor had not the bill on which he made his affidavit of debt for the docket in his possession at the time, the bill being the only evidence of the debt, the court annulled the *fiat* on his petition, and at his costs; but the court refused to impound the bill, which is only done where there is a criminal charge against any of the parties to it. *Patzeker, ex parte*, 2 Deac. (s.) 469; and 3 M. & Ayr. 329.

32. Petition by trustees under a trust deed, executed by two parties, one an infant, and against whom a joint *fiat* had issued, to annul the *fiat*, refused; the petitioners having no interest to give them a *locus standi* to make application, as the infancy would be equally fatal to the trust deed as to the *fiat*. *Addison, ex parte*, 3 Mont. & Ayr. (s.) 434.

33. After a verdict in an action against assignees, to which the petitioning creditor was not a party, held that it was not of course to annul the *fiat* as against him. *Mackintosh, ex parte*, 3 Mont. & Ayr. (s.) 365.

34. Affidavit of two creditors' (in Ireland) signature of consent to annul, allowed, although not sworn before a magistrate, but before a master extraordinary, attested by a notary public. *Greer v. Greer*, 2 Deac. (s.) 340; and 3 M. & Ayr. 216.

35. The court will not interfere where there are competing dockets, unless the officer refers the party to it by refusing to issue a *fiat*. *Thorpe, ex parte*, 3 Mont. & Ayr. (s.) 395.

36. The Chancellor has jurisdiction to hear an original petition, to supersede or annul a *fiat*; but he is not bound to do so, and will not unless special grounds shown. *Brittain, ex parte*, 3 M. & Ayr. (s.) 325.

37. Where a renewed *fiat* is sought by the bankrupt, and the petitioning creditor does not issue it, the bankrupt will be at liberty to issue it in the petitioning creditor's name. *Bristow, ex parte*, 3 M. & Ayr. (s.) 213; and 2 Deac. 334.

38. Where the *fiat* had been directed to commissioners of W. district, upon a mistaken supposition that the commissioners of K., to which it would otherwise have gone, were creditors, the Lord Chancellor directed a renewed *fiat* to issue to K., taking up the proceedings in the state they then were at W. *Evans, in re*, 2 Deac. (s.) 480.

39. All *fiats* to be directed to the Court of Bankruptcy, or the list in the country, nearest to the bankrupt's place of residence, unless a special order be obtained on affidavit, directing it to go to any other list. *Gen. Ord. 9 June 1837*; 3 Mont. & Ayr. (s. c.) 714; and 3 Deac. (s.) 549.

40. Every *fiat*, without special reason for the



contrary, should be worked near the place where the bankrupt carried on his business, as tending best to the discovery of the property, and where are the best witnesses to contradict him. Brett, ex parte, 1 Mont. & Ch. (s.) 70.

41. So the mere allegation of the act of bankruptcy being fraudulent, and the suggestion of the greater facility of committing fraud in the country on London creditors, held not sufficient grounds for issuing it in London. Meeking, ex parte, 1 Mont. & Ch. (s.) 71.

42. Nor that it would occasion expense and greater delay. Allen, in re, lb. 146.

43. So, although the majority of creditors in number and value resided in town. Hugo, ex parte, and Helyer, ex parte, lb. 72.

44. So, although all the creditors of a country trader were resident in town. Anon. lb. 142; Binks, ex parte, lb. 144. S. P. Anon. lb. 148; Allen, in re, lb.

45. Where two of the country commissioners were creditors, two residing at a considerable distance, and the fifth generally declined attending, and only four creditors out of 60,000l. resided in the neighborhood, the Lord Chancellor allowed the application after refusal by the Court. Geach, ex parte, 1 Mont. & Ch. (s.) 145.

46. And where the bankrupt lived 120 miles distant, and petitioning creditor, witness to prove the act of bankruptcy, and major part in value of the creditors resided in London, *fiat* allowed to issue there. Anon. lb. 142. But refused in Mansfield, ex parte, lb. 145, on similar grounds.

47. Where it was shown that the business was carried on in different places distant from each other, the Court reluctantly allowed it to be worked at a place central, and nearer the major part of the creditors. Haines, ex parte, 1 Mont. & Ch. (s.) 72.

48. *Fiat* removed from the country to London, where the majority of the creditors resided, the costs in the first instance to be paid by the petitioning creditor, and afterwards recouped out of the estate. Ellis, ex parte, 1 Mont. & Ch. (s.) 39.

49. But refused merely on the ground of the petitioning creditor residing in London, and a considerable portion of the creditors. Rawlings, ex parte, 1 Mont. & Ch. (s.) 59.

50. Where the destination of the *fiat* was improperly changed on a false statement, as of country commissioners being creditors, a new one ordered to be issued to them. Scott, in re, 3 Mont. & Ayr. (s. c.) 724.

51. The Court refused to allow the *fiat* to be directed to a place where the bankrupt had resided two years ago, and had since no permanent place of residence, although largely indebted to persons there. Hewitt, in re, 3 Deac. (s.) 586.

52. The Court allowed, but reluctantly, a London *fiat* to issue against a country trader where the property was in town, and about to be carried out of the country. Booth, ex parte, 3 Mont. & Ayr. (s. c.) 627.

53. So, where a majority of the creditors re-

sided in London. Grigg, in re, lb. 684; and 3 Deac. 381.

54. Where the bankrupt carried on his trade at Oxford, a *fiat* issued in London, where the major part of the creditors as well as debtors resided, the petitioning creditor undertaking to pay the expenses of the bankrupt coming to London to attend the *fiat*. Trowers, ex parte, 3 Mont. & Ayr. (s. c.) 484.

55. Docket papers describing the bankrupt as of the place where he was then actually trading preferred to those describing him only as of his late residence. Allday, ex parte, 3 Mont. & Ayr. (s. c.) 465.

56. The circumstance of a majority of creditors residing in London is not a ground for ordering the *fiat* to be directed to London instead of country commissioners. Rawlinson, ex parte, 3 Deac. (s. c.) 535.

57. Where a joint *fiat* issued against two, one of whom shortly afterwards died; held, that the petitioning creditor was entitled to a reasonable time to issue another *fiat*, and where guilty of no unreasonable delay, to be preferred to one who had previously lodged docket papers for a separate *fiat*. Norris, ex parte, 3 Deac. (s.) 643; and 1 Mont. & Ch. 157.

58. The court refused to interfere between two parties competing for the *fiat* on the mere ground of irregularity in the description of the party in the bond, but permitted a verbal inaccuracy to be amended. Lees, in re, 3 Deac. (s.) 38.

59. A commission renewed in 1816, and since which two of the commissioners were dead, and two others removed, held a sufficient ground for superseding it; and the pendency of a petition to the Lord Chancellor to annul a renewed *fiat* was no objection to the hearing of the petition. Higgs, ex parte, 3 Deac. (s. c.) 474; and 1 Mont. & Ch. 94.

60. Where the court sees clearly that the sole object of suing out a separate *fiat* is to dissolve a partnership, the *fiat* will be annulled; but not where the circumstances amount to suspicion only. Parkes, ex parte, 3 Deac. (s.) 31.

61. Proceedings under separate *fiats* ordered to be incorporated with those under a joint *fiat*, where assignees had been chosen and a dividend declared under separate *fiats*. Lister, ex parte, 3 Deac. (s.) 516.

62. A second one allowed to issue by the same party where the first had expired by inadvertence and mistake in the construction of the new Insolvent Act. Partridge, ex parte, 1 Mont. & Ch. (s.) 165.

63. Where the bankrupt, with a surety, entered into an agreement for a composition for 20s. in the pound, in consideration that the *fiat* should be annulled, and 10s. having been paid, the assignees possessed a fund sufficient to satisfy the remainder, but were proceeding to sell the bankrupt's property, the court refused to interfere, questioning the validity of the agreement to suspend the working of the *fiat*. Nainby, ex parte, 3 Deac. (s. c.) 586.



64. Where no proceedings were taken for nearly two years after issuing the *fiat*, to enable the bankrupt to settle disputes with his partner by arbitration, which failed, the court, and Lord Chancellor, on application, refused to allow a fresh one to be issued. *Foljambe, ex parte, 3 Deac. (s. c.) 628.*

65. The court refused to enlarge the time for opening a town *fiat*, on the ground of the non-attendance of the witness to prove the act of bankruptcy. *Hilsdon, ex parte, 1 Mont. & Ch. (s.) 72.*

66. Where the 28 days for opening a *fiat* expired on the 11th of January, and the adjudication was made on the 10th, but no notice thereof having appeared, another docket was struck by a creditor on the 14th; held, that the first *fiat* was valid, and a motion for a *fiat* to issue on the second docket refused: the costs would depend on the question of good faith between the parties. *Wood, in re, 3 Deac. (s. c.) 514; and 1 Mont. & Ch. 69.*

67. Several creditors may join in one power of attorney to sign a consent to annul a *fiat*. *Anon. 3 Deac. (s. c.) 377.*

68. Where a joint *fiat* was taken out against two, one an infant, the court allowed it to be annulled, either as to him only, or generally. *Watson, ex parte, 3 Mont. & Ayr. (s. c.) 682; 3 Deac. 277.*

69. Where upon an insufficient petitioning creditor's debt, one assignee petitioned to annul, but the other was desirous of prosecuting the *fiat*, alleging that a good petitioning creditor's debt might be substituted, the court refused the petition to annul, but gave the party leave to retire at his own costs. *Booker, ex parte, 3 Deac. (s. c.) 232; and 3 Mont. & Ayr. 643.*

70. On a petition to annul a *fiat*, the court will inspect the proceedings, and if not satisfied, will either allow affidavits to be made, or direct a *viva voce* examination; but if no act of bankruptcy appears on the face of the proceedings, it will annul the *fiat*: if a *viva voce* examination be directed, notice must be given by the assignees of the act they rely on, but they need not name the witnesses for such examination; affidavits cannot be read: if the petition be by the bankrupt, *bona fide*, the court will allow him to inspect or to have copies of the depositions, but not where it is by a third party. *Foster, ex parte, 3 Deac. (s. c.) 175; and 3 Mont. & Ayr. 492.*

71. A petition by a creditor to annul must show that he was a creditor at the time the *fiat* issued, and is still so; and after a delay of three years, the court would not interfere in his behalf. *Sandall, ex parte, 3 Deac. (s. c.) 275.*

72. On petition by the bankrupt to annul for want of trading, an affidavit stating that a party when examined said so and so, cannot be read, as the examination should be produced (*diss. Rose, J.*) *Newall, ex parte, 3 Mont. & Ayr. (s. c.) 666; and 3 Deac. 333.*

73. Where it appears that a *fiat* has been sued out, not for the legitimate purposes of a *fiat* in bankruptcy but of enforcing securities, and for an account pending a suit in equity, the court is bound in the exercise of its equitable jurisdiction

to annul it (*diss. Erskine, C. J.*) *Hall, ex parte, 3 Deac. (s. c.) 405.*

74. It is not imperative on the court to annul a *fiat* issued by a party who has come in under a trust deed, as where he afterwards discovers that the deed gives a fraudulent preference to any creditor. *Hallowell, ex parte, 3 Mont. & Ayr. (s. c.) 538; and 3 Deac. 278.*

75. Where the *fiat* appeared to have been sued out only for the purpose of giving the bankrupt his certificate, and to deprive the petitioners of the fruit of a judgment, held to be an abuse of the process of the court, and annulled. *Gaitkell, ex parte, 3 Deac. (s.) 635; and 1 Mont. & Ch. 160.*

76. The order to annul for want of prosecution is of course, unless the petitioning creditor presents a cross petition for leave to open the *fiat*, notwithstanding the time for the opening has elapsed. *Jones, ex parte, 3 Deac. (s. c.) 230; and 3 Mont. & Ayr. 503.*

77. *Fiat* annulled with consent of creditors, the meeting for the choice of assignees having been advertised and adjourned, but none attended, and the bankrupt having surrendered. *Foukes, in re, 3 Mont. & Ayr. (s.) 724.*

78. On a petition to annul a *fiat* and stay the adjudication, the court will not order the latter unless probable cause be shown that the petitioner will succeed on the former part of his petition. *Rhodes, ex parte, 3 Deac. (s.) 696.*

79. Where a party had acted as assignee under a *fiat* for above two months, and his proof been rejected; held, that he was not in a situation to apply to annul the *fiat*, for want of a good petitioning creditor's debt. (*Diss. Cross, J.*) *Booker, ex parte, 3 Deac. (s. c.) 346.*

80. On a petition by the bankrupt to annul for want of a sufficient act of bankruptcy, the obligation of proving the affirmative lies on the respondent; and upon a reference back to review the adjudication, new depositions before them are admissible in support of the *fiat*. *Welden, ex parte, 3 Deac. (s. c.) 240; and 3 Mont. & Ayr. 493.*

#### [E] COMMISSIONERS—POWERS OF—COMMITMENTS BY.

1. Where the solicitor wilfully omits to summon the quorum commissioners in a country *fiat*, the court will order him to indemnify them for fees of the previous meetings, with costs, and to be summoned at all future meetings. *Williams, ex parte, 1 Deac. (s.) 596; and 1 M. & Ayr. 616.*

2. Where a country commissioner being regularly summoned does not attend the meeting, being absent on his own private business, he is liable to pay the costs of another meeting rendered necessary by his default; and *semb.* the Court would find means of enforcing the payment. *Hall, ex parte, 1 Deac. (s.) 536; and 2 M. & Ayr. 677.*

3. If fees are improperly taken by commissioners, they should be served with the petition, and brought before the Court; they may, if necessary,



hold separate meetings on the same day, and receive fees for each. *Hadfield, ex parte*, 2 Deac. (s.) 121; and *S. C. Christy, ex parte*, 3 M. & Ayr. 96.

4. Where a party, whilst detained in five actions in custody of the warden, being declared bankrupt, a warrant issued from the commissioners, directed to the keeper of Newgate, to detain him until he should make full answers; the Court held, that not being in the custody of the warden under the commissioners' warrant, the Court had no authority to inquire as to its validity. *Garcia, ex parte*, 3 Bing. N. S. (c. p.) 299; 3 Sc. 662; and 5 Dowl. (p. c.) 352.

5. Where the bankrupt, whilst committed in execution to the marshal, being brought up for examination before the subdivision court, was by them committed to Newgate for not answering satisfactorily, the keeper of which re-delivered him to the messenger, who delivered him over to the marshal; the court refused a *habeas corpus* to bring him up on the ground of the answers being satisfactory. *Knight, ex parte*, 2 Mees. & W. (xx.) 106.

6. A solicitor cannot refuse to summon a *quorum* commissioner, because, in his judgment, he may have taken an illegal fee; but the commissioner cannot take two travelling fees for two meetings held on the same day, at the same place, although under different *fiats*. *Scott, ex parte*, 3 Mont. & Ayr. (s.) 424.

And *vid. infr.*

7. Where the commissioner had expunged a proof, on the ground of his not having disclosed a security held, and the court subsequently made an order for him to inquire into the truth of certain allegations as to a supposed fraudulent preference, which the commissioner declined doing, *semb.* such refusal was improper, and amounting to a denial of justice; the effect of 1 & 2 Will. 4, c. 56, does not affect the duties of the commissioners and the Court of Review has the same jurisdiction to call on them to fulfil their duties; there is no distinction between the duties of the London and of country commissioners. *Rolfe, ex parte*, 3 M. & Ayr. (s.) 421; and 2 Deac. 305.

8. The court refused an *ex parte* application to annul a commission, although issued above twenty years, and 20s. in the pound had been paid, and the creditors could not be found; but, with consent, a renewed *fiat* might issue, or the heirs of the assignees might be traced, or the debts be expunged on the ground of payment in full. *Ward, ex parte*, 3 Mont. & Ayr. (s.) 399.

9. *Semb.* a commissioner ought not to adjudicate a party bankrupt from evidence on record of the *fiat* being void at law. *Chambers in re*, 3 M. & Ayr. (s.) 294; and 2 Deac. 494.

10. The 6 Geo. 4, c. 16, s. 106, is merely directory, and the commissioners may therefore appoint a meeting for auditing, after the six months, without an order of the court. *Holyland, ex parte*, 3 M. & Ayr. (s.) 326.

11. The commissioners have power to appoint an audit meeting, although more than six months have elapsed since the last examination. *Holyland, ex parte*, 3 M. & Ayr. (s. o.) 694.

12. The court refused to interfere to direct commissioners to issue a warrant for the apprehension of the bankrupt, he not having surrendered. *Creed, in re*, 3 Deac. (s.) 38; and 3 M. & Ayr. 725.

13. A party who had been found bankrupt, and about to abscond to America, having been apprehended by the messenger without warrant, and committed by the commissioner for not satisfactorily answering, the court (*Rose, J. dubitante*), ordered the commissioner to discharge him forthwith. *James, ex parte*, 3 Deac. (s. c.) 518; and 1 Mont. & Ch. 165.

14. Where a party had been lying under a commitment, for not answering satisfactorily, for 12 months, and was in a state of extreme destitution, the court, under circumstances, ordered him to be brought up again at the expense of the estate. *Crosswell, ex parte*, 3 Deac. (s. c.) 492; and 1 Mont. & Ch. 40.

15. Where the bankrupt was under commitment for contempt, for not paying costs awarded on a previous order made by the Lord Chancellor, on application to be discharged, on the ground of the commitment being invalid; held, 1st, that the Court of Review had power to make any order for enforcing an order of the Lord Chancellor in bankruptcy; 2dly, that the order reciting it to have been made upon a previous petition, the court would not question the regularity of the order upon affidavits alleging formal inaccuracies, and that the affidavits in support of the petition were properly entitled, "In the Court of Bankruptcy," and that a clerical error in stating the order of commitment to have been made on the *intention*, instead of petition, was not fatal. *Green, ex parte*, 3 Deac. (s.) 700.

#### [F] ASSIGNEES.

##### (a) *Choice—removal.*

1. The commissioners ought not to adjourn the choice to enable creditors, whose proof is rejected, to petition the Court for liberty to vote in the choice. *Bignold, ex parte*, 1 Deac. (s.) 712; and 2 M. & Ayr. 633.

2. Notice of meeting for the choice, advertised only three days before, giving insufficient opportunity for creditors residing at a distance of attending; held a sufficient ground for setting aside the choice. *Morris, ex parte*, 1 Deac. (s.) 498.

3. Upon the removal of an assignee for any cause, the Court will give the creditors the option of choosing another. *Rolls, ex parte*, 1 Deac. (s.) 618.

4. Where it was alleged that the choice had been by connivance with the bankrupt, and that they had proved fictitious debts, the Court directed an inquiry, although there was reason to believe the allegations untrue, and founded in malice; upon the general rule of protection which the Court is bound to give to bankrupt's estates. *Molineux, ex parte*, 1 Deac. (s.) 603.



5. Where parties, as trustees, managed the bankrupt's business for the general benefit of the creditors, and issued *fiats* to prevent others doing so, under which they also acted as assignees; held, that being liable to account in both characters, the court could not avoid removing them, and directing a new choice. Mendel, ex parte, 4 Deac. (s.) 725.

6. Where one is elected against his consent, and refuses to accept the office, there must be a new choice of all. Stephenson, ex parte, 3 M. & Ayr. (s. c.) 663; and 3 Deac. 321.

7. So where one becomes lunatic. Rolls, ex parte, 1b. 792.

8. As the assignees must be removed where the choice has been influenced by the interference of the bankrupt: where they did not deny that they were parties to some arrangement having for its object their being chosen, the court directed an inquiry. Molineaux, ex parte, 3 M. & Ayr. (s. c.) 703.

9. But in such case, if the petitioner be insolvent, the assignees may apply for security for the costs of such inquiry. 1b.

10. A party elected sole assignee in his absence, and contrary to his intention, in executing the power to vote in the choice, allowed to be removed, paying the costs. Hammond, ex parte, 1 Mont. & Ch. (s.) 72.

#### (b) Duties—liabilities—protection.

1. Where an affidavit is made by an assignee to dispense with his personal attendance at the audit, he is liable to the costs of such affidavit. Hadfield, ex parte, 2 Deac. (s.) 227; and S. C. Christy, ex parte, 3 M. & Ayr. 88.

2. *Semb.* under s. 106, an audit, passed without the personal examination of the assignees, is not valid. 1b.

3. Where one of three assignees had gone abroad, and could not be heard of, the audit allowed to pass on the oaths of the other two. Heatherley, ex parte, 2 Deac. (s.) 93; and 3 M. & Ayr. 28.

4. Assignees held to have been properly disallowed the costs of a meeting of creditors to consider measures which they themselves ought to have determined, and also the tavern expenses of the bidders at a sale. Molineaux, ex parte, 2 Deac. (s.) 33.

5. Where there is fair doubt in the minds of the assignees how to act in a case of difficulty, the court will decree a reference, as whether an arrangement will be beneficial or not. Marks, ex parte, 2 Deac. (s.) 86; and 3 M. & Ayr. 35.

6. Where the sale had been made ten years ago, and the assignees were dead, the court refused a claim made by the executors of the auctioneer; and held, that, as the official assignee ought not to have appeared separately, he should pay the costs of his appearance. Hendrie, ex parte, 2 Deac. (s.) 76; and 3 M. & R. 20.

7. Where the purchaser of a bankrupt's estate,

before conveyance by the assignees, resold it at a profit, the court, in the absence of any unfairness, ordered the assignees to convey to such second purchaser. Anderdon, ex parte, 1 Deac. (s.) 585.

8. Where the bankrupt had agreed for the purchase of a freehold, and paid a deposit, but became bankrupt before the conveyance, the court made a special order for the assignees, within a fortnight, to elect, to perform or rescind the agreement without prejudice to the question of return of the deposit. Bridger, ex parte, 1 Deac. (s.) 581.

9. Where the wife, being possessed of gas shares, the certificates of which the husband deposited with bankers as a security for advances, but no notice was given of the transfer to the gas company until after an act of bankruptcy; held, that the bankers could not retain the certificates as against creditors; and the wife held entitled to be served with the petition. Spencer, ex parte, 1 Deac. (s.) 468.

10. After a notice by a creditor to assignees, to dispute the bankruptcy in an action brought by them; held, that he could not be permitted to petition against them as assignees: held also, that where they carried on the business by the authority of a majority of creditors, one dissenting could only apply for an order for their ceasing to do so, upon proof that he had sustained damage thereby. Hall, ex parte, 2 Deac. (s.) 263.

11. Where an assignee refuses to concur in an arrangement, there must be a reference to the commissioners, and if they affirm it to be beneficial, the assignee must execute the deed of confirmation. Taylor, ex parte, 3 M. & Ayr. (s.) 222; and 2 Deac. 399.

12. Reference, whether the sale of a debt by the assignee would be beneficial to the estate, allowed. Trimmer, ex parte, 3 M. & Ayr. (s.) 245.

13. Assignees are bound to elect whether they will take or reject a lease, although it may be tainted with usury; and if they reject it, the lease will be ordered to be delivered up; and although the petition be dismissed, the rejection will stand. Williams, ex parte, 3 M. & Ayr. (s.) 210; and 2 Deac. 330.

14. Where a party struck a docket, and afterwards became a trustee under an assignment of all the bankrupt's property in trust for creditors, and after he had incurred some expenses in executing the trust, another creditor issued a *fiat* and the assignee seized the property in the hands of the petitioner; held, that the assignment being of itself notice of an act of bankruptcy, he could acquire no lien on the property as against the assignees. Swinburne, ex parte, 3 Deac. (s. c.) 396; and 1 Mont. & Ch. 119.

15. Where the sole assignee of a party who had become liable as a surety was a creditor of the principal, and petitioned for the sale of the property mortgaged by the latter, an inquiry directed as to what interest the surety had in it, and to appoint persons in the nature of assignees to protect such interest, if any existed. Haines, ex parte, 1 Mont. & Ch. (s.) 32.



16. Where an assignee had not been consulted as to the sale, nor had in any way consented thereto, and entertained fears that he might, by executing the conveyance, prejudice the rights of the creditors, the court refused to order him to execute, without a previous reference and inquiry whether the sale was proper and one in which he ought to concur. *Underhill, ex parte*, 3 Mont. & Ayr. (s. c.) 660; and 3 Deac. 326.

17. The court refused to allow, in the assignee's accounts, charges for meetings of creditors to resolve whether an action against them should be defended or not, nor for tavern expenses of bidders at an auction of part of the estate. *Molineux, ex parte*, 3 Mont. & Ayr. (s. c.) 721.

18. Where the purchaser of an estate from the assignees immediately re-sold it at an advanced price, in the absence of any thing alleged against the sale, the court ordered the assignees to convey to such person as the purchaser should direct. *Anderdon, ex parte*, 3 Mont. & Ayr. (s. c.) 698.

19. Where, after a dividend of 15s. declared, the assignee, in expectation of the estate paying 20s., paid a creditor at that rate, and became bankrupt, and the creditor was appointed his assignee; held, that the court could compel him to repay the excess so received. *Grimwood, ex parte*, 3 Mont. & Ayr. (s. c.) 685.

20. Where, before the election of assignees, the petitioner paid a sum to prevent a distress, and with the bankrupt's consent sold goods to part of the amount, the court restrained the assignees from prosecuting an action to recover that sum. *Elliott, ex parte*, 3 Mont. & Ayr. (s. c.) 664; and 3 Deac. 343.

21. Where the bankrupt, on being appointed treasurer of a friendly society, was by the rules, to pay interest on a stated sum in hand; held, that it did not constitute a loan, but within the 4 & 5 Will. 4, c. 40, s. 12, as within his hands by virtue of his office as treasurer, and the assignees liable to pay over the amount to the society. *Ray ex parte*, 3 Deac. & 1 Mont. & Ch. (s. c.) 537.

22. Where a party on being examined produced a book before the commissioners, of which he was in the lawful possession, and which the assignees retained, the court ordered it to be restored, without entering into the question of the legal title to it. *Gilbard, ex parte*, 3 Deac. (s. c.) 488.

23. In trover by an assignee, upon the issue that the plaintiff was not possessed, &c. as assignee, it appearing that the plaintiff, being assignee under a second commission, had permitted the bankrupt to continue in the order and disposition of the goods, the defendant succeeded on that issue; held, that he was entitled to the costs of proving the third *fact*, which was not a nullity, but not of proving the estate sufficient for payment of 15s. in the pound under the second commission; the 6 Geo. 4, c. 16, s. 127, extending only to the cases where the estate and effects existing at the date of the certificate were sufficient to produce that amount; which, unless that were the case, the subsequently acquired estate would vest in the assignees. *Butler v. Hobson*, 5 Bing. N. S. (s. c.) 128; and 7 Dowl. (p. c.) 157.

### (c) Official assignees.

1. The official assignee is not an officer of the court within the 6 Geo. 4, c. 16, s. 44, so as to be entitled to notice of an action by the bankrupt for seizing his goods under the *fiat*. *Knight v. Turquand*, 2 Mees. & W. (ex.) 101.

2. The court refused to compel the official assignee to execute an assignment of all the bankrupt's effects on a contract by the assignees, without a reference to settle the form of the deed, and of his indemnity. *Young, ex parte*, 2 Deac. (s.) 240.

3. As to attaching parties appointed to particular lists, see the New Ord. 1835. 1 Deac. (s.) 692; and 2 M. & Ayr. xxxiv.

4. As to payment of monies in to the Accountant in bankruptcy, see the New Ord. 1836; 1 Deac. 694; and 2 M. & Ayr. xxxiv.

And see *Witness*; and *infra*, [O.] 1.

5. An official assignee ought never to present a petition, except under the express directions of a commissioner. *Groom, ex parte*, 3 M. & Ayr. (s.) 161; and 2 Deac. 265.

6. Dividends, until actually paid over to the creditors, continue to form part of the bankrupt's estate; where, therefore, they remained in the hands of a deceased assignee, prior to 6 Geo. 4, c. 16, held that the official assignee was entitled to file a bill for an account, &c., against the representatives of the deceased assignee; and it is not necessary that creditors not claiming should be parties. *Green, ex parte*, 3 Mont. & Ayr. (s.) 414.

7. The official assignee has such a title in unpaid dividends, shown to have been remaining in the hands of a former assignee, as to entitle him to support a suit against the personal representative of such assignee, and to a decree for an inquiry as to the manner such sums have been disposed of. *Green v. Weston*, 3 Myl. & Cr. (ch.) 385.

8. An official assignee retiring, order made for his discharge, on his undertaking to pass his accounts from time to time as the several estates were wound up. *Goldswid, ex parte*, 3 Mont. & Ayr. (s. c.) 623.

9. The official assignee's title to remuneration is for services performed; where therefore the proceeds of sale of mortgages were insufficient to satisfy the mortgage debt, and were paid over by the purchaser to the mortgagee; held, that he was not entitled to commission. *Whisson, ex parte*, 3 Deac. (s.) 646.

[d] *What passes to, under the assignment—what within the order and disposition of the bankrupt.*

1. Where foreign merchants remitted bills to their London agents, and there was nothing from the correspondence to show that the latter were authorized to deal with them as their own, but that the only obligation of the foreign house was to keep the agents in cash to meet the bills when



due; held, that the bills not having been discounted nor disposed of, there was nothing to displace the title of the remitters, and that they did not pass to the assignees of the agent. *Jombart v. Woollett*, 2 Myl. & Cr. (ex.) 389.

2. Where the plaintiff contracted for the building of a ship, the price to be paid by instalments upon the completion of certain portions, the work to be approved of by the plaintiff's agent; after certain parts completed, and the instalments paid, the builder became bankrupt, and the assignees finished the ship, and the plaintiff tendered the remaining instalments; held, in trover for the ship, that upon payment of the instalments the property in the portion completed vested in the plaintiff, subject to the right of detaining, in order to earn the remaining part of the price, and that the materials subsequently added became the property of the general owner, and that the ship did not pass to the assignees as property within the order and disposition of the bankrupt. *Clarke v. Spence*, 4 Ad. & Ell. (x. s.) 448; and 6 Nev. & M. 399.

3. Where A., B. and C. being partners, on the retiring of A., B. and C. covenanted to pay him ————, by annual instalments, and that, if any instalment should become in arrear, A. might enter and take possession of all the partnership property, and that the assignment of A.'s interest to B. and C. should become void; afterwards B. retired, and assigned all his share to C., who became bankrupt, and the instalments in arrear, but C.'s assignees paid some part, and also received debts due to the original firm; held that such debts were not in the order, &c. of C. at the time of his bankruptcy with the assent of A., and that the assignees were accountable to him for such. *Pemberton, ex parte*, 1 Deac. (s.) 421; and 2 M. & Ayr. 549.

4. Where bills were sent to the bankrupt, an agent, before, but received after his bankruptcy, with instructions to apply the proceeds to a particular creditor, who has notice thereof, held, that the assignees could not retain them. *Cotterill, ex parte*, 3 Mont. & Ayr. (s.) 376.

5. Where a party, by lending his name to a bill, by which a debt may eventually arise, held, that it is a subject of mutual credit, within 6 Geo. 4, c. 16, s. 50; and where the defendant in *assumpsit*, by assignees, for money received to the use of the bankrupt, with a count for money received to the use of the assignees, pleaded the circumstances constituting a mutual credit; held, that the plaintiffs could not, by their replication, put in issue the legality of the debt. *Hulme v. Muggleston*, 6 Dowl. (p. c.) 112; and 3 Mees. & W. (xx.) 28.

6. Where the plaintiff let the goods to a hotel-keeper, to furnish the hotel, which the defendants had seized as assignees, as goods within the order, &c., of the bankrupt, and it was shown, to a considerable extent, to be the custom of upholsterers to let out furniture to such persons; held, that the plaintiff, being the undoubted owner, the issue lay on the defendants to show their title as assignees; and that the question for the jury was, whether the custom was so general that persons must be supposed to have known that the goods, although in the possession, were not the property of the

bankrupt. The jury found for the plaintiff. *Mullett v. Green*, 8 C. & P. (s. r.) 388.

7. Where the broker entered into a contract of freight on behalf of the owner, who afterwards assigned the freight and earnings as a security for a debt to C., who gave notice thereof to the broker, but not to the charterer; upon the bankruptcy of the owner, held that the amount due on the charterparty was not within the bankrupt's order and disposition. *Gardner v. Lachlan*, 8 Sim. (ex.) 123.

8. Where a gas company, possessed of copyholds, and by the deed the shares were made personally; held, that a shareholder having deposited shares as a security, without notice to the company before his bankruptcy, was still to be deemed the apparent owner, and that they passed to his assignee. *Vallance, ex parte*, 3 M. & Ayr. (s.) 224; and 2 Deac. 354.

9. In trover by assignees, plea that the plaintiff was not assignee, held to put in issue the petitioning creditor's debt and the act of bankruptcy; and held also, that goods in possession of the bankrupt, with the consent of his assignee, were to be deemed in his order and disposition, and liable to be seized by his assignee on a subsequent insolvency. *Butler v. Hobson*, 4 Bing. N. S. (c. r.) 290; and 6 Dowl. (p. c.) 409.

10. Where the defendant, the bankrupt's agent in trade, *bona fide* sold goods to a purchaser, after an act of bankruptcy committed by his principal, but of which the defendant was ignorant, and the sale took place two months before the commission issued; held, in trover, that having sold under a general authority only, it was a sufficient dealing with the goods to constitute a conversion, unless justified in what he did by any facts, and which should have been specially pleaded; and that, in the absence of any evidence to show that the purchaser was ignorant of the bankruptcy, on a mere traverse of the assignee's possession, the plaintiffs were entitled to recover; the 6 Geo. 4, c. 16, ss. 81, 82, protecting only the transfer where the dealing is without notice, and the onus of establishing that lying on the party establishing the sale. *Pearson v. Graham*, 6 Ad. & Ell. (x. s.) 689.

11. The assignees being only entitled derivatively from or through the bankrupt, held, that as he could not have maintained an action against the East India Company for the arrears of his pension, it did not pass to his assignees. *Gibson v. East India Company*, 5 Bing. N. S. (c. r.) 262.

12. Where a sum was bequeathed, subject to forfeiture if the legatee should "mortgage, charge, sell, assign or incur;" held, that bankruptcy being an act of law, and not a voluntary assignment by the legatee, which was alone contemplated by the will, the assignees were entitled. *Whitfield v. Prickett*, 2 Keene, (ex.) 608.

13. Where a grantor settled estates on two in succession for life, on condition that the party entitled for the time being should reside in the mansion-house and bear the name and arms of the grantor, the latter becoming bankrupt; held, that having a vested right in remainder in the property at the time of his bankruptcy, it passed, under the bargain and sale, to his assignees, although liable



to be defeated by the default of the party to fulfil the condition; and the court would sanction any arrangement with the assignees whereby the forfeiture might be saved. *Goldney, ex parte*, 3 Deac. (s.) 570; and 1 Mont. & Ch. 75.

14. On a petition by one assignee against his co-assignee for his removal, and to deliver up property of the bankrupt which he had taken in execution before the bankruptcy, but allowed the bankrupt to continue in the possession, the court ordered the goods to be sold, and the proceeds to be paid into court, and an issue, or that the commissioner, with the assent of parties, should decide whether they were in the order, &c. *Bishop, ex parte*, 3 Deac. (s. c.) 132.

15. Where on a joint commission against G. and L. the latter obtained his certificate, and in consideration of undertaking to pay his creditors in full within a certain time, obtained a deed poll to enable him to supersede, and they also executed a power of attorney to enable F. to receive the dividends for the use of L., and do what was requisite to enable L. to supersede. The consideration was never performed, and afterwards a second commission issued against L.; held, that the creditors, and not F. were entitled to receive the dividends, and that the reputed ownership and order and disposition of them was not in the bankrupt. *Smithers, ex parte*, 3 Mont. & Ayr. (s. c.) 693.

16. Where foreign merchants remitted bills to factors, who sold them and entered the amount of the price in their books to the credit of the principals, who had the right of drawing on them to the amount; held, that upon the bankruptcy of the factors the principals were entitled to the proceeds of the bills, and that the bankrupts having indorsed them in their own names, were not to be deemed the owners of them. *Pauli, ex parte*, 3 Deac. (s. c.) 169.

And see *Scott v. Surman*, Willes, 405.

17. Where foreign merchants, through their agents, procured consignments and remitted bills to the consignees for the amount, and informed the consignors of having so done, but before payment the agents became bankrupt; held, that the latter were to be deemed agents through the whole transaction, and that, notwithstanding the claim of the agents or the consignees, the consignors were entitled to recover the bills from such agents. *Douglas, in re*, 1 Mont. & Ch. (s.) 1.

18. Where the bankrupt had deposited as a security for a loan, by the petitioner, shares in a foreign mining company, accompanied with an agreement to complete the transfer when required, and he communicated such deposit to one of the directors, who communicated it to the board before the act of bankruptcy committed; the petitioner afterwards sealed up the shares and entrusted them to the bankrupt to keep in his iron safe for better custody, where they remained until three weeks before the bankruptcy, when they were delivered back; held, not to be within the order and disposition of the bankrupt at the time of his bankruptcy; and, *semble*, shares of a com-

pany possessing lands abroad for the purposes of trade are not to be deemed real property. *Richardson, ex parte*, 3 Deac. (s. c.) 496; and 1 Mont. & Ch. 43.

19. Where premises, with fixtures, were mortgaged, but the mortgagor continued in possession, and, becoming bankrupt, his assignees removed the fixtures; held, that the mortgagee, as against the defendants as strangers, was entitled to consider the mortgagor as his tenant at will, and maintain an action for the injury to his reversionary interest; held, also, that having the same right to the fixtures as his tenant, he might maintain trover for the fixtures so severed, and that they did not pass to the assignees as goods within the bankrupt's order and disposition. *Hitchman v. Walton*, 4 Mees. & W. (xx.) 409.

And see *Partridge v. Bere*, 5 B. & Ald. 604.

20. Where the wife was possessed of gas shares, of which the bankrupt pledged the certificates as a security for advances; held, that no notice having been given to the company until after the act of bankruptcy, the shares were to be deemed within his order and disposition. *Spencer, ex parte*, 3 Mont. & Ayr. (s. c.) 697.

21. Where railway shares were deposited by the bankrupt's partner with bankers, as security for acceptances by a third party, and for whom the bankers had discounted them, and who, being managing director of the company, was informed at the time of renewing the bill that the certificates of the shares had been so deposited; held, that as the bankrupt had parted with the possession of them, and that, as transfer could be made without the authority of the party for whose use they had been so deposited, the bankrupt was not to be deemed the reputed owner, and in his order and disposition. *Harrison, ex parte*, 3 Deac. (s. c.) 185; and 3 Mont. & Ayr. 596.

22. Where certificates of shares of a foreign bank were transmitted to the bankrupts on a contract for joint purchase of them, and clothed with a trust to apply the proceeds, when disposed of, to retire bills drawn for the purchase; held, that they were not within the order and disposition as the property of the bankrupt, and did not therefore pass to the assignees. *Brown, ex parte*, 2 Deac. (s.) 91; and 3 Mont. & Ayr. 472.

23. Where the same party was secretary to two offices, with one of which shares were deposited, held, not sufficient notice of the transfer of the bankrupt's interest to prevent the claim of reputed ownership. *Bignold, ex parte*, 3 Deac. (s. c.) 151; and 3 Mont. & Ayr. 477.

#### (c) *In case of trusts.*

1. Under s. 79, the court may order, if it think proper, trust property to be conveyed to more than one trustee in the place of a bankrupt trustee. *Wilkinson, ex parte*, 2 Deac. (s.) 151.

2. Where lands were devised to the bankrupt and others, in trust to sell and divide equally amongst a class of whom the bankrupt was one, and in consideration of sums agreed to be paid to



of it, yet, if the arbitrator, upon being told that it was intended to have his judgment appealed against, in furtherance of that appeal assigns an erroneous ground for the decision he has pronounced, the Court will interfere. *Jones v. Corry*, 5 Bing. N. S. (c. r.) 187; and 7 Dowl. (r. c.) 298.

#### [B] HOW ENFORCED.

1. To found a motion for an attachment for non-performance of an award under an order of *nisi prius*, the order or submission must appear to have been previously made a rule of Court. *Bath, Mayor, &c. v. Pinch*, 4 Sc. (c. r.) 299.

2. Where the defendant at the time of service refused to take the copy of the award and rule; held, that the attachment might issue, the other requisites being complied with. *Ellis v. Giles*, 5 Dowl. (r. c.) 255.

3. The Court overruled an objection to the affidavit of service of the award, stating it to be of "T. Ward," instead of "T. Wood," the document served being correct; and also that there was no affidavit of the fact of the several enlargements by the arbitrators; having been incorporated in the rule of Court, and made by agreement of the parties, the Court would intend that what was necessary to be done as a foundation for the rule had been done. *Smith v. Reeves*, in re, 5 Dowl. (r. c.) 513.

4. The Court refused to refer back to the arbitrator an award made on a reference of the cause and all matters in difference, on the ground of his having omitted to decide as to one subject, where the application was not made within the first four days of the following term. *Lyng v. Sutton*, 3 Sc. (c. r.) 187; and 5 Dowl. (r. c.) 39.

5. Where, before the cause had been entered, articles of agreement to refer were executed, and the submission was not made a rule of Court until the second term after the publication of the award; held too late to move to set it aside: unless there appear clear and sufficient grounds for the delay, the Court in cases not under the statute will not interfere. *Reynolds v. Askew*, 5 Dowl. (r. c.) 682.

6. Where in an action of covenant by landlord against tenant, assigning several breaches, the cause and all matters were referred, and by the order of *nisi prius* the jury were to find a verdict and damages on the first breach, subject, &c., but no power was given to the arbitrator to enter a verdict on the other breaches; held, that he could not do so, as an indirect mode of ordering money to be paid by the defendant to the plaintiff: held also, that an application might be made to set aside the award at any time within the next term; and a mere application by the defendant's attorney for time, when the costs were taxed and execution about to be taken out, to which the defendant was no party, was not a waiver of the objection to the award. *Hayward v. Phillips*, 1 Nev. & P. (κ. b.) 288.

And see *Donlan v. Brett*, 5 Ad. & Ell. 344.

7. Where a cause was referred to two arbitra-

tors, with power to appoint a third, the award to be made by a stated day, or such other day as they or any two of them should appoint, and the two original referees enlarged the time before the third was named; held, that such enlargement was invalid, and that an award subsequently made by all could not be enforced by attachment. *Reade v. Dutton*, 2 Mees. & W. (ex.) 69.

8. A rule for setting aside an award must be drawn up on reading the award, or it will be discharged. *Barton v. Ransom*, 5 Dowl. (r. c.) 597.

9. Where the award directed costs to be paid in equal proportions by three persons; held, that there must be rules for separate attachments. *Guliver v. Summerfield*, 5 Dowl. (r. c.) 401.

10. Where by the order of reference the party succeeding is to be at liberty to sign final judgment for the amount, and to tax his costs; held, that the award being found for the defendant, he might sign judgment for his costs. *Maggs v. Yorton*, 6 Dowl. (r. c.) 481.

11. Upon a reference of several actions, costs of the several actions, matters, &c., to abide the event, and the arbitrator in each case awarded costs to the successful party; held good, although he did not succeed in all; held also, that after the award made, no objection can be made as to infants having been made parties, or that others interested were not. *Jones v. Powell*, 6 Dowl. (r. c.) 483.

12. Where two actions relating to a right of way had been referred, and the arbitrator directed that the defendant should undertake not to use it, which was given; on an application for an attachment for breach of the undertaking by the defendant's servants, he swearing that he had neither himself used the way, and that the acts complained of were without his knowledge or consent, the Court refused to grant it. *Russell v. Yorke*, 4 Sc. (c. r.) 422.

13. Where an action had been brought on a right of water, as limited by an award, which was referred, and the second award regulating the use was moved to be set aside, as founded on a misconstruction of and at variance with the former one, which the Court considered it not to be; held, that the defendant was not entitled to the costs of the motion, the award being supported. *Hocker v. Greenfell*, 4 Bing. N. S. (c. r.) 103; 2 Sc. 391; and 6 Dowl. (r. c.) 250.

14. The affidavit of execution of a power of attorney demanding performance of the award, held, to be entitled in the cause. *Doe v. Stillwell*, 6 Dowl. (r. c.) 305.

15. Where an action against a pawnbroker for not complying with the requisites of the 39 & 40 Geo. 3, c. 99, s. 6, on receiving a pledge, was referred to an arbitrator, who was to state a case for the Court; and who having stated only one fact, and on reference to him he was unable to state whether the defendant had made the requisite inquiries or not, the Court directed a new trial, unless the parties would consent to its going back to him to find affirmatively or negatively whether the proper inquiries had been made by the defendant. *Fer-*



guson v. Norman, 4 Bing. N. S. (c. r.) 52; and 3 Sc. 304.

16. Where the award upon the face of it purported, and was attested to have been made in due time, the Court would presume it to have been so made: held, also, that the award being for one party to make a surrender of premises, and the costs of it having been offered on making it, it lay upon the party who was to make the surrender to do the first act; an affidavit more than a year old allowed to be used on the application for an attachment. *Doe v. Stillwell*, 3 Nev. & P. (q. b.) 701.

17. Where the parties have intentionally allowed the time to expire without enlargement, the Court has no power under 3 & 4 Will. 4, c. 42, to compel the parties to proceed with the reference. *Doe d. Jones v. Powell*, 7 Dowl. (p. c.) 539.

18. Where an action on a note, and on an account stated, was referred, and the award found the sum, being the amount of the note mentioned in the declaration, to be due; held bad, as not disposing of the issue on the account stated; held, also, in an action on the award, that the production of the rule of Court and award, was sufficient *prima facie* evidence to sustain the issue on the fact of the award. *Gisborne v. Hart*, 5 Mees. & W. (xx.) 50; and 7 Dowl. (p. c.) 402.

19. Where the agreement for an arbitration stipulated that the award, and not the *submission*, should be made a rule of Court, held that the Court had, notwithstanding, jurisdiction under 9 & 10 Will. 3, c. 15. *Storey, ex parte*, 2 Nev. & P. (q. b.) 667; supporting *Fedley v. Westmacott*, 3 East, 603; *Powell v. Phillips*, 2 Tidd, Fr. 821, note (h), ed. 9; and 7 Ad. & Ell. 602.

20. Where an attachment was obtained for non-performance of an award which was ordered to remain suspended, to await the result of an inquiry, and to be discharged on certain conditions which were not complied with; held, that the costs of such inquiry were to be considered as incidental to, and to be considered as part of, the costs of the attachment. *Tyler v. Campbell*, 5 Bing. N. S. (c. r.) 192.

21. Upon reference of a cause at *nisi prius*, with power to certify whether the cause was a proper one to be tried before a Judge of assize; and a certificate was given in the affirmative, but the learned Judge died before the certificate made known to him; held, that having exercised no opinion thereon, the Court had no authority to direct the master to tax full costs. *Astley v. Joy*, 1 Perr. & Dav. (q. b.) 460.

22. Where, after a cause referred, the award was set aside, and the cause again tried, and the plaintiff obtained a verdict; held that the master properly refused the costs of the first trial. *Wood v. Duncan*, 7 Dowl. (p. c.) 344.

23. Where an action, and a cross bill in equity for an injunction to restrain the suit, were referred, the costs of the action and suit "to abide the event," and of the reference, to be in the discretion of the arbitrator; the arbitrator found some of the issues for the plaintiff, with 5*l.* damages,

and the others for the defendant, but that they, having a defence in law, should not proceed in the suit in equity as regarded them; held, that the arbitrator, by having directed that the plaintiff should not proceed in the action for his damages or costs, although he had thereby indirectly exercised a jurisdiction over the costs of the action, had not exercised such a discretion as the reference meant to exclude, but that the costs were still left to abide the event as the parties intended. *Reeves v. MacGregor*, 1 Perr. & Dav. (q. b.) 372.

24. Where, upon a cause being referred before trial, an arbitration bond was executed, but the reference being abortive, the cause was tried; held that the costs of the reference were not costs in the cause, but only recoverable under the bond. *Doe v. Morgan*, 4 Mees. & W. (xx.) 171.

25. Where the language of the award, on the reference of an action on a special contract, and for goods sold, was as much referable to the special as to the general count, and the award was treated as valid, the Court refused to direct the taxation of the master of the general counts to be reviewed. *Rennie v. Miles*, 5 Bing. N. S. (c. r.) 249; and 7 Dowl. (p. c.) 295.

26. Where the reference was to two arbitrators and an umpire, and the agreement to perform the award of the said arbitrators and their umpire, and it was made by the arbitrators only, the Court refused an attachment. *Heatherington v. Robinson*, 7 Dowl. (p. c.) 19; and 4 Mees. & W. (xx.) 608.

And see *Costs*.

## BAIL.

[A] AFFIDAVIT OF.

[B] DEPOSIT IN LIEU OF.

[C] JUSTIFICATION.

(a) *When allowed.*

(b) *Notice of.*

(c) *Affidavit of—in person.*

(d) *Time, when given—effect.*

[D] RENDER.

[E] BAIL-BOND—PROCEEDINGS ON—WHEN STAYED—SET ASIDE.

[A] AFFIDAVIT OF.

1. The affidavit merely stating the debt, "on an account stated between them;" held insufficient, and leave to arrest a second time refused. *Hooper v. Vestris*, 5 Dowl. (p. c.) 710.

2. Affidavit by a party describing himself manager to the R. branch of the Y. bank, and that the defendant was justly, &c. to J. S., as one of the registered public officers of the Y. bank, for £— for money lent to the deponent as such manager, held irregular, as not showing the authority to lend; but not a nullity, and that an application to be discharged made three days after



57. Where the debt arose on a joint note made in 1825 with a party who, in 1835, executed an assignment for the benefit of his creditors, under which a dividend was afterwards received in respect of the note and interest; held, that such payment by a co-contractor did not revive the debt against the bankrupt so as to make it provable. *Woodward, ex parte*, 3 Mont. & Ayr. (s. c.) 609; and 3 Deac. 290, 294; supporting *Jackson v. Fairbank*, 2 H. Bl. 340.

58. Where the bill came through the acceptor, held that, in the absence of fraud, it was no objection to the proof. *Gill, ex parte*, 3 Mont. & Ayr. (s. c.) 590; and 3 Deac. 288.

59. Where the bankrupt was executor in trust, and interested in a share of the bequest, but had not surrendered, a joint legatee allowed to prove; costs to be paid out of the trust fund, but no order made as to the bankrupt's part. *Forrester, ex parte*, 1 Mont. & Ch. (s.) 143.

60. Where a joint and several bond was executed by the bankrupts, and a surety in a sum to secure a balance to that extent on a running account, of bankers with the bankrupt, and on the faith of which subsequent advances were made, but by subsequent dealings the surety became released; held, that the bankers might, notwithstanding, prove against the separate estate of the principals for the amount of balance due. *Walker, ex parte*, 3 Deac. (s.) 673.

61. Where the bankrupts lodged with their bankers acceptances of the petitioners, as security for the floating balance with them, and they afterwards proved for the whole balance and received a dividend; the petitioners afterwards paid the bills and claimed to have the amount of the dividend, to the extent of the bills, refunded and paid to them; the court dismissed the petition with costs as against the bankers, but declared the petitioners to be entitled to all future dividends in respect thereof. *Holmes, ex parte*, 3 Deac. (s.) 663.

62. Where the bankrupt granted an annuity and received from his attorney the whole of the consideration, but half an hour afterwards, and at a different place, paid him a part of it in discharge of a *bona fide* debt, and there were no circumstances of fraud or contrivance to evade the provisions of the Annuity Act; held not a retention within the Act, and the annuity provable. *Bogue, ex parte*, 3 Deac. (s. c.) 319.

63. Where the bankrupt, by deed, granting an annuity, acknowledged the receipt of the consideration, and in an account admitted the amount due, and he had paid the annuity for 10 years, the court refused to reject the proof on an affidavit by the bankrupt that the whole of the consideration was not advanced. *Fairman, ex parte*, 3 Deac. (s. c.) 467; and 1 Mont. & Ch. 126.

64. Where, upon the grant of an annuity, the bankrupt, as surety, covenanted jointly and severally with the grantee to pay the annuity, in case default should be made by the grantor, provided that the grantee should, in such case, give 21 days' notice, in writing, of the sum in arrear, previous to any proceeding against the surety; held,

that, on the bankruptcy of the surety, before any default made, the grantor was not entitled to prove for the value of the annuity under 6 Geo. 4, c. 16, s. 54. *Marks, ex parte*, 3 Deac. (s. c.) 133; and 3 Mont. & Ayr. 521.

65. Where a party, become insolvent, assigned all his estate to four trustees, who carried on the business for the benefit of creditors, three of whom became subsequently bankrupt, and the other died solvent, but there was no joint estate; held, that the rule, that partnership creditors can only resort to the estate of a solvent partner, where there is one, and not prove against the separate estate of each, applied also to the case of joint contractors; and that it was not a sufficient ground for expunging the proof against the separate estate of a partner who was solvent at the time of proof, that he had since become insolvent; held, also, that the estate of the deceased partner, being solvent, could not be considered in the light of a solvent partner. *Bauerman, ex parte*, 3 Deac. (s. c.) 476.

66. Where one of two bankrupts, before the commencement of their partnership, received a deposit of foreign bonds, as a pledge for covering acceptances, which he afterwards applied to purposes of the partnership; held not to discharge his separate liability, and that the commissioner properly admitted proof against his separate estate; and, *semble*, the petitioner might elect to prove either against the joint or separate estate. *Meinertzhagen, ex parte*, 3 Deac. (s.) 101.

67. Where partners carried on business in their separate homes at M. & L., held, that the holder of bills, drawn by one upon the other, was bound to elect to prove against the joint or separate estates, but that he was not bound by the previous receipt of a dividend under the separate estate, on refunding it and paying the costs of the transfer of proof. *Law, ex parte*, 3 Deac. (s. c.) 541; and 1 Mont. & Ch. 111.

68. Where two partners gave their joint and separate note, and before their bankruptcy one executed a mortgage to secure that and such other advances as might become due, and the mortgagee realized a part of the debt due at the time of the bankruptcy; held, that the amount due on the note did not merge in the mortgage, and that proof might be made on the note (*disse*). *Erakine, C. J.* *Bate, ex parte*, 3 Deac. (s. c.) 358.

And see *Ex parte Ladbroke*, 2 Gl. & J. 81.

69. Where one of two partners, jointly possessed of shares, but standing in the name of one, undertook, in consideration of the payment to the firm of an acceptance, to obtain the transfer; held, that, upon the bankruptcy of the firm, the claim on such undertaking sounding in damages and not in debt, the proof could only be made against the joint estate. *Raleigh, ex parte*, 3 Deac. (s. c.) 160; and 3 Mont. & Ayr. 670.

70. Where proof had been made before payment of a portion of the debt by a surety, held, that it did not prevent the receiving dividends on the whole amount of the proof. *Coplestone, ex parte*, 3 Deac. (s. c.) 547.

71. Where the business was carried on in the



due; held, that the bills not having been discounted nor disposed of, there was nothing to displace the title of the remitters, and that they did not pass to the assignees of the agent. *Jombart v. Woollett*, 2 Myl. & Cr. (ch.) 389.

2. Where the plaintiff contracted for the building of a ship, the price to be paid by instalments upon the completion of certain portions, the work to be approved of by the plaintiff's agent; after certain parts completed, and the instalments paid, the builder became bankrupt, and the assignees finished the ship, and the plaintiff tendered the remaining instalments; held, in trover for the ship, that upon payment of the instalments the property in the portion completed vested in the plaintiff, subject to the right of detaining, in order to earn the remaining part of the price, and that the materials subsequently added became the property of the general owner, and that the ship did not pass to the assignees as property within the order and disposition of the bankrupt. *Clarke v. Spence*, 4 Ad. & Ell. (x. s.) 448; and 6 Nev. & M. 399.

3. Where A., B. and C. being partners, on the retiring of A., B. and C. covenanted to pay him ————, by annual instalments, and that, if any instalment should become in arrear, A. might enter and take possession of all the partnership property, and that the assignment of A.'s interest to B. and C. should become void; afterwards B. retired, and assigned all his share to C., who became bankrupt, and the instalments in arrear, but C.'s assignees paid some part, and also received debts due to the original firm; held that such debts were not in the order, &c. of C. at the time of his bankruptcy with the assent of A., and that the assignees were accountable to him for such. *Pemberton, ex parte*, 1 Deac. (s.) 421; and 2 M. & Ayr. 549.

4. Where bills were sent to the bankrupt, an agent, before, but received after his bankruptcy, with instructions to apply the proceeds to a particular creditor, who has notice thereof, held, that the assignees could not retain them. *Cotterill, ex parte*, 3 Mont. & Ayr. (s.) 376.

5. Where a party, by lending his name to a bill, by which a debt may eventually arise, held, that it is a subject of mutual credit, within 6 Geo. 4, c. 16, s. 50; and where the defendant in *assumpsit*, by assignees, for money received to the use of the bankrupt, with a count for money received to the use of the assignees, pleaded the circumstances constituting a mutual credit; held, that the plaintiffs could not, by their replication, put in issue the legality of the debt. *Hulme v. Mugleston*, 6 Dowl. (r. c.) 112; and 3 Mees. & W. (xx.) 28.

6. Where the plaintiff let the goods to a hotel-keeper, to furnish the hotel, which the defendants had seized as assignees, as goods within the order, &c., of the bankrupt, and it was shown, to a considerable extent, to be the custom of upholsterers to let out furniture to such persons; held, that the plaintiff, being the undoubted owner, the issue lay on the defendants to show their title as assignees; and that the question for the jury was, whether the custom was so general that persons must be supposed to have known that the goods, although in the possession, were not the property of the

bankrupt. The jury found for the plaintiff. *Mullett v. Green*, 8 C. & P. (s. r.) 382.

7. Where the broker entered into a contract of freight on behalf of the owner, who afterwards assigned the freight and earnings as a security for a debt to C., who gave notice thereof to the broker, but not to the charterer; upon the bankruptcy of the owner, held that the amount due on the charterparty was not within the bankrupt's order and disposition. *Gardner v. Lachlan*, 8 Sim. (ch.) 123.

8. Where a gas company, possessed of copyholds, and by the deed the shares were made personally; held, that a shareholder having deposited shares as a security, without notice to the company before his bankruptcy, was still to be deemed the apparent owner, and that they passed to his assignee. *Vallance, ex parte*, 3 M. & Ayr. (s.) 224; and 2 Deac. 354.

9. In trover by assignees, plea that the plaintiff was not assignee, held to put in issue the petitioning creditor's debt and the act of bankruptcy; and held also, that goods in possession of the bankrupt, with the consent of his assignee, were to be deemed in his order and disposition, and liable to be seized by his assignee on a subsequent insolvency. *Butler v. Hobson*, 4 Bing. N. S. (c. r.) 290; and 6 Dowl. (r. c.) 409.

10. Where the defendant, the bankrupt's agent in trade, *bonâ fide* sold goods to a purchaser, after an act of bankruptcy committed by his principal, but of which the defendant was ignorant, and the sale took place two months before the commission issued; held, in trover, that having sold under a general authority only, it was a sufficient dealing with the goods to constitute a conversion, unless justified in what he did by any facts, and which should have been specially pleaded; and that, in the absence of any evidence to show that the purchaser was ignorant of the bankruptcy, on a mere traverse of the assignee's possession, the plaintiffs were entitled to recover; the 6 Geo. 4, c. 16, ss. 81, 82, protecting only the transfer where the dealing is without notice, and the onus of establishing that lying on the party establishing the sale. *Pearson v. Graham*, 6 Ad. & Ell. (x. s.) 899.

11. The assignees being only entitled derivatively from or through the bankrupt, held, that as he could not have maintained an action against the East India Company for the arrears of his pension, it did not pass to his assignees. *Gibson v. East India Company*, 5 Bing. N. S. (c. r.) 262.

12. Where a sum was bequeathed, subject to forfeiture if the legatee should "mortgage, charge, sell, assign or incur;" held, that bankruptcy being an act of law, and not a voluntary assignment by the legatee, which was alone contemplated by the will, the assignees were entitled. *Whitfield v. Prickett*, 2 Keene, (ch.) 608.

13. Where a grantor settled estates on two in succession for life, on condition that the party entitled for the time being should reside in the mansion-house and bear the name and arms of the grantor, the latter becoming bankrupt; held, that having a vested right in remainder in the property at the time of his bankruptcy, it passed, under the bargain and sale, to his assignees, although liable



to be defeated by the default of the party to fulfil the condition; and the court would sanction any arrangement with the assignees whereby the forfeiture might be saved. *Goldney, ex parte*, 3 Deac. (s.) 570; and 1 Mont. & Ch. 75.

14. On a petition by one assignee against his co-assignee for his removal, and to deliver up property of the bankrupt which he had taken in execution before the bankruptcy, but allowed the bankrupt to continue in the possession, the court ordered the goods to be sold, and the proceeds to be paid into court, and an issue, or that the commissioner, with the assent of parties, should decide whether they were in the order, &c. *Bishop, ex parte*, 3 Deac. (s. c.) 132.

15. Where on a joint commission against G. and L. the latter obtained his certificate, and in consideration of undertaking to pay his creditors in full within a certain time, obtained a deed poll to enable him to supersede, and they also executed a power of attorney to enable F. to receive the dividends for the use of L., and do what was requisite to enable L. to supersede. The consideration was never performed, and afterwards a second commission issued against L.; held, that the creditors, and not F. were entitled to receive the dividends, and that the reputed ownership and order and disposition of them was not in the bankrupt. *Smithers, ex parte*, 3 Mont. & Ayr. (s. c.) 693.

16. Where foreign merchants remitted bills to factors, who sold them and entered the amount of the price in their books to the credit of the principals, who had the right of drawing on them to the amount; held that upon the bankruptcy of the factors the principals were entitled to the proceeds of the bills, and that the bankrupts having indorsed them in their own names, were not to be deemed the owners of them. *Pauli, ex parte*, 3 Deac. (s. c.) 169.

And see *Scott v. Surman, Willes*, 405.

17. Where foreign merchants, through their agents, procured consignments and remitted bills to the consignees for the amount, and informed the consignors of having so done, but before payment the agents became bankrupt; held, that the latter were to be deemed agents through the whole transaction, and that, notwithstanding the claim of the agents or the consignees, the consignors were entitled to recover the bills from such agents. *Douglas, in re*, 1 Mont. & Ch. (s.) 1.

18. Where the bankrupt had deposited as a security for a loan, by the petitioner, shares in a foreign mining company, accompanied with an agreement to complete the transfer when required, and he communicated such deposit to one of the directors, who communicated it to the board before the act of bankruptcy committed; the petitioner afterwards sealed up the shares and entrusted them to the bankrupt to keep in his iron safe for better custody, where they remained until three weeks before the bankruptcy, when they were delivered back; held, not to be within the order and disposition of the bankrupt at the time of his bankruptcy; and, *semble*, shares of a com-

pany possessing lands abroad for the purposes of trade are not to be deemed real property. *Richardson, ex parte*, 3 Deac. (s. c.) 496; and 1 Mont. & Ch. 43.

19. Where premises, with fixtures, were mortgaged, but the mortgagor continued in possession, and, becoming bankrupt, his assignees removed the fixtures; held, that the mortgagee, as against the defendants as strangers, was entitled to consider the mortgagor as his tenant at will, and maintain an action for the injury to his reversionary interest; held, also, that having the same right to the fixtures as his tenant, he might maintain trover for the fixtures so severed, and that they did not pass to the assignees as goods within the bankrupt's order and disposition. *Hitchman v. Walton*, 4 Mees. & W. (xx.) 409.

And see *Partridge v. Bere*, 5 B. & Ald. 604.

20. Where the wife was possessed of gas shares, of which the bankrupt pledged the certificates as a security for advances; held, that no notice having been given to the company until after the act of bankruptcy, the shares were to be deemed within his order and disposition. *Spencer, ex parte*, 3 Mont. & Ayr. (s. c.) 697.

21. Where railway shares were deposited by the bankrupt's partner with bankers, as security for acceptances by a third party, and for whom the bankers had discounted them, and who, being managing director of the company, was informed at the time of renewing the bill that the certificates of the shares had been so deposited; held, that as the bankrupt had parted with the possession of them, and that, as transfer could be made without the authority of the party for whose use they had been so deposited, the bankrupt was not to be deemed the reputed owner, and in his order and disposition. *Harrison, ex parte*, 3 Deac. (s. c.) 185; and 3 Mont. & Ayr. 596.

22. Where certificates of shares of a foreign bank were transmitted to the bankrupts on a contract for joint purchase of them, and clothed with a trust to apply the proceeds, when disposed of, to retire bills drawn for the purchase; held, that they were not within the order and disposition as the property of the bankrupt, and did not therefore pass to the assignees. *Brown, ex parte*, 2 Deac. (s.) 91; and 3 Mont. & Ayr. 472.

23. Where the same party was secretary to two offices, with one of which shares were deposited, held not sufficient notice of the transfer of the bankrupt's interest to prevent the claim of reputed ownership. *Bignold, ex parte*, 3 Deac. (s. c.) 151; and 3 Mont. & Ayr. 477.

#### (e) *In case of trusts.*

1. Under s. 79, the court may order, if it think proper, trust property to be conveyed to more than one trustee in the place of a bankrupt trustee. *Wilkinson, ex parte*, 2 Deac. (s.) 151.

2. Where lands were devised to the bankrupt and others, in trust to sell and divide equally amongst a class of whom the bankrupt was one, and in consideration of sums agreed to be paid to



each of the *cestui que trusts* by the bankrupt, but not in fact paid, but only promissory notes given, they conveyed the lands to him; held, that they had a lien on the lands devised in the hands of the assignees for the money unpaid. *Latey, ex parte*, 1 Deac. (s.) 557; and 2 M. & Ayr. 609.

3. Where a trustee failed on a petition upholding the trust deed, and to annul a *fiat*, but consented to have the account taken by reference, ordered to pay the costs of the petition, and interest on the balance found from the date of the order, at 4 per cent., although no interest found to have been made, but costs of the reference out of the estate. *Harding, ex parte*, 4 Deac. (s.) 793.

And *vide infra*, [G] 7.

(f) *In case of mortgages.*

1. Upon the construction of s. 70, of 6. Geo. 4, c. 16, held that assignees tendering the principal and interest of mortgaged estates of the bankrupt after the day of payment, obtain the legal estate so as to maintain trover for the title deeds. *Dunn v. Massey*, 1 Nev. & P. (x. s.) 578.

2. Where the creditor has several mortgages on distinct debts, he cannot apply the surplus of one to make good the deficiency of another, but the sale of each must be applied to the particular debt charged thereon. *Bigbold, ex parte*, 2 Deac. (s.) 66; and 3 M. & Ayr. 9.

3. Where the bankrupt deposited leases of two houses, with a written memorandum as a security, and on the same day signed another agreement to pay an improved rental for the premises of which the leases were deposited, specifying three houses, and that one house was let to J. H. as tenant-at-will, being in fact contained in another lease which had not been deposited; held, that the party had a lien on all the premises mentioned in the second agreement. *Edwards, ex parte*, 1 Deac. (s.) 611.

4. The usual order for sale in case of equitable mortgage directed, although the agreement was suggested to be a mere executory one for a mortgage, and creating no lien on the property. *Jones, ex parte*, 4 Deac. (s.) 750.

5. An equitable mortgagee, with consent, allowed to make improvements, and add the expense and costs to the charge on the mortgaged estate. *Smith, ex parte*, 2 Deac. (s.) 236; and 3 M. & Ayr. 63.

6. Where the bankrupt purchased an estate, which he mortgaged to the petitioner before he had paid the purchase-money; held, that the latter could only sell the bankrupt's interest therein, unless the unpaid vendor consented, and the court would not act until he had been served. *Wright, ex parte*, 3 M. & Ayr. (s.) 40.

7. Petition by an equitable mortgagee for sale, there being other liens, some disputed as to the legality, and others as to priority; held, that the court could make no order unless the other parties were present before them, and dismissed the peti-

tion with costs. *Semb.* the court of Review has no jurisdiction in matters relating to the estates of bankrupts in those cases where the Chancellor formerly exercised it upon bill in equity. *Bigbold, ex parte*, 1 Deac. (s.) 514.

8. Where deeds were deposited as an equitable mortgage with the petitioner, a solicitor, as a security for future as well as bills of costs then due, the Court refused to interfere. *Wake, ex parte*, 2 Deac. (s.) 352; and 3 Mont. & Ayr. 329.

9. Where deeds had been deposited twelve years, without any memorandum, and the bankrupt was dead, the Court refused to interfere upon the common petition by the equitable mortgagee. *Jones, ex parte*, 3 Mont. & Ayr. (s.) 327.

10. Upon a deposit, without any written memorandum, the bankrupt having died, and the application twelve years after, the common equitable mortgage order refused. *Jones, ex parte*, 3 M. & Ayr. (s.) 152.

11. An agreement to deposit a lease, when granted, held to create an equitable mortgage. *Orrett, ex parte*, 3 M. & Ayr. (s.) 153.

12. Where the deposit was made only nine days before the *fiat* issued, and for an antecedent debt, the Court refused to make the usual order, unless with consent to have the proceeds paid into Court, subject to any further order on the petition of the assignees. *Ainsworth, ex parte*, 2 Deac. (s.) 563; and 3 Mont. & Ayr. 451.

13. An equitable mortgagee held entitled to the rents only from the order of sale, notwithstanding notice to the tenants. *Burrell, ex parte*, 3 Mont. & Ayr. (s.) 439.

14. But where the common order was accompanied with a reference to ascertain the date of the deposit of the deeds, and the certificate agreed with the statement of the petitioner; held, that he was entitled to the rents accruing between the former order and the time of the sale; and held, that some of the deposits having been made without memoranda, the costs of the petition were to be apportioned, and as to such the petitioner was to pay them, and as to the others to come out of the proceeds. *Thorpe, ex parte*, 3 Mont. & Ayr. (s.) 441.

15. The court refused to make any other than the common order as to rents received since the bankruptcy, at the instance of an equitable mortgagee. *Carlton, ex parte*, 2 Deac. (s.) 333; and 3 Mont. & Ayr. 328.

16. On a petition by an equitable mortgagee for leave to bid, he must pay the costs. *Evans, ex parte*, 2 Deac. (s.) 531.

17. Where, upon the retirement of one partner, and assignment of all the estate, real and personal, of the firm, a sum held in trust, was entered as a sum "due to the B. trust," and the retiring partner subsequently assigned other estates, his separate property, as a further security for such sum; upon his death, a bill being filed against his representatives for an account, upon which it was arranged that the sum due to the continuing partner should be taken at £—, and a conveyance executed; held that, upon his bankruptcy, the assignees could claim no lien on the estates conveyed in respect of the trust-fund, which, in



fact, remained unpaid. Russell, ex parte, 3 M. & Ayr. (s.) 192.

18. Where the bankrupt was lessee of a mill, machinery, &c., which he was restrained from assigning without license, and allowance was to be made to or by the bankrupt and lessor for the improved or diminished value at the end of the term; the bankrupt having made additions, and mortgaged the fixtures as a security for money advanced, and the assignees having sold the bankrupt's interest, held, that they were liable to the mortgagee for the bankrupt's interest in such fixtures. Spicer, ex parte, 3 M. & Ayr. (s.) 213; and 2 Deac. 335.

19. Where, by a deposit of deeds of property in Scotland, no equitable mortgage was by the law of that country created, and it could therefore be treated only as a personal contract, and not affecting the estates; held, that it could not be enforced as against the assignees in a court of equity in England. Pollard, ex parte, 2 Deac. (s.) 607; and 3 M. & Ayr. 340.

20. Where the bankrupt, a few days before his bankruptcy, deposited a bill as a security, and no question of fraudulent preference was made, order made for his indorsing it, or that the petitioner might bring an action in the name of the assignees against the acceptor, indemnifying them. Rhodes, ex parte, 3 M. & Ayr. (s.) 217; and 2 Deac. 364.

21. The assignees, either of a bankrupt or insolvent can recover only such things as he has a right, both legal and equitable, and where that equitable interest exists, the effect of an assignment would not be to convert it into a legal one: where there had been an agreement by a bankrupt to mortgage specific articles ascertained, held, to prevent them passing to the assignees; *aliter*, if it were only an agreement to mortgage goods subsequently to be acquired, or to give a bill of sale at a future day. Moss v. Baker, 3 Mees. & W. (x.) 195.

22. Where, on a loan, the borrower gave a security over a parcel of his estate believed to extend over 95 acres, and adequate to the sum advanced, and the lender was *infect*: it being afterwards discovered that it extended only over six acres, the borrower executed an additional security conveying the whole, but after a sequestration awarded against him; in an action to reduce that security by the trustee, held void as against the trustee, as a preference of the bankrupt, reducible under the Act 1696, and also as granted by a party not having the power of transferring the estate. Inglis v. Mansfield, 3 Cl. & F. (r.) 362; affirming the judgment below, but reversing it so far as costs against the appellant.

23. A legal mortgagee, *semble*, is entitled to have the estate sold in the same condition, as to crops, as it stood at the date of the order of sale. Barnes, ex parte, 3 Deac. (s. c.) 223; and 3 Mont. & Ayr. 497.

24. Where the mortgage deed contained a covenant not to call in the mortgage money for five years, if the interest were paid regularly, held that on the bankruptcy of the mortgagor, the mortgagee claiming to prove was entitled to the usual

order of sale. Bignold, ex parte, 3 Deac. (s. c.) 151; and 3 Mont. & Ayr. 477.

25. Where all parties agree to the sale, no order is necessary for the sale of property under an equitable mortgage. Whitbread, ex parte, 3 Deac. (s.) 311.

26. The Court, on the usual order for leave to bid by an equitable mortgagee, refused to add the terms of not paying a deposit if declared the purchaser. Wilson, ex parte, 1 Mont. & Ch. (s.) 110; and 3 Deac. (s. c.) 545.

27. Where after a deposit of deeds with a written memorandum, part were returned and others substituted, but without any fresh memorandum, the court held that the costs of the usual order for sale should be allowed out of the proceeds of the sale of the substituted property. Cobham, ex parte, 3 Deac. (s.) 609.

28. Where a legal mortgage was executed in pursuance of the agreement on a deposit of the deeds, but after notice of an act of bankruptcy, held, that though inoperative as a security, it did not merge the previous equitable mortgage, and that his rights revived. Hervey, ex parte, 3 Deac. (s. c.) 547.

29. A petition by an equitable mortgagee, claiming priority against parties over whom the court had no jurisdiction, dismissed; but where the parties agree to submit, the court will decide as to priority; if the case be complicated, a mortgagee may enter his claim for the amount of his debt until the question is decided. Bignold, ex parte, 3 Mont. & Ayr. (s. c.) 706.

30. Where by the terms of a joint stock banking company, it was provided that no share should be held jointly, and that the shares should be chargeable as a security for any debt contracted with the share-holders, and shares had been bought with partnership property, although standing in their separate names, and the debt incurred subsequently by the partnership with the company; held, that the company could not prove against the joint estate without deducting the value of the shares. Connell, ex parte, 3 Deac. (s. c.) 201; and 3 Mont. & Ayr. 581.

31. Where there is nothing to justify the inference that it is the intention of the mortgagor that an equitable mortgagee shall receive the rents, the court will make only the common order, and the latter will not entitle himself to the rents before the order of sale, by giving notice to the tenants. Scott, ex parte, 3 Mont. & Ayr. (s. c.) 592; and 3 Deac. 304.

32. Where one of two partners deposited with the petitioners (bankers) title-deeds, as a security for the balance due from the firm, and he afterwards alone became bankrupt; held, that the usual order for sale might be made, but no proof allowed against the bankrupt. Lloyd, ex parte, 3 Mont. & Ayr. (s. c.) 601; and 3 Deac. 305.

33. In case of equitable mortgages, if all parties agree to a sale, no petition is necessary; and if a party wishes for the order, he must pay the costs. Whitbread, ex parte, 3 Mont. & Ayr. (s. c.) 604; and 3 Deac. 311.

And *supra*.



(g) *In case of partners.*

1. Where upon the marriage of one partner he gave a security for a sum to be settled, payable by instalments, and the partners also, not to have the partnership funds drawn out, gave a separate joint security for a larger sum; held, that the trustees were entitled to prove against the joint estate in the first instance, and against the separate estate for the balance only, and not to double proof, and it made no difference that the debts arose on distinct instruments. *Hill, ex parte*, 2 Deac. (s.) 249.

2. Held also, that the principle of rebate, applying only upon payment of a dividend, none could be made upon the amount of proof of a debt payable *in futuro*. *Ib.*

And *infra*, [G] 8. 10. 19.

3. Where three partners, A., B., and C., borrowed a sum of 10,000*l.* of their bankers, and for which, as security, B. executed a mortgage of freehold, and C. of copyhold estate, which being sold, the estate of B. realized a large portion of the debt, and that of C. only a small portion; held, that A.'s estate being wholly insolvent, the estate of B. was entitled to be recouped from that of C., to the extent of the difference of the sum liquidated by the estate of C., and half the amount of the mortgage, debt and interest. *Plowden, ex parte*, 2 Deac. (s.) 456; and 3 Mont. & Ayr. 402.

(h) *Mutual credit—set off—payments protected.*

1. An advance of money upon a deposit of goods, held to amount to no more than a loan, and not a payment protected within 6 Geo. 4, c. 16, s. 82, although *bona fide*, and without notice of an act of bankruptcy. *Wright v. Fearnley*, 5 Bing. N. S. (c. r.) 89; 8 Sc. 513; and 7 Dowl. (r. c.) 129.

And see *Cannan v. Denew*, 10 Bing. 292.

And see *Assumpsit*.

2. All contracts made *bona fide* with any bankrupt previous to the date and issuing any *fiat* against him, to be valid, provided no notice had of prior act of bankruptcy. By 2 & 3 Vict. c. 29.

3. In *assumpsit* by assignees on an agreement by the bankrupt for the sale of goods, to be paid for by an acceptance, alleging the refusal to accept, and damage by loss of the benefit of such acceptance, and injury to his estate thereby; held, that the damage resulting in pecuniary loss only, did not amount to such an allegation of unliquidated damages as to preclude the debtor's right of set-off. *Groom v. West*, 1 Perr. & D. (q. n.) 19.

And see *Gibson v. Bell*, 1 Bing. N. C. 743.

(i) *Actions and suits by and against.*

1. In case against the sheriff by assignees for seizing the bankrupt's goods, held that he was entitled, without pleading specially, to prove pay-

ments out of the proceeds, necessarily made, in reduction of the damages. *Goldsmid v. Raphael*, 3 Sc. (r. c.) 385.

2. Where the assignees commenced a suit in equity, without the consent of creditors, a reference directed whether beneficial; if there were a subsequent approbation by creditors of a sufficient amount, held enough. *Llewellyn, ex parte*, 1 Deac. (s.) 474.

3. Want of assets is a defence in the court, to an application by the solicitor against the assignees for payment of his bill, and an inquiry may be had whether in fact they have assets. *Adams, ex parte*, 2 M. & Ayr. (s.) 706.

4. Where P. & Co., the bankrupts, deposited the East India Company's paper as security for the re-payment of a loan to the respondents (bankers), and in default of re-payment by a given day to sell for their reimbursement, rendering the surplus to P. & Co., the bankers being at the time holders of notes which they had discounted for P. & Co., but before the re-payment of the loan P. & Co. were declared insolvent under the Indian Bankrupt Act, 9 Geo. 4, c. 73, similar in its provisions with the 6 Geo. 4, c. 16. The bankers sold the paper, and after re-payment of the loan there was a considerable surplus; held, in an action by P. & Co. to recover the surplus, that it did not fall within the principle of mutual credit within the act, and that the bankers could not set off the amount due from P. & Co. on the notes (reversing the judgment below.) *Young v. Bank of Bengal*, 1 Deac. (s.) 622; and 1 Moore, (r. c.) 150.

5. Where the bankrupt, being uncertificated, brought an action for work, and a sum being on reference found due to him, his assignees claimed it, held that, upon a fresh action brought by the bankrupt, and a rule of interpleader obtained, the assignees were bound to satisfy the attorney's bill both for the costs of the former action and of the reference. *Jones v. Turnbull*, 2 Mees. & W. (ex.) 601; and 5 Dowl. (r. c.) 591.

6. Where an indictment had been prosecuted against the bankrupt, on which he had been acquitted, and a reference directed as to there being probable cause, before the costs of it allowed; held that such petition ought not to enter into the details of the accusation. *Cumming, ex parte*, 2 Deac. (s.) 93; and 3 M. & Ayr. 29.

7. A general order may be made for the assignees to institute suits and actions, but where there is a solvent partner absent abroad, he should be served with the order personally or by substitution. *Wilson, ex parte*, 3 M. & Ayr. (s.) 219; and 2 Deac. 387.

8. A consent by a creditor to instituting a suit, given by an authorized agent, is sufficient. *Belcher, ex parte*, 3 M. & Ayr. (s.) 448.

9. Under 6 Geo. 4, c. 16, s. 88, the consent to the institution of a suit, by the majority of creditors who have proved, may be authorized by a majority acting by attorney, under a regular power for that purpose. *Bannatyne v. Leader*, 3 Myl. & Cr. (ex.) 379.



10. In *assumpsit* by assignees for money received to the use of the bankrupt before the bankruptcy, plea, that the money, although in the defendant's possession after the bankruptcy, was in fact received before, and that the bankrupt was indebted to the defendant in a large sum, which he claimed to set off, held bad, as confessing, but not availing; as, if received before the bankruptcy the assignees could only claim it as received under a fraudulent preference, in which case the general issue would be the proper plea. *Wood v. Smith*, 4 Mees. & W. (xx.) 522; and 7 Dowl. (r. c.) 214.

11. In trover by assignees, on a plea denying that the plaintiffs were assignees; held, that it put in issue the petitioning creditor's debt and act of bankruptcy. *Buckton v. Frost*, 1 Perr. & D. (q. s.) 102.

And see *Butler v. Hobson*, 4 Bing. N. C. 290.

12. Where a builder entered into a contract with the defendants for preparing and fixing certain works, and for which he was to be paid on being fixed, and approved of by the surveyor, and the contract contained a stipulation that if the builder should become bankrupt, the defendants might take possession of the work then already done, and avoid and put an end to the agreement, and should pay so much as should be adjudged the fair worth of the work actually done and fixed; and certain sashes having been made and approved of, and taken to the premises, where pulleys, the property of the defendants, were added, but before being fixed the builder became bankrupt, having received advances beyond the amount of the work certified to have been done; held, that the property in the sashes remained in the bankrupt, notwithstanding the approval, and addition made of the pulleys thereto, and that the assignees, after demand and unqualified refusal, might maintain trover for the sashes. *Tripp v. Armitage*, 4 Mees. & W. (xx.) 687.

13. In trover against assignees, pleas, first, not guilty, and secondly, denying the property in the plaintiffs; held, that the defendants, under the latter plea, were entitled to show that the goods were in the order and disposition of the bankrupt as the true owner, and that the defendants, as assignees, sold the goods. *Isaac v. Belcher*, 5 Mees. & W. (xx.) 139; and 7 Dowl. (r. c.) 516.

14. Where a creditor had sold his debt, held that he was a competent witness to support the *fiat*. *Pelling v. Meredith*, 8 C. & P. (x. r.) 763.

15. Proceedings in a creditor's suit against the estate of a joint obligor, a surety of the bankrupt to the petitioners, as to the liability of the surety, held admissible in evidence on a petition to prove against the estate of the principals. *Walker*, ex parte, 3 Deac. (s.) 672.

issued more than a statutable distance from the banker's residence; and a condition that what the agent should certify as the balance should be taken as the balance, would not bind the surety, as to such items as were void by the statute, and no obligation in the principal to repay. *Swan*, ex parte, 1 Deac. (s.) 746; and 2 M. & Ayr. 656.

2. Where bankers at N. had an agent at T., sixteen miles from N., and a customer residing twenty miles from N. was in the habit of sending for small sums, and once a week gave a check for the whole, by filling up a blank check of the N. bank, to which it was transmitted by the agent as a voucher; held, that the giving such check was not an issuing within the meaning of the Stamp Act, precluding the bankers from proving in respect of the sums so advanced. To render a party subject to the penalties of the act, not only must there be an issuing to the party entitled to demand payment, but the money must be paid on the check so issued: held also, that it could not be presumed against the N. bankers that they knew that the checks were drawn at a different place from that which appeared on the face of them: 2dly, the bankers having upon the dishonor of one bill, at a meeting with the drawer and acceptor, and communication of the latter being insolvent, refused to accept a composition, did not amount to an agreement to waive the presentment and notice of dishonor of other bills coming due, and the amount of which, therefore, was ordered to be deducted from the proof. *Big-nold*, ex parte, 1 Deac. (s.) 712; and 2 M. & Ayr. 633.

3. A complaint of a rejection of a claim by the commissioners is not an appeal from a judgment by a court competent to determine a suit and bind the parties. *Ib.*

4. Where on a transaction, ostensibly the purchase of a bond, usurious interest was agreed for, and the purchaser forbore to prove the debt under the commission of the obligee, and the latter in consideration of a further advance gave a security for the whole amount, held that the second security was so tainted with the original illegal contract as to justify the rejection of the proof; the party was however allowed to prove in respect of the latter advance. *De Grouchy*, ex parte, 2 Deac. (s.) 79; and 3 M. & Ayr. 21.

5. Where bills were *bona fide* discounted and goods deposited as a collateral security, held that since the 3 & 4 Will. 4, c. 98, s. 7, proof of such bills could not be rejected on the ground of usurious interest having been agreed for, but the dividends might be retained to enable the assignees to inquire into their right to recover the goods pledged in the hands of the petitioner. *Knight*, ex parte, 1 Deac. (s.) 459; and 2 M. & Ayr. 568.

6. Where the secretary of a coursing club became bankrupt, having subscriptions collected in his hands, held that the treasurer was the proper person to prove, and the possibility that the funds might be applied to purposes against the 16 Car. 2, c. 7, (Gaming) was no objection. *King*, ex parte, 2 Deac. (s.) 23; and 2 M. & Ayr. 676.

#### [G] PROOF—DIVIDENDS.

1. Proof on a bond against sureties to bankers, held not to have been properly admitted where part of the amount consisted of unstamped checks



7. A creditor who has received a dividend under the Insolvent Act has the same right of proof for the residue of his debt as he would after receiving a dividend under any deed of trust. *Fenwick, ex parte*, 2 Deac. (s.) 27; and 2 M. & Ayr 6:1.

8. Where the bankrupt became possessed of trust funds, knowing them to be such, held responsible to the *cestui que trusts*, as though actually appointed trustee, and they may prove against his estate, and are not barred by the Statute of Limitations. *Gowers, ex parte*, 2 Deac. (s.) 207.

9. Where the creditor drew bills on one of two partners for his own private debt, and obtained the partnership acceptance, without inquiry whether the one had authority to pledge the partnership property, proof against the joint estate expunged. *Thorpe, ex parte*, 2 Deac. (s.) 16.

10. Where the bill on which the proof was claimed and exhibited at the time was lost before the dividend declared, the commissioners should give special directions to the official assignee to pay the dividends without production of the bill. *Wallis, ex parte*, 1 Deac. (s.) 496; and see New Orders in Bankr. 14 May 1836. S. P. in case of a lost bond, upon indemnity to the assignees. *Robins, ex parte*, 1 Deac. (s.) 587.

11. Where A. and B., prior to 1780, were partners as army agents; when A. retired, the firm was carried on in the same way and with the same books by B. and C., and they continued to do so down to the time of their bankruptcy in 1820, and rendered accounts to the War office according to the regulations issued in 1783, not as with the respective firms, but merely of the sums issued in respect of each regiment; held, (*Cross, J.*, dis.) that it could not be presumed that the latter firm had adopted the debt due, at the withdrawal of A., to the Crown, nor that the Crown had assented to such adoption, so as to be entitled to prove the whole debt accruing to the Crown during the respective firms, against the estate of the latter firm; but it appearing that the assignees of B. and C. and the Crown had instituted proceedings against the representatives of A., in Scotland, charging A. as the debtor of such portion of the debt, a claim permitted to be entered until the result of such proceedings known. *Sandham, ex parte*, 4 Deac. (s.) 812; discussing *Clayton's case*, 1 Mer. 572.

12. Where it appeared from the bankrupt's books that there were items of dealings between the parties within six years, held sufficient to take the case out of the statute, and that the account ought to be taken and the creditor admitted to prove for the balance found. *Seaber, ex parte*, 1 Deac. (s.) 543.

13. And where, although there appeared no payment within that period to the petitioner by the bankrupt, but only an advance by him of the amount of a drainage-rate, held sufficient evidence of a running account between them. *Peachey, ex parte*, 1 Deac. (s.) 551.

14. Checks for payment of dividends to deceased creditors to be indorsed by executor or ad-

ministrator. New Ord. 1836; 1 Deac. (s.) 693; and 2 M. & Ayr. xxxiv.

15. Where a father advanced a sum to his son to set him up in business, taking a note for the amount, with interest, which four years after he exchanged for a bond; held, that notwithstanding expressions of his son's having the bond after his death, yet clearly intending to retain a control over it, his executors were entitled to prove it against the son: and costs given to the petitioner, although against the decision of the commissioners. *Ridler, ex parte*, 2 Deac. (s.) 225; and 3 M. & Ayr. 62.

16. Where the bankrupt entered into an agreement with the owner of salt-works, by which he engaged to manufacture the salt for a term, and he granted an annuity charged on the sums payable to him under the agreement; held, that such annuity was capable of valuation, notwithstanding its being liable to forfeiture by reason of non-performance of the conditions and covenants. *Parratt, ex parte*, 1 Deac. (s.) 696; and 2 M. & Ayr. 626.

17. Where the bankrupt, whilst in the employment of the petitioner, committed embezzlement, but the latter took a warrant of attorney to secure the amount by instalments; held, that the latter was not entitled to prove until he had prosecuted for the felony, and that having been a party to the compounding felony, *semb.* he could not be competent to prosecute. *Elliott, ex parte*, 2 Deac. (s.) 179; and 3 M. & Ayr. 110.

And see *Master v. Miller*, 4 T. R. 333; *Crosby v. Long*, 12 East, 413; *Stone v. Marsh*, 6 B. & Cr. 564; and *Bolland, ex parte*, 1 Mont. & M. 396; questioning *ex parte Birks*, 2 M. & Ayr. 208, n.

18. The surety to an annuity bond prior to 6 G. 4, c. 16, and which had been given up, held not entitled to prove in respect of payments made since the commission issued against the principal. *Paxton, ex parte*, 3 M. & Ayr. (s.) 5; and 2 Deac. 62.

19. Where the obligee of a bond, as trustee for others, but with a beneficial interest therein himself, deposited it as a security for advances to himself; held, that no notice having been given to the obligor, the bonds were to be deemed within the reputed ownership of the bankrupt; held also, that a security given by the bankrupt, on an expectancy of an interest as next of kin of a lunatic dying intestate, must be noticed by the creditor in his proof. *M'Turk, ex parte*, 2 Deac. (s.) 58; and 3 M. & Ayr. 1.

20. Where monies agreed to be settled by the bankrupt on his marriage were in fact drawn from the partnership, but without the knowledge of the wife, and were after the marriage advanced to the partnership, secured by their joint bond, the trustees held entitled to prove in respect of the bond, and the dividends to accumulate until the principal was realized. *Crofts, ex parte*, 2 Deac. (s.) 102.

21. The mere non-entry in the books of the party seeking to prove is not of itself a ground of rejection; but, if rejected, the court cannot refer the matter to any other person, but must it-



self decide the question. *Beasley, ex parte*, 2 M. & Ayr. (s.) 632.

22. Where the creditor sold goods to one partner, as he believed, on the partnership account, and on the bankruptcy proved against the joint estate, but it turned out that they were purchased on the separate account, the proof allowed to be transferred. *Vining, ex parte*, 1 Deac. (s.) 555.

23. To constitute the making of a claim to prove under a commission, within the meaning of 6 Geo. 4, c. 16, s. 59, the plaintiff must either prove his debt or have his claim entered on the proceedings under the commission. *Augard v. Thompson*, 2 Mees. & W. (xx.) 617; and 5 Dowl. (p. c.) 762.

24. The court will restrain a party who proves from proceeding at law for the same debt, which, if doubtful, it will refer for inquiry. *Diack, ex parte*, 2 M. & Ayr. (s.) 675.

25. Where by mistake an error was in the condition of a bond, the court allowed it to be amended to enable the party to prove. *White, ex parte*, 2 M. & Ayr. (s.) 541.

26. The court will only reduce a proof at the instance of the bankrupt by consent, and with an affidavit that there is no collusion. *Pownall, ex parte*, 2 M. & Ayr. (s.) 707.

27. Where after a composition and commission in 1825, not paying 15s. in the pound, the bankrupt, with the knowledge of his assignees, again commenced business, and continued until a *fiat* issued in 1835, under which the official assignee collected assets; the court ordered them to be distributed amongst the creditors under the *fiat*, unless a petition was presented by the original assignees before the second day of term, after payment of costs. *Abbott and another, ex parte*, 1 Deac. (s.) 479; and 2 M. & Ayr. 599.

28. Where a creditor held a bill as a security for the debt proved, and after the receipt of dividends, the bill was paid in full; the Court held that it had no power over his representative to compel the dividend to be refunded; *alter*, as to dividends received after the payment of the bill. *Carr, ex parte*, 3 M. & Ayr. (s.) 64.

29. Where the creditor delayed his proof, under a misapprehension of a supposed composition, the court allowed him to call a meeting to establish his proof, and in the meantime payment of a dividend to be stayed. *Hunt, ex parte*, 2 Deac. (s.) 213.

30. The 5 & 6 Will. 4, c. 29, s. 5, held not to affect an order for distribution of unclaimed dividends obtained before the passing of the act. *Curtis, ex parte*, 1 Deac. (s.) 583; and 2 M. & Ayr. 732.

31. But where they had been actually paid in to the accountant, held to be within the express provisions of the act, and that the court could not act upon a preliminary order obtained before the act. *Bell, ex parte*, lb. 595; and 1 M. & Ayr. 733.

32. A creditor whose debt is disputed, and a sum set apart under 1 & 2 Will 4, c. 56, s. 31, held not entitled to interest upon substantiating his proof. *Jamieson, ex parte*, 2 Deac. (s.) 6. *S. P. Lewis, ex parte*, 2 M. & Ayr. (s.) 670.

33. Where goods were directed to be procured by an agent, with an authority to draw a bill and get it discounted, and with the proceeds pay for the goods, which was done; but before the arrival of the goods, or presentment for acceptance, the principal became bankrupt, and the assignees sold the goods for the benefit of the estate; held, that the circumstances did not amount to an acceptance of the bill, or enable a subsequent indorsee for valuable consideration to prove under the estate; but an issue offered as to the custom of merchants whether what was done amounted to an acceptance. *Bolton, ex parte*, 2 Deac. (s.) 537; and 3 M. & Ayr. 367.

34. Where a factor, to whom goods were consigned, accepted bills on the security of the proceeds, for his principals A. and B, who paid them into their bankers, who knew of the arrangement; held, that the latter, on the bankruptcy of the principals and the factor, were entitled to have the proceeds of the goods remaining unsold applied in exchange of the bills, and to prove for the balance against both estates, but the proof which they had made in full expunged *pro tanto*. *Hobhouse, ex parte*, 3 M. & Ayr. (s.) 269; and 2 Deac. 291.

35. Where money had been advanced to, and went for the use of a firm, one of whom assigned securities to a trustee, under which a considerable part of a debt was received; held that, as against the firm the creditor was entitled to prove for the whole amount of the debt, and not merely for the balance due. *Adams, ex parte*, 3 M. & Ayr. (s.) 157.

36. Where paying commissioners merely nominated one of a banking firm as treasurer, without making a due appointment as directed by the Act, and the collector paid monies into the bank, but the commissioners drew checks on the individual partner as treasurer, and which were paid by the firm, and the account was kept in a pass-book as between the firm and the commissioners; held that, upon the bankruptcy of the firm, the commissioners could only prove against the joint estate, and not against the separate estate of the one named their treasurer. *Dobinson, ex parte*, 2 Deac. (s.) 341. 349.

37. Where, on the retiring of one partner, the other continued the business under another firm, the former assigning his moiety of the partnership effects, and the latter indemnifying him against debts, &c., and at the time of the dissolution, a creditor continued to deal with the latter without any rest in the account, until his bankruptcy; held, that the joint debt could not be proved against his separate estate. *Appleby, ex parte*, 2 Deac. (s.) 482.

38. Where the wife, before marriage, assigned a debt from A., and also a debt from B., to A. and B. in trust to invest, &c., but which they never did, but each continued to pay the interest on their respective debts; held, that each was liable for his own default only, and that proof could only be made by the *cestui que trust* against the estate of B., become bankrupt, for his debt. *Woodward, ex parte*, 3 M. & Ayr. (s.) 232; and 2 Deac. 401.



39. Where, upon the marriage of the bankrupt, the wife's property was settled to the separate use of the wife, and on the death of either, to the use of the survivor, and afterwards for the children, and the bankrupt covenanted to pay to the trustees a sum to the like uses; held, that the contingent interest of the bankrupt might be sold, and the proceeds applied in part satisfaction of his covenant, and the trustees prove for the residue remaining unpaid. *Gonne, ex parte*, 3 M. & Ayr. (s.) 166; and 2 Deac. 278.

40. Upon a bond given to trustees of a marriage settlement, conditioned for payment of a sum "in case he should become bankrupt or insolvent," and, upon being pressed by the trustees, he gave a note for the payment of the sum, payable on demand; held, that the trustees might prove for the whole amount. *Wright, ex parte*, 2 Deac. (s.) 551; and 3 M. & Ayr. 387.

41. Trustee of a benefit society allowed to prove against the treasurer (become bankrupt) for monies received by him as such. *Crowley, ex parte*, 2 Deac. (s.) 555.

42. Executors allowed to prove against a bankrupt co-executor without an order. *Phillips, ex parte*, 2 Deac. (s.) 334.

43. *Semb.*, in order to prevent proof on fraudulent judgments, the commissioners may examine into the consideration of a judgment debt, (*dub. Cross, J.*) *Marston, ex parte*, 3 M. & Ayr. (s.) 444.

44. Where the funds were small, dividends allowed to be paid over to *cestui que trusts* under a settlement lost, without a reference. *Harrison, ex parte*, 3 M. & Ayr. (s.) 392.

45. A petition to the court for a dividend is liable to the same restriction as an action would have been before 6 Geo. 4, c. 16, and the assignees may set up the Statute of Limitations as a bar. *Clarkson, ex parte*, 3 M. & Ayr. (s.) 154.

46. Payment of dividends refused to be stayed in a case of gross neglect in proving the debt or entering a claim on the proceedings. *Todd, ex parte*, 2 Deac. (s.) 416.

47. The commissioner cannot reject the proof of a debt admitted by the bankrupt, and not opposed by the assignees, because it is not supported by the evidence of third persons. *Chapman, ex parte*, 3 Deac. (s. c.) 273.

48. On a petition to prove after rejection by the commissioners, held, that it must show the grounds on which rejected; and that in order to entitle the party to take an order in the absence of the assignees, it must be served on them personally. *Baker, ex parte*, 1 Mont. & Ch. (s.) 156.

49. Executor, where bankrupt, held that he might prove in the usual way; and that the petitioner, his agent, and conversant with the accounts of the estate, might be called as his witness to prove the facts. *Collingdon, ex parte*, 1 Mont. & Ch. (s.) 156.

50. So, where trustee, his proof allowed, but the dividends to be paid into Court. *Strettell, ex parte*, 1 Mont. & Ch. (s.) 165.

51. Where the creditor, having taken the bankrupt in execution, died shortly before the issuing of the *fiat*, and eight months after, a Judge's order was obtained for his discharge, on the ground of the suit having abated by the death of the plaintiff: held not to amount to an extinguishment of the debt, but that it was provable by the executor of the creditor: execution, in the eye of the bankrupt law, is only considered as security. *Goodman, ex parte*, 3 Deac. (s.) 631: and 1 Mont. & Ch. 151.

52. Where the executors of a deceased partner continued to carry on the business with the survivors for 12 months, and then, upon taking the account, received a bond from them for the balance due, and the continuing partners, six years afterwards, became bankrupt; held, that the executor was entitled to prove for the amount of the bond against their estate. *Hull, ex parte*, 3 Deac. (s. c.) 125.

53. Where the claim was to recover the difference between the contract price for a cargo to arrive, (which the bankrupt was to purchase, and the vendor to deliver within 14 days after being landed), and the market price at the time of the refusal to accept; held, that as every fact which was to be the basis of calculation of the damages might be denied or disputed, the claim was one of damages purely, and not a debt provable. The cases of stock and of rights, which may be treated as debts where mere matters of calculation, are exceptions to the general rule, that no claim can be proved as a debt for which the intervention of a jury is necessary. *Green v. Bicknell*, 3 Nev. & P. (q. n.) 634.

54. Where a party, two years before his bankruptcy, obtained a loan, by way of mortgage on lands he was about to sell, which was advanced on a note payable at 3 months' date and renewal from time to time, at the option of the borrower, for a period not exceeding 18 months, and a verbal agreement to pay 10 per cent. until the estate should be sold; the note was renewed every three months, and the rate of interest paid; upon claim to prove for the last one given, held, that the transaction was usurious, and merely colorable to evade the usury laws; held, also, that the 3 & 4 Will. 4, c. 98, s. 7, is only applicable to bills and notes existing at the time of the contract for discounting or negotiating the same, and where money advanced thereon. *Terwest, ex parte*, 3 Deac. (s.) 590; and 1 Mont. & Ch. 146, (since reversed by the Lord Chancellor).

55. To enable the holder of bills indorsed by a bankrupt, to prove, if the bankruptcy occur before the bills become due, and before the choice of assignees, the notice of dishonor must be given to the bankrupt; if after the choice, then to the assignees. *Chapple, ex parte*, 3 Deac. (s. c.) 218; and 1 Mont. & Ayr. 490.

56. Where an acceptance in the name of the joint firm was obtained as a security for the separate debt of one, and it was clear, from the facts, that it was taken with the reasonable belief that it was fairly available against the firm; held, that it was provable only against the separate, and not against the joint estate. *Thorpe, ex parte*, 3 Mont. & Ayr. (s. c.) 716.



57. Where the debt arose on a joint note made in 1825 with a party who, in 1835, executed an assignment for the benefit of his creditors, under which a dividend was afterwards received in respect of the note and interest; held, that such payment by a co-contractor did not revive the debt against the bankrupt so as to make it provable. *Woodward, ex parte*, 3 Mont. & Ayr. (s. c.) 609; and 3 Deac. 290. 294; supporting *Jackson v. Fairbank*, 2 H. Bl. 340.

58. Where the bill came through the acceptor, held that, in the absence of fraud, it was no objection to the proof. *Gill, ex parte*, 3 Mont. & Ayr. (s. c.) 590; and 3 Deac. 288.

59. Where the bankrupt was executor in trust, and interested in a share of the bequest, but had not surrendered, a joint legatee allowed to prove; costs to be paid out of the trust fund, but no order made as to the bankrupt's part. *Forrester, ex parte*, 1 Mont. & Ch. (s.) 143.

60. Where a joint and several bond was executed by the bankrupts, and a surety in a sum to secure a balance to that extent on a running account, of bankers with the bankrupt, and on the faith of which subsequent advances were made, but by subsequent dealings the surety became released; held, that the bankers might, notwithstanding, prove against the separate estate of the principals for the amount of balance due. *Walker, ex parte*, 3 Deac. (s.) 673.

61. Where the bankrupts lodged with their bankers acceptances of the petitioners, as security for the floating balance with them, and they afterwards proved for the whole balance and received a dividend; the petitioners afterwards paid the bills and claimed to have the amount of the dividend, to the extent of the bills, refunded and paid to them; the court dismissed the petition with costs as against the bankers, but declared the petitioners to be entitled to all future dividends in respect thereof. *Holmes, ex parte*, 3 Deac. (s.) 663.

62. Where the bankrupt granted an annuity and received from his attorney the whole of the consideration, but half an hour afterwards, and at a different place, paid him a part of it in discharge of a *bona fide* debt, and there were no circumstances of fraud or contrivance to evade the provisions of the Annuity Act; held not a retention within the Act, and the annuity provable. *Bogue, ex parte*, 3 Deac. (s. c.) 319.

63. Where the bankrupt, by deed, granting an annuity, acknowledged the receipt of the consideration, and in an account admitted the amount due, and he had paid the annuity for 10 years, the court refused to reject the proof on an affidavit by the bankrupt that the whole of the consideration was not advanced. *Fairman, ex parte*, 3 Deac. (s. c.) 467; and 1 Mont. & Ch. 125.

64. Where, upon the grant of an annuity, the bankrupt, as surety, covenanted jointly and severally with the grantee to pay the annuity, in case default should be made by the grantor, provided that the grantee should, in such case, give 21 days' notice, in writing, of the sum in arrear, previous to any proceeding against the surety; held,

that, on the bankruptcy of the surety, before any default made, the grantor was not entitled to prove for the value of the annuity under 6 Geo. 4, c. 16, s. 54. *Marks, ex parte*, 3 Deac. (s. c.) 133; and 3 Mont. & Ayr. 521.

65. Where a party, become insolvent, assigned all his estate to four trustees, who carried on the business for the benefit of creditors, three of whom became subsequently bankrupt, and the other died solvent, but there was no joint estate; held, that the rule, that partnership creditors can only resort to the estate of a solvent partner, where there is one, and not prove against the separate estate of each, applied also to the case of joint contractors; and that it was not a sufficient ground for expunging the proof against the separate estate of a partner who was solvent at the time of proof, that he had since become insolvent; held, also, that the estate of the deceased partner, being solvent, could not be considered in the light of a solvent partner. *Bauerman, ex parte*, 3 Deac. (s. c.) 476.

66. Where one of two bankrupts, before the commencement of their partnership, received a deposit of foreign bonds, as a pledge for covering acceptances, which he afterwards applied to purposes of the partnership; held not to discharge his separate liability, and that the commissioner properly admitted proof against his separate estate; and, *semble*, the petitioner might elect to prove either against the joint or separate estate. *McInertzhagen, ex parte*, 3 Deac. (s.) 101.

67. Where partners carried on business in their separate homes at M. & L., held, that the holder of bills, drawn by one upon the other, was bound to elect to prove against the joint or separate estates, but that he was not bound by the previous receipt of a dividend under the separate estate, on refunding it and paying the costs of the transfer of proof. *Law, ex parte*, 3 Deac. (s. c.) 541; and 1 Mont. & Ch. 111.

68. Where two partners gave their joint and separate note, and before their bankruptcy one executed a mortgage to secure that and such other advances as might become due, and the mortgagees realized a part of the debt due at the time of the bankruptcy; held, that the amount due on the note did not merge in the mortgage, and that proof might be made on the note (*diss.* *Erakins, C. J.*) *Bate, ex parte*, 3 Deac. (s. c.) 358.

And see *Ex parte Ladbroke*, 2 Gl. & J. 81.

69. Where one of two partners, jointly possessed of shares, but standing in the name of one, undertook, in consideration of the payment to the firm of an acceptance, to obtain the transfer; held, that, upon the bankruptcy of the firm, the claim on such undertaking sounding in damages and not in debt, the proof could only be made against the joint estate. *Raleigh, ex parte*, 3 Deac. (s. c.) 160; and 3 Mont. & Ayr. 670.

70. Where proof had been made before payment of a portion of the debt by a surety, held, that it did not prevent the receiving dividends on the whole amount of the proof. *Coplestone, ex parte*, 3 Deac. (s. c.) 547.

71. Where the business was carried on in the



premises of one partner, who executed a mortgage of them to bankers, to secure advances to the partnership, and died, having devised the property to the other partners; the latter afterwards becoming insolvent, executed an assignment of all their estate to trustees for the benefit of creditors, and the trustees, with the sanction of the bankers, contracted for the sale of the mortgaged premises, the purchaser agreeing to pay the bankers the sum advanced by instalments; a *fat* afterwards issued, and the bankers proved for the amount; the proof allowed to stand, but the dividend to be paid into court to await the further order. *Smyth, ex parte, 3 Deac. (s.) 507.*

72. A bankrupt cannot support a petition to expunge a proof on the ground of so much not being due, unless he alleges a probability of a surplus, or that he will be entitled to an allowance. *Pitchforth, ex parte, 3 Deac. (s. c.) 487; and 1 Mont. & Ch. 96.*

73. Where the separate debt of A. to C. was guaranteed by B., who afterwards became a partner with A., and on application for indulgence no answer was returned, but C. forbore to sue; held that in the absence of any express consent, it was not converted into a joint debt, and the proof against the joint estate properly rejected. *Hitchcock, ex parte, 3 Deac. (s. c.) 507; and 1 Mont. & Ch. 60.*

74. Where, upon the formation of a firm, a creditor of one partner consented that his separate debt should become a joint one from the firm, and bills were drawn and warrants transferred; held, that it could not be afterwards proved as a separate debt. *Whitmore, ex parte, 3 Mont. & Ayr. (s. c.) 627; and 3 Deac. 365.*

75. The bankrupt's wife admitted to prove on behalf of herself and children. *Thring, ex parte, 1 Mont. & Ch. (s.) 73.*

76. The executrix of a surviving assignee allowed to pay unclaimed dividends into Court. *Raikes, ex parte, 3 Deac. (s. c.) 494; and 1 Mont. & Ch. 96.*

77. Where a clerk left his employer's service 12 months before his bankruptcy, not being compelled so to do, but from approaching insolvency, and became employed elsewhere, held not entitled to six months' wages within 6 Geo. 4, c. 16, s. 49. *Gee, ex parte, 3 Deac. (s.) 34. 563; and 1 Mont. & Ch. 99.*

78. *Aliter*, if he was compelled to leave. *Bennett, ex parte, 3 Mont. & Ayr. (s. c.) 669.*

79. The decision in *Fussell, ex parte*, (3 Deac. 158; and 3 Mont. & Ayr. 67), that an articulated clerk is an apprentice within 6 Geo. 4, c. 16, s. 49, reversed by the Lord Chancellor, in *Prideaux, ex parte*, 3 Mont. & Ayr. (s. c.) 506; and 3 Myl. & Cr. (s.c.) 327.

80. Upon an order for proof made by the court, the commissioner cannot decline receiving it until a meeting and inquiry. *Richardson ex parte, 3 Deac. (s. c.) 377.*

81. Where a cross petition is presented within a reasonable time, a petition for a dividend is of course. *Lees, ex parte, 3 Mont. & Ayr. (s. c.) 591; and 3 Deac. 287.*

82. Where, on the rejection of proof, a sum was set apart and invested under 1 & 2 Will. 4, c. 56, s. 31, and on appeal the proof allowed; held, that the creditor was not entitled to the interest made by the investment. *Jamieson, ex parte, 3 Mont. & Ayr. (s. c.) 715.*

83. The interest on unclaimed dividends follows the principal, and belongs to the creditors who may afterwards claim. *Gregg, ex parte, 3 Mont. & Ayr. (s. c.) 622; and 3 Deac. 308.*

And see *Bond*; and *supra* (g).

#### [H] SURRENDER.

1. The court, has no authority to enlarge the time for surrender, unless the application is made at least six days before the day appointed for the surrender. *Burnell, ex parte, 2 Deac. (s.) 212.*

2. Where the first certificate was stayed, and the bankrupt afterwards procured a new one; held, that the former ought first to have been cancelled before the commissioner could certify again. *Myers, ex parte, 2 Deac. (s.) 97; and 3 M. & Ayr. 30.*

3. The signature of a creditor living in Scotland allowed to be verified by affidavit sworn before a magistrate there. *Growcock, ex parte, 2 Deac. (s.) 78; and 3 M. & Ayr. 22.*

4. Where the petitioner was a creditor at the opening of the *fat* and might have entered a claim, but delayed doing so; held, that he could not stop the certificate for the purpose of enabling him to prove his debt. *Hellings, ex parte, 3 Deac. (s.) 151.*

5. A petition to stay certificate will be dismissed, if merely for the purpose of proving, and the assignees have not been served, unless misconduct be alleged against the bankrupt. *Woodroffe, ex parte, 2 Deac. (s.) 71; and 3 M. & Ayr. 14.*

#### [I] CERTIFICATE.

1. A certificate having been allowed by the commissioners, on condition of his tendering satisfactory accounts, which he had not complied with; held, on petition to stay the certificate, that it must be referred back to be reviewed generally. *Kimberley, ex parte, 3 M. & Ayr. (s.) 235; and 2 Deac. 412.*

2. Where the plaintiff, for the accommodation of the defendant, drew a bill upon a party indebted to the latter, which was accepted, and afterwards indorsed by the plaintiff to the defendant, and upon the defendant becoming bankrupt, and the bill dishonored, it was taken up by the plaintiff and paid; held to be a debt proveable and barred by the defendant's certificate; the plaintiff was equally a surety for the bankrupt, as well as for the acceptor. *Haigh v. Jackson, 3 Mees. & W. (ex.) 596.*

3. Where no misconduct was charged subsequent to the *fat*, held that the charge of having caused unnecessary delay in the progress of a Chancery suit, and pending which the petitioner's



debt could not be ascertained, was not a sufficient ground for staying the certificate: held also, that the word "witness" prefixed to the name of the solicitor attesting the signature of the petitioner, was a sufficient compliance with the general order for attestation: held also, that it is unnecessary, in a petition for staying a certificate lying in the office for allowance, to allege that it has been signed by the commissioners, or creditors. *Stocken, ex parte*, 3 Deac. (s.) 610; and 1 Mont. & Ch. 232.

4. So, it refused to stay it until the determination of an action pending, for the purpose of realizing part of the petitioner's debt, where no misconduct was alleged against the bankrupt, and the parties had not used due diligence in making his security available. *Pheasant, ex parte*, 3 Deac. (s.) 635.

5. A petition to stay the certificate on allegations that certain debts had been improperly retained, and others expunged, but not showing that they would have turned the balance, or that the bankrupt was privy thereto, held insufficient: the bankrupt having also been a partner with the petitioners, held that it was not enough to allege, that if the accounts were taken, a large balance would be due from the bankrupt, without showing the probable amount; and on a petition by one, the other partners, *semble*, must be served with the petition. *May, ex parte*, 3 Deac. (s. c.) 392; and 1 Mont. & Ch. 18.

6. Where the certificate was referred back, but the commissioners differed in opinion as to their power to re-consider it after having once signed it, and no report made, the court allowed it to be delivered out, with costs of the motion. *Allday, ex parte*, 3 Mont. & Ayr. (s. c.) 487.

#### [K] SUPERSEDEAS.

1. Where the bankrupt had left the country and not surrendered, and a true bill had been found against him for not so doing, the court refused a *supersedeas* with consent of creditors, or to direct a meeting to take his surrender. *Levy, ex parte*, 2 Deac. (s.) 25; and 2 M. & Ayr. 635.

2. A petition to supersede dismissed with costs, although two verdicts were obtained by the bankrupt in actions against his assignees, for want of a good petitioning creditor's debt, there being grounds for believing contrivance and collusion between him and the creditor's assignee, who was also the petitioning creditor, and they consenting to annul the commission. *Munk, ex parte*, 3 M. & Ayr. (s.) 252; and 2 Deac. 444.

3. The certificate of the commissioners under the composition clause (s. 133,) need not state that no creditor to the amount of 50*l.* is without the jurisdiction of the court. *Butterworth, ex parte*, 3 Deac. (s. c.) 395; and 1 Mont. & Ch. 140.

#### [L] RIGHTS OF BANKRUPT—OF WIFE.

1. Where the bankrupt's estate in the hands of

the assignees paid 14*s.* in the pound, but having been permitted to continue the business, a balance was alleged to be due to them; held, that he was entitled to his allowance, but that the claim, if found due on a reference, might be set off: held also, that if the last were intended to be a final dividend, although not so expressly declared in the order, the court would do so for the purpose of entitling the bankrupt to his allowance. *Cooper, ex parte*, 2 Deac. (s.) 41; and 2 M. & Ayr. 639.

2. But he is not entitled to set off against that amount sums due to him from the assignees on a personal contract with him. *S. C.* 3 M. & Ayr. (s.) 137.

3. Where the defendant omitted to plead his bankruptcy, and gave a cognovit; held, entitled to be discharged out of custody, on affidavit of his certificate having been enrolled; the cognovit creates no new cause of action. *Oswald v. Williams*, 5 Dowl. (r. c.) 159; 1 Mees. & W. (xx.) 550; and 1 Tyr. & Gr. 925.

4. The bankrupt is entitled under s. 132 to be furnished with copies of the assignees' accounts, and not merely to inspection of them, and he may petition for that purpose without a previous application to the commissioners. *Emerson, ex parte*, 2 Deac. (s.) 156; and 3 M. & Ayr. 133.

5. The bankrupt is entitled to copies of the dispositions on petition to annul the *fiat* or reverse the adjudication, and such proceedings cannot be used in evidence against him unless he has notice of the intention to do so. *Goodwin, ex parte*, 1 Deac. (s.) 695; and 1 M. & Ayr. 532.

6. On an application by a *cestui que trust* to remove a bankrupt trustee; held that he was entitled to the costs of his appearance. *Whitley, ex parte*, 1 Deac. (s.) 478.

7. Where the defendant became bankrupt; held, that the plaintiff could not apply to the court under 6 Geo. 4, c. 16, s. 59, for leave to discontinue, unless he had either proved under the commission, or had his claim entered on the proceeding under the *fiat*. *Augarde v. Thompson*, 5 Dowl. (r. c.) 762.

8. Where the bankrupt after repeated applications for payment of a previous debt, but after a secret act of bankruptcy, delivered goods *bona fide* in part payment; held to be a payment protected by 6 Geo. 4, c. 16, s. 82. *Cannon v. Wood*, 2 Mees. & W. (xx.) 465.

9. Where goods were placed in the defendant's hands as a security for advances, and after an order given for an advance thereon, and no advance made, but it was agreed that it should at some future time be set off against bills of exchange, the bailor became bankrupt, and the advance was subsequently made on the order, which was found to have been a fraudulent preference, and the goods remaining in specie unaffected by any lien; held, that the subsequent advance was not a payment protected within 6 Geo. 4, c. 16, s. 83. *Green v. White*, 3 Bing. N. S. (c. r.) 59; and 3 Sc. 387.

10. Where the circumstances under which the defendant bought goods of the bankrupt just be-



fore the bankruptcy, showed that he knew of, or had the means of knowing, the embarrassed state of the bankrupt's affairs, and that the transaction was not honest; held, that the payment was not protected; the terms, "really and *bona fide* paid," mean something different from, and additional to, an actual payment. *Devas v. Venables*, 3 Bing. N. S. (c. r.) 400; and 4 Sc. 123.

11. Where a trader conveyed substantially the whole of his property to trustees to sell and pay creditors, and joined in the conveyance of premises to a purchaser, who five years afterwards sold them to the defendant, who objected to the title, alleging the first conveyance to be an act of bankruptcy, although no commission ever issued; held to be within the protection of s. 87 of 6 Geo. 4, c. 16. *Earl Granville v. Danvers*, 7 Sim. (ch.) 121.

12. Where the clerk quitted the service six months before the issuing the *fiat*, on account of the bankrupt's having assigned his property, and inability to pay him; held, that he was entitled under s. 48. *Saunders, ex parte*, 2 Deac. (s.) 40; and 2 M. & Ayr. 684.

13. The 6 Geo. 4, c. 16, s. 127, vesting all future effects of a party becoming a second time bankrupt, unless his estate shall pay 15s. in the pound; held to apply only to cases arising after the passing of the act. *Guthrie v. Boucher*, 8 Sim. (ch.) 248.

14. Application on motion to discharge a certificated bankrupt, on the ground of the certificate being void in law, being under a third commission, and 15s. in the pound not paid, refused; doubting, however, the validity of the decision, and that it was a question to be raised on the record. *Summers v. Jones*, 3 M. & Ayr. (s.) 400.

15. Where the last examination was adjourned *sine die*, without a protection given, and a second day appointed, when he attended, but no protection given, he was afterwards arrested, but upon attending to be further examined, received a protection; held, that it did not entitle him to be discharged from the arrest. *Bailey, ex parte*, 3 M. & Ayr. (s.) 408.

16. It is of course to order a bankrupt to execute a conveyance, under 6 Geo. 4, c. 16, s. 78, unless he contests the *fiat*. *Brown, ex parte*, 3 M. & Ayr. (s.) 262; and 2 Deac. 479.

17. The 6 Geo. 4, c. 16, s. 120, applies only to parties assisting the bankrupt in the concealment of his goods, and not to a case of debtor and creditor; *semb.*, a creditor might, however, come within the act, although a fraudulent preference is intended: but a separate penalty cannot be recovered for each distinct act of concealment. *Brooks v. Glencross*, 2 M. & Rob. (n. r.) 62.

18. Where the assignees, whilst the bankrupt was proceeding to get the commission superseded, sold his estate, and he filed a bill against them and the solicitor, charging fraud and collusion in the sale, and alleging that all the other creditors were satisfied and consenting to the *supersedeas*; held, that it appearing that no other person was interested except the bankrupt, and he could get no relief in the Court of Bankruptcy,

and that the bill was sustainable, the demurrer overruled. *Lantour v. Halcombe*, 8 Sim. (ch.) 76.

19. Where the bankrupt was tenant from year to year, at a rent payable on the 9th October and 6th April, and became bankrupt during a current half-year, and the assignees having declined, the bankrupt, on the 5th April, delivered up the possession, under 6 Geo. 4, c. 16, s. 75; held, that a tenancy by parol was within the statute, and the rent not accruing due until the 6th April, he was not liable in use and occupation for the time he occupied *pro rata*. *Slack v. Sharp*, 3 Nev. & P. (q. s.) 390.

20. Any one or more of the judges of the court empowered by warrant to exercise the same powers as are given by 1 & 2 Will. 4, c. 56, to any three of them. 3 M. & Ayr. (s.) 285; and 2 Deac. 491.

21. Where the commissioner orders the allowance before, he may sign it after the choice of assignees, and, if made with consent of the assignees, they cannot afterwards object that there is not any estate. *Stephenson, ex parte*, 3 Mont. & Ayr. (s. c.) 605; and 3 Deac. 311.

And see *Action; Bail; Power*.

#### [M] COURT OF REVIEW—JURISDICTION—APPEALS.

1. Where the petitioner agreed with the bankrupt to procure a lease of premises then used in his business, and assign to the bankrupt, in consideration of sums to be paid by instalments, and secured by bonds, and the bankrupt was let into possession, but the petitioner, by the death of the lessor, being unable to obtain the lease, except with restrictive covenants, had called upon the assignees to rescind the agreement, which had been done under order of the court, and the bonds directed to be delivered up; held, that the court had authority to make such order as the equity of the case required; and directed an inquiry as to what ought to be allowed for the use and occupation by the bankrupt, and also for dilapidations and ground-rent paid, and proof to be made for such amount. *Benecke, ex parte*, 2 Deac. (s.) 46; and 2 M. & Ayr. 692.

2. The court will entertain a petition as to the delivery of specific chattels, if the parties consent to be bound; but a party who is only trustee cannot give such consent. *Ellison, ex parte*, 4 Deac. (s.) 725; and 2 M. & Ayr. 365.

3. Where the commissioner to whom an order of reference had been made, whether a contract by the assignees were beneficial or not, refused to interfere, the court reluctantly allowed it to go to the registrar. *Bradstock, ex parte*, 1 Deac. (s.) 691; and 2 M. & Ayr. 593.

4. The court refused to interfere and confirm the registrar's report, as to its being beneficial that the bankrupt's trade should be carried on, the creditors consenting thereto. *Hamer, ex parte*, 2 Deac. (s.) 39.

5. An order confirming an arrangement made



between the bankrupt and his assignees, with the consent of the great majority of the creditors, made without directing a reference. Chambers, in re, 1 Myl. & Cr. (ch.) 509.

6. Where the Vice-Chancellor had ordered the commissioners to tax the costs of petitions, which he adopted, and ordered the payment, the court refused to reverse his order. Hadfield, ex parte, 2 Deac. (s.) 114; and S. C. Christy, ex parte, 3 M. & Ayr. 88.

7. Although the Lord Chancellor may hear an appeal otherwise than on special case, it is not alone enough to induce him to do so that the matters of law and fact are blended, and the latter numerous. Maberly, in re, 2 M. & Ayr. (s.) 686; S. P. Britten, ex parte, and Butterworth, in re, ib.

8. Where the judgment of the court of review had been reversed by the Lords Commissioners, the Lord Chancellor, a new judge, and who had heard no part of the case, would with reluctance allow an appeal to the House of Lords, without first hearing the appeal complained of. Watkins, ex parte, 3 M. & Ayr. (s.) 134.

9. A party receiving part of the estate and becoming assignee, and so not able to sue himself, is accountable to the court: where a party, being a member of Parliament, disobeys an order of court for payment of money, *quæ*. if it can issue a *distringas* against him? *Semb.* s. 4 of 1 & 2 Will. 4, c. 56, is confined to the matters referred to, viz. to process connected with issues. Grimwood, ex parte, 3 M. & Ayr. (s.) 285; and 2 Deac. 465.

10. The court will direct a *viva voce* examination, both parties agreeing, and affidavits may be read on such examination. Biggs, ex parte, 3 M. & Ayr. (s.) 152, 153; and 3 M. & Ayr. 328.

11. The court has no jurisdiction in bankruptcy to order the funds of a testator, in the hands of a bankrupt executor, to be divided amongst his creditors, but a bill must be filed for that purpose, and it will make a special order for transferring the fund in its power to the accountant-general upon such bill being filed. Williams, ex parte, 3 Deac. (s. c.) 378; and 1 Mont. & Ch. 91.

12. The court has no jurisdiction to enforce specific performance of contracts under sales by order of the court; and if it had, from the mere statement in the conditions that the sale was by such order, it could not be inferred that the purchaser had submitted to the jurisdiction. Catts, ex parte, 3 Deac. (s. c.) 242; reversing Brettell, ex parte, ib. 11. 543; and overruling Gould, ex parte, 2 Deac. & Ch. 818; Barrington, ex parte, 4 Deac. & Ch. 46; and 3 Mont. & Ayr. 549.

13. Where the court of Review had, upon the petition of the bankrupt, annulled the *fiat*, with costs to be paid by the petitioning creditor, and upon which the order of the Lord Chancellor issued, annulling the *fiat*; held that the Lord Chancellor had no jurisdiction over what had taken place in the Court of Review, unless upon appeal brought before him upon a special case, unless, under very special circumstances, he

should otherwise direct; and the refusal to introduce into the case a statement of certain facts would not be a ground of appeal by sect. 3 of 1 & 2 Will. 4, c. 56, making the determination of the Judge in the settlement of the case final and conclusive. Stubbs, ex parte, 3 Deac. (s.) 549; correcting the observations of Lord Brougham, in Keys, ex parte, 3 Deac. 275; and 1 Mont. & Ayr. 242.

14. Any one Judge empowered to exercise the same powers as by the same Act creating the court are given to any three of them. Queen's Warrant, 3 Mont. & Ayr. (s. c.) 724.

15. A petition against the decision of the commissioners on a question of proof, on which the court hears new evidence in the case, is not to be construed an appeal in a strict legal sense, although called so in the Act; and a party therefore held not precluded by the lapse of more than a month after such determination: but on rehearing the court adhered to the former decision (in ex parte, Whitmore, 3 Deac. 365). Jackson, ex parte, 3 Deac. (s.) 651.

16. Where the registrar becoming insolvent, resigned, the court refused to interfere to order payment of arrears of salary to him, his assignee refusing to receive it. Bousfield, ex parte, 1 Mont & Ch. (s.) 41.

17. Decrees and orders of Courts of Equity and Court of Review to have the effect of judgments. 1 & 2 Vict. c. 110, s. 18.

18. It is of course to revive a former order, on petition unless some hardship can be shown from the court so doing. Evans, ex parte, 3 Deac. (s. c.) 381.

#### [N] PRACTICE ON PETITIONS—COSTS.

1. Affidavits alleged to be impertinent not read on the hearing; costs disallowed if found by the officer to be impertinent. Harvey, ex parte, 1 Deac. (s.) 571.

2. Where several affidavits are filed at the same time, only one fee is payable for filing; if at different times, on the same day, it will depend on circumstances whether one or more shall be allowed. Hadfield, ex parte, 2 Deac. (s.) 118; and 3 M. & Ayr. 92.

3. There is no occasion for a petition to refer for scandal, it is a motion of course. Gomm, ex parte, 2 M. & Ayr. (s.) 512.

4. Where the party had applied to have the petition stand over for his own convenience, and then moved to refer all the affidavits referred for scandal and impertinence, the court imposed terms. Knight, ex parte, 2 Deac. (s.) 75; and 3 M. & Ayr. 19.

5. The court will not vary the minutes after an order had been drawn up, and a notice of such motion does not prevent the drawing up of the order. Bell, ex parte, 1 Deac. (s.) 690; and 2 M. & Ayr. 578.



6. Where the petition of an equitable mortgagee of a lease of premises, engines, &c. omitted in the prayer of sale the word *lease*, the court permitted it to be amended *instanter*. *Cochs*, ex parte, 2 Deac. (s.) 14.
7. Where a petition stands over, it may be set down again for further directions on application at the registrar's office. *Cooper*, ex parte, 3 M. & Ayr. (s.) 1.
8. Although the examination of a party, as the petitioning creditor, may be read as admissions against him, yet where the bankrupt was also interested in the result of the petition, it could not be read against him without notice, and a copy tendered. *Wilkes*, ex parte, 2 Deac. (s.) 1; and 2 M. & Ayr. 667. *S. P. Bignold*, ex parte, 1 Deac. (s.) 728.
9. So, on a petition to annul a *stat. depositions* as to the trading, not allowed to be read, unless notice and copies had been given to the party against whom intended to be used. *Thurkell*, ex parte, 2 Deac. (s.) 9; and 2 M. & Ayr. 672.
10. On a petition to reverse the adjudication, a reference to revise the petitioning creditor's debt ordered, with liberty to receive further depositions. *Gartley*, ex parte, 2 M. & Ayr. (s.) 524.
11. A petition to remove assignees on the ground of collusion, to surcharge and falsify their accounts, and refer the solicitors and accountants' bills to be taxed, held multifarious, and that it might be dismissed *in toto*, or in part; and the petition as against the accountants dismissed with costs. *Knight*, ex parte, 2 Deac. (s.) 215; and 3 M. & Ayr. 58.
12. A petition to prove can only be made after an express rejection by the commissioner, and he is not estopped by a judgment from inquiring as to the validity of the debt. *Marson*, ex parte, 2 Deac. (s.) 245.
13. The court will not impose on a judge the trouble of producing his notes, unless good ground be shown for a new trial. *Church*, ex parte, (s.) 72; and S. C. 3 M. & Ayr. 15.
14. In taxing the costs between solicitor and client, if the registrar allows four retainers of counsel, he ought to allow four briefs; held also, that a fee to counsel for settling a petition, not of course, was allowable. *Hadfield*, ex parte, 2 Deac. (s.) 118; and S. C. *Christy*, ex parte, 3 M. & Ayr. 92.
15. Costs of the day on postponement, not allowed where counsel not instructed on the other side at the time of the application to postpone. *Hill*, ex parte, 3 Deac. (s.) 239.
16. Unopposed motions to postpone a petition, require the consent of counsel on the other side. *Brodie*, ex parte, 3 M. & Ayr. (s.) 205; and 2 Deac. 318.
17. Upon applying for a petition to stand over, it must be on payment of full costs of the day. *Kent*, ex parte, 2 Deac. (s.) 287.
18. Where the copy of the petition is not produced, a party could not be allowed to depose to the service. *Bellam*, ex parte, 3 M. & Ayr. (s.) 246.
19. Where at the time of pronouncing an order of dismissal, there was no petition filed, to which it should apply, the court allowed it to be filed *ex parte* *pro tunc*. *Carnes*, ex parte, 3 M. & Ayr. (s.) 453.
20. Where different petitions are between the same parties and on the same point, after notice given by one that the decision in one shall be conclusive as to the other, the costs of affidavits afterwards filed in the latter will not be allowed. *Scott*, ex parte, 3 M. & Ayr. (s.) 433.
21. A party is not disqualified from petitioning in another bankruptcy, by reason of his being himself an uncertificated bankrupt. *Sayer*, ex parte, 2 Deac. (s.) 491.
22. The Lord Chancellor having made an order sanctioning a compromise between the bankrupt and the assignees, of the questions between them, a petition by two creditors, to set it aside, dismissed with costs. *Jerrard*, ex parte, 3 M. & Ayr. (s.) 358.
23. Several affidavits being referred and one only certified scandalous, the party ordered to pay the balance on taxing the costs. *Knight*, ex parte, 3 M. & Ayr. (s.) 143.
24. All proceedings stayed until security for costs given, the petitioner being in Scotland and no step taken by the respondent. *Scott*, ex parte, 3 M. & Ayr. (s.) 393.
25. Petition ordered to stand over generally, until security for costs given, where the petitioner described himself out of the jurisdiction of the court. *Scott*, ex parte, 2 Deac. (s.) 556; and 3 M. & Ayr. 433.
26. A creditor petitioning to tax the bill of the petitioning creditor's solicitor, before the commissioner had completed his taxation, held, irregular, and the petition dismissed with costs. *Lucas*, ex parte, 2 Deac. (s.) 532.
27. A petition is necessary to set aside an order in bankruptcy irregularly obtained. *Haward*, ex parte, 3 Mont. & Ayr. (s. c.) 608; and 3 Deac. 324.
28. The practice is to hear the petition, and if it appears that the parties are at issue on any matter of fact, to direct a *visa voce* examination. *Tate*, ex parte, 3 Deac. (s. c.) 516.
29. Where one of the judges of the Court of Review had refused to certify a special case as being a question of fact, a petition of appeal dismissed with costs. *Woodward*, ex parte, 3 Deac. (s.) 393.
30. The mere circumstance of a petition standing over does not prevent the party from filing fresh affidavits; but if filed late, time will be given to answer. *Worthington*, ex parte, 3 Deac. (s. c.) 332.
31. Where on a petition for rehearing, an affidavit contains additional facts, known on the former hearing, a supplemental petition ought to be filed. *Booker*, ex parte, 3 Deac. (s. c.) 347.
32. Where there is no variation between the



order and the minutes, the court will not vary the latter, but leave the party to petition for rehearing. *Dolly, ex parte*, 3 Deac. (s.) 51.

33. Where costs are ordered to be paid to the bankrupt or his solicitor, a demand by the former is sufficient to ground a motion for committal. *Diack, ex parte*, 3 Deac. (s.) 53.

34. A petitioner cannot, by not opening his petition, prevent the respondent having the costs of his affidavits; if not filed in time, and the petitioner thinks they ought to be excluded, he should apply for a rehearing. *Sidebotham, ex parte*, 3 Deac. (s. c.) 221; and 3 Mont. & Ayr. 495.

35. On a reference to appoint a trustee, it is not necessary to confirm the report: *aliter*, if the officer is to select and report his nomination to the court. *Anon.* 3 Deac. (s. c.) 223; *S. C. Masefield, ex parte*, 3 Mont. & Ayr. 487.

36. On a petition for the appointment of a new trustee in place of the bankrupt, held, that if served, he is entitled to have his costs. *Whitley, ex parte*, 3 Mont. & Ayr. (s. c.) 696.

37. On application for a special case, the grounds of appeal must be stated to the judge certifying it, and the case must state the facts found by the court, not the evidence of them. *Wilson, ex parte*, 3 Deac. (s. c.) 214.

38. Where the affidavit in answer to a petition referred to exhibits, being extracts and copies of accounts relating to the petitioner's debt, but not mutual accounts between the bankrupt and the petitioner, the court refused to order copies to be furnished to the bankrupt, before the hearing of the petition. *Parr, ex parte*, 3 Deac. (s.) 607.

39. Where the affidavits were directly contradictory, the court would not decide on probabilities, but allow a *viva voce* examination of parties, or an issue. *Bunn, ex parte*, 3 Deac. (s. c.) 120.

40. Where counsel not being prepared with an affidavit, the petition is ordered to stand over, it cannot keep its place in the paper, if the party in the following petition objects. *Crossley, ex parte*, 3 Deac. (s. c.) 404; and 1 Mont. & Ch. 93.

41. Where the application to remove the *fiat* from Norfolk to town was refused, the court held, that to dispense with the attendance of the petitioning creditor at the opening, must be the subject of a separate application. *Wright, ex parte*, 1 Mont. & Ch. (s.) 144.

42. On a petition to annul a joint *fiat*, one only having been found bankrupt, held that the affidavit ought to have been entitled, "in the matter of A. and B." *Fisher, ex parte*, 3 Deac. (s.) 695.

And *vid. supra*, and *infra*.

#### [O] SOLICITOR.

1. The solicitor has no lien against the estate, but his right is against the assignees personally. Where an action was brought against the official

assignee by the bankrupt, who disputed the bankruptcy, the court refused to order the official assignee to pay the amount to the solicitor, but the assignees, with liberty to retain out of the estate. Where actions are brought against the official assignee, it is his duty to apply to the court, who will extend to him the same protection as the court of equity does to receivers. *Rains, ex parte*, 2 Deac. (s.) 229; and 3 M. & Ayr. 51.

2. The court has no jurisdiction to order the executor of a deceased solicitor to pay costs of taxation; and *semble*, not to refund a balance found to be due, if assets were not admitted; but an inquiry might be had as to assets. *Spackman, ex parte*, 3 M. & Ayr. (s.) 135.

3. Where a solicitor was employed on business not taxable, and being required to strike a docket, which, not having been admitted as a solicitor in bankruptcy, he employed another to do; held, that his bill containing the latter as taxable matter, he could not split it to avoid a taxation of part. *Cass, ex parte*, 4 Deac. (s.) 718; and 2 M. & Ayr. 170.

4. After an order for taxation he cannot withdraw items inserted by mistake, so as to exclude them from the calculation of one-sixth of the whole; and where after taxation by the commissioners, a re-taxation by the officer is ordered, the sums taxed off by the commissioners, and disallowed by the officer, are to be included in the calculation. (*Diss. Erskine, C. J.*) *Hadfield, ex parte*, 2 Deac. (s.) 113; and *S. C. Christy, ex parte*, 3 M. & Ayr. 100.

5. A bill containing a charge for attending the commissioners on behalf of an equitable mortgage held taxable. *Williams, ex parte*, 1 Deac. (s.) 469; and 2 M. & Ayr. 578.

6. Where the solicitor's bill up to the choice of assignees had been taxed by the commissioners, and paid upwards of two years, the court, at the instance of a creditor, directed a re-taxation, on objectionable items stated in the affidavit, though not in the petition, without bringing the petitioning creditor before the court. *Moore, ex parte*, 1 Deac. (s.) 578.

7. One of three petitioning creditors held entitled to petition for the taxation, undertaking to pay the costs of the action commenced; and the order was a suspension; and the practice in bankruptcy is to give costs where one-sixth is taken off, whether an action has been commenced or not. *Watts, ex parte*, 1 Deac. (s.) 588; and 2 M. & Ayr. 621.

8. A solicitor will not be allowed beyond 1*l.* for himself and clerk at each meeting, unless a necessity be shown for an extra clerk; advertisements in country papers, after being advertised in the Gazette, will not be allowed. *Hadfield, ex parte*, 2 Deac. (s.) 121; and *S. C. Christy, ex parte*, 3 M. & Ayr. 96.

9. After an order for taxation the bill cannot be altered by inserting items, or withdrawing others; and the court will only hear exceptions to taxation where involving a question of principle. *Id.*

10. An order for taxation of a solicitor's bill in



bankruptcy, become insolvent as against his assignee, dismissed with costs Simpson, *ex parte*, 3 M. & Ayr. (s.) 223; and 2 Deac. 400.

11. The court refused to allow the name of a commissioner to be struck out of the fiat, to enable him to act as solicitor to the commission. Brinton, *ex parte*, 3 Mont. & Ayr. (s.) 395.

12. Where the solicitor to the fiat was also a mortgagee of the bankrupt's estate; held, that he might tender provisional biddings at the sale for the protection of his own interests, reserving all further considerations until after the sale, and another solicitor to be appointed to conduct the sale. Briggs, *ex parte*, 3 Deac. (s. c.) 238; and 3 Mont. & Ayr. 585.

13. Where the petitioner, a creditor, who had only lately proved, applied to re-tax the solicitor's bill, which had been taxed and paid two years ago; held, that upon the general jurisdiction, he was not precluded, but that the objectionable items must be pointed out, and he cannot refer to them in the bill of costs not set out in the petition; and if the petitioning creditor or his solicitor have received part of the estate, they must be parties. Moore, *ex parte*, 3 Mont. & Ayr. (s. c.) 699.

14. The court will not delay the dividend where the solicitor does not take in his bill in a reasonable time, and a petition that unless he delivered it in for taxation, the dividend might be declared, dismissed. Monk, *ex parte*, 3 Mont. & Ayr. (s. c.) 626.

15. Upon a petition to tax the solicitor's and also the messenger's bill, the objection that the petition was multifarious, over-ruled; but held irregular to bring the latter before the court, and directed that the payment of his costs should depend ultimately on the taxation of his bill. Pring, *ex parte*, 3 Mont. & Ayr. (s. c.) 607; and 3 Deac. 322.

16. Where the bill is taxed after the death of the solicitor, his representatives will not be ordered to pay the costs of taxation, although more than a sixth be taken off: and the court refused to allow them to be set off against the costs of an action brought against assignees for the recovery of the amount. Hammond, *ex parte*, 1 Mont. & Ch. (s.) 136.

17. Where one only of three assignees required the commissioners to tax the solicitor's bills, which was at first refused, but the commissioners afterwards professed to tax four of the bills (12 in number), the others not concurring, and a small sum being taken off, the bills were paid; held, that the assignee was not estopped by such payment from applying for an order of taxation, but that he must either make his co-assignees parties or serve them with the petition. Fosbrooke, *ex parte*, 3 Deac. (s.) 687; and 1 Mont. & Ch. 176.

18. In the case of petitioning creditor and solicitor, the court has jurisdiction to tax, where the items, if allowed, come out of the estate. Davis, *ex parte*, 3 Mont. & Ayr. (s. c.) 624; and 3 Deac. 320.

## BARON AND FEME.

[A] RIGHTS OF HUSBAND.

[B] OF THE WIFE.

[C] INTER SE.

### [A] RIGHTS OF HUSBAND.

1. Where the goods were supplied to the wife living apart from the husband, and kept in ignorance of the marriage of his daughter, for whose use the wife had ordered part, and the rest for the purpose of balls, &c., against the express remonstrance of the husband, and to whom the plaintiff never made any reference; held, that not being necessary nor suitable, the husband was not liable. Atkins v. Curwood, 7 C. & P. (N. F.) 756.

2. Money lent to the wife, or expended at her request, in supporting an indictment against the husband for assaulting her, cannot be recovered in an action against him, such a proceeding not being necessary to her protection; *aliter* in the case of exhibiting articles of the peace against him. Grindall v. Godmand, 1 Nev. & P. (X. S.) 168.

And see Shepherd v. Mackoul, 3 Campb. 326.

3. Where the father has the custody of the children, and they are obtained from him, the court will restore them to him as to the legal custody; and will only not act upon its jurisdiction where there is danger in entrusting them to his care. Rex v. Greenhill, 6 Nev. & M. (X. S.) 244; and 4 Ad. & Ell. 624.

And see Rex v. Dobbyn, 1b. 644; and Rex v. Wilson, 1b.

4. Where the wife's property was settled on default of issue on the wife's next of kin, she being illegitimate, held that her husband, taking out administration, was entitled to the fund, and not the crown. Hawkins v. Hawkins, 7 Sim. (CH.) 173.

5. And the fund having been devised to trustees for the use and benefit of the wife, to be paid and settled on her for life in case of marriage; if not, the interest to be paid to her, and in the event of her not marrying, or dying, then over; held that the husband taking out administration, was entitled. 1b.

6. In an action for beer and spirituous liquors supplied to the defendant's wife, he being generally absent, and a stranger having cautioned the plaintiff that the defendant would not pay for such articles, and more than sufficient had been paid to cover the amount of the beer supplied; held, that it was for the plaintiff to show that the wife contracted the debt by the authority of her husband, and not for the latter to prove having given notice to the plaintiff not to supply the goods to his wife. Spreadbury v. Chapman, 8 C. & P. (N. F.) 371.

7. Where the husband and wife are living apart, the husband allowing her a sufficient mainte-



nance; held that he was not liable for necessities supplied, and it is immaterial whether the tradesman has notice or not. *Mizen v. Pick*, 3 Mees. & W. (ex.) 481.

8. Where, in an action against the husband for supplies to the wife, living separate, and only a payment of a sum into court pleaded; held, that the defendant thereby admitting the authority to contract, it was a question only of amount, but that she could not pledge his credit beyond what would be reasonable and necessary for her subsistence; the bill, 140*l.*, being for horses and carriages let on hire for 10 months, and 73*l.* paid into court, the jury found for the defendant. *Emmett v. Norton*, 8 C. & P. (n. p.) 506.

9. But he will not be liable to any extent if she be living apart in adultery: the verdict, however, in an action for *crim. con.* being *inter alios partes*, is not evidence in the action for such supplies; and if the husband inform the tradesman that she is living in adultery, he will not be liable beyond necessities, although he does not prove the adultery. *Hardie v. Grant*, 8 C. & P. (n. p.) 512.

10. In an action for coals supplied to the wife, living separate, held that he was liable, unless the wife be shown to have a competent provision, and it lies on him to show that, and a mere notice that he will not pay is not sufficient to relieve him from the liability: where the tradesman served both, and agreed with the husband not to charge him with the goods supplied to the wife, he could not recover from the husband. *Dixon v. Hurrell*, 8 C. & P. (n. p.) 717.

11. In case by husband and wife for slander of the latter, held that special damage for loss of the wife's service could not be recovered, which would accrue to the husband alone. *Dengate v. Gardiner*, 4 Mees. & W. (ex.) 5.

12. Where the wife of the defendant took her niece to the plaintiff's school, and there was slight evidence of her agency in ordinary household expenses, which was objected to as inadmissible, the court considering it some, although slight, evidence to go to the jury, refused to disturb the verdict. *M'George v. Egan*, 5 Bing. N. S. (c. p.) 196.

13. In a cause of divorce, the costs of the wife taxed against the husband, although she possessed a separate and permanent income, and that of the husband was variable, it not appearing that her income was adequate to her support, and also payment of the costs. *Belcher v. Belcher*, 1 Curt. (ARCHES) 444.

14. But where he had been recently discharged under the Insolvent Act, the court refused the application against him, although the wife had no separate property. *Walker v. Walker*, Ib. 560.

15. Where husband and wife perished at sea, the husband at the time the vessel struck being on deck, and the wife and child below, there being no evidence of the latter having survived, administration with the will annexed granted to the next of kin of the husband as a widower. In the Goods of Murray, 1 Curt. (PRER.) 596.

And see *Action; Arrest*.

## [B] OF THE WIFE.

1. Where after an informal marriage contract in Holland, where the parties were domiciled, upon the death of the father and second marriage, and birth of children in this country, the rights of the children were settled under a judicial process in Holland, and each declared entitled to one-fourth of the mother's personal estate; held, that their rights so ascertained, whilst they continued domiciled in this country, were to be administered according to the law of this country, and that the father was entitled to the enjoyment of the children's property until they attained 18, as by the law of Holland he would have been. *Gambier v. Gambier*, 7 Sim. (ch.) 263.

2. Where after the marriage of a female ward of the court, a moiety of a plantation estate in Demerara, her property, was settled for the benefit of her and of the children of the marriage, but which settlement, by the colonial law, was void; and she, with her husband, afterwards mortgaged the estate; held, that the equity of the wife only attached to the person of the husband and not upon the estate, and that the mortgagees, though having full notice, were not affected by that equity. *Martin v. Martin*, 2 Russ. & M. (ch.) 507.

3. A bequest of the residue to A. and B., one a married woman and the other her daughter, for their own use and benefit, "independent of any other person;" held to include the husband, and that they were entitled for their separate use. *Margetts v. Barringer*, 7 Sim. (ch.) 482.

4. Where the wife was deranged and had been deserted by her husband, part of the capital of a fund in court, to which she was entitled, ordered to be applied to her maintenance. *Peters v. Grote*, 7 Sim. (ch.) 238.

5. Where upon a separation a counterpart was prepared for the wife's trustees; held, that it was not to be considered a necessary for the wife, so as to enable the wife's trustees to recover for the expense of preparing it. *Ladd v. Lynn*, 2 Mees. & W. (ex.) 265.

6. Where the wife having separate property, employed and undertook to pay the attorney out of her own estate, which was afterwards sought to be enforced by bill against her, *semble*, that if on taxation more than one-sixth of the bill were taken off, the solicitor would be entitled to the costs of taxation. *Murray v. Barlee*, 7 Sim. (ch.) 194.

7. Where a *feme sole* executed a transfer of stock to trustees, who executed a declaration of the trust to be to her for life, for her sole and separate use, and free from the control of any husband, and after her death to such uses as she should appoint, and for default thereof in trust to the use of herself, her executors, &c.; she afterwards married, and by deed, reciting the settlement, executed by her husband and herself, assigned the dividends in trust to secure an annuity granted by the husband; held, that his joining in the deed operated as a confirmation of the deed of settlement, and that the assignment by the wife was valid. *Maber v. Hobbs*, 2 Younge (ex. eq.) 317.



8. Where, in an action for goods sold, defendant pleaded coverture; replication, that the husband was an alien, and never within the kingdom, and that the promises were made and cause of action accrued whilst the defendant was living separate, and that she contracted and promised as a *feme sole*; rejoinder, traversing each of these facts; held, that on such issues the plaintiff was bound to prove that the defendant represented herself to be a *feme sole* to the plaintiff, or that he dealt with her believing her to be such; and that her dealings with other persons, and representations that she was a *feme sole*, were inadmissible, unless so made as to come to the plaintiff's knowledge. *Barden v. De Keverberg*, 2 Mees. & W. (ex.) 61.

9. The court, on petition, took the consent of the wife, though a minor, to have a sum paid over to the husband. *Gullin v. Gullin*, 7 Sim. (ch.) 236.

10. Where the wife was sued before marriage, and the plaintiff afterwards proceeded and took her in execution, it not being sworn that she had no separate property, the court refused to discharge her, but left the husband to bring his writ of error. *Evans v. Chester*, 6 Dowl. (P. C.) 140; and 2 Mees. & W. (ex.) 847.

11. On a plea of coverture, a letter written by the husband (being abroad) in answer to one shortly before addressed to him, held admissible, and sufficient to entitle the defendant to a verdict. *Reed v. Norman*, 8 C. & P. (N. F.) 65.

12. Where a bond was assigned to trustees for such intents and purposes as P., a *feme covert*, should direct and appoint, and she afterwards appointed her interest to certain parties, in order to indemnify them in case of their not being able to recover monies appropriated by her husband, their solicitor; held, 1st, to be a trust executed, to which, although the consideration had not been available, the court would give effect, and 2dly, that the appointees were entitled to file a supplemental bill to have the benefit of a suit instituted for having the interest declared, and become defective by the bankruptcy of P.'s husband. *Collinson v. Patrick*, 2 Keene, (ch.) 123.

13. The wife of a person who has taken the benefit of the Insolvent Act, and no settlement upon her marriage, held entitled to have a fund in court applied for the benefit of herself and children. *Brett v. Greenwell*, 3 Younge & C. (ex. xq.) 230.

14. Upon a devise, gift or settlement of property to a woman for her separate use, and independent of the control of any husband, it may be enjoyed by her as separate estate, although it may vest in her whilst originally covert, or single, or becoming subsequently discover; and the nature and extent of her powers will be collected by the court from the terms in which the gift is made to her; if made without more than "for her sole and separate use," she has during the coverture an alienable estate independent of her husband; if "without power to alienate," she has the present enjoyment of an unalienable estate, independent of him; and in either of such cases, she has a power of alienation when discover, the restraint being annexed to the separate estate only, of which it is only a modification, and the separate estate existing only during coverture;

whilst discover, the separate estate, whether modified by restraint or not, is suspended, although capable of arising upon the happening of a marriage; where, therefore, the wife was entitled to a life interest in two separate estates, one modified by the restraint, the other not, and she had assigned her interest as security for annuities granted by her and her husband, held that the grantee acquired no right under his security as against the former, but was entitled in respect of the latter to relief, and for a receiver and account. *Tullett v. Armstrong*, 1 Beav. (ch.) 1; reviewing the cases.

15. So where the woman, being a widow at the date of the will and at the death of the testator, afterwards married; held, that the husband was not entitled to the separate estate. *Scarborough v. Borman*, 1 Beav. (ch.) 34.

16. Where the devise was to a woman unmarried, at the death of the testator, for her separate use, and without power of anticipation, and she afterwards married, became discover, and contracted a second marriage, without having disposed of the property whilst discover; held, that the clauses of separate use and against anticipation attached upon the latter marriage. *Clarke v. Jaques*, 1 Beav. (ch.) 36.

17. Where the wife entitled to reversionary freehold and funded estate on her marriage, settled it to her separate use, and her first husband dying she contracted marriage again; held, that she was entitled to the interest of the trust fund for her separate use. *Dixon v. Dixon*, 1 Beav. (ch.) 40.

18. Where a prisoner was described in the indictment as a single woman, but had been described by all the witnesses as the wife of the other prisoner, and passed and appeared as such, if the jury were satisfied that she was so in fact, the jury ought to acquit, notwithstanding she had pleaded to the indictment. *R. v. Woodward and another*, 8 C. & P. (N. F.) 561.

19. Where, in consideration of the wife proceeding no further in the prosecution of an indictment for an assault, the husband agreed to secure her an annuity; held an illegal contract, and that in a creditor's suit, she was not entitled to come in as a creditor. *Garth v. Earnshaw*, 3 Younge & C. (ex. xq.) 584.

20. Where the husband and wife were joined as co-plaintiffs in a suit relating to the wife's separate estate, the court refused to dismiss the bill; but on giving security for the costs incurred, allowed the wife to amend by adding a next friend, and making the husband a defendant. *England v. Downs*, 1 Beav. (ch.) 96.

21. Where a moiety of the wife's contingent interest in a reversion expectant had been assigned as a security for the debt of the husband, and upon the contingency happening, she insisted on a settlement, and a moiety was settled; held, that the assignment passed all the remaining moiety, and not the half of it; held also, that the wife's costs in enforcing her equity were to be deducted from the entire fund, before division. *Archer v. Gardiner*, 1 Coop. (ch. c.) 340.



22. The court will enforce the payment of the alimony decreed; nor will it refuse to do so on the mere ground that the wife has removed out of the jurisdiction, and refuses to obey an order of the court of King's Bench for delivering up the children to the husband. *Greenhill v. Greenhill*, 1 Curt. (cons.) 462.

[C] INTER SE.

1. Where the wife for several years acquiesced in her husband's receipt of her pin-money, and there was no evidence to sustain a contract or promise to pay it, or of continued claim of it; held, that the Master had properly allowed only one year's amount. *Thrupp v. Halman*, 3 Myl. & K. (ch.) 513.

2. Although in the case of a wife consenting to the husband receiving money of hers, her consent in court would be sufficient; yet, where the wife had assigned it by deed to a trustee as to part of it for the husband, held, that the bill by both against the trustee, to give effect to the deed, was to be deemed the bill of the husband alone, and that she ought to be a defendant. *Hanrott v. Cadwallader*, 2 Russ. & M. (ch.) 545.

3. Bequest by a husband to A., as his wife, it afterwards appearing that she was at the time married, and her first husband still living; held, not invalid by such false description, the testator and legatee appearing to have had common knowledge of, and equally guilty of the criminal act, which did not affect their civil rights; *aliter*, if the false character was acquired by a fraud which had deceived the testator. *Giles v. Giles*, 1 K. (ch.) 635.

4. A supplemental bill filed by her, describing herself as A. P., *alias* A. G., by her next friend against the first husband, in order to make him a party; held, not to be such an alteration in the frame of the record as to render the evidence taken in the first cause inadmissible at the hearing of the two causes, and did not affect the liability of a witness examined in the former suit for perjury. 1b.

5. Upon a bill, against husband and wife, charging fraud, and he being out of the jurisdiction, she by her answer disclaimed any interest in the suit, and denied that she had any separate property; held insufficient, being bound to answer fully, if at all. *Whiting v. Rush*, 2 Younge & C. (ex. ex.) 546.

6. Where by a deed executed after marriage, a power was given of jointuring, which was subsequently executed, held, that she was not competent during coverture, to elect between the jointure and her right of dower, and a consent by her counsel to release her jointure was not binding upon her after her husband's decease. *Frank v. Frank*, 3 Myl. & Cr. (ch.) 171.

7. Where an annuity was settled on the wife upon the marriage, during her life, to pay to such persons as, notwithstanding her coverture, she should appoint, and in default, to her sole and separate use; held, that on the death of the hus-

band, she became absolutely entitled, and that upon the insolvency of her second husband, the annuity passed to his assignee, subject to the wife's right to a provision out of it. *Bradley v. Hughes*, 8 Sim. (ch.) 149.

8. Where by a post-nuptial settlement the husband and wife agreed that all the property which she was or might become entitled to, should be held in trust for her for life, and after her death for the husband, and after the death of the survivor, to such children as the wife should appoint, whether begotten by her then or any future husband, the court refused to give effect to such a settlement. *Halloway v. Headington*, 8 Sim. (ch.) 324; over-ruling *Ellis v. Nimmo*, *Lloyd & G. Rep.* 333.

9. Where a part of residuary estate was bequeathed to one of the plaintiffs, a married woman, for her sole and separate use, without power of anticipation, and afterwards to her children equally, and a bill was filed by the husband and wife and the children, for an account; held, that as regarded the wife, it being to be considered the suit of the husband, the husband ought to have been made a defendant, and a demurrer for misjoinder of him as plaintiff, allowed; but amendment by striking out his name as plaintiff, and making him a defendant, and a party inserted as plaintiff, as next friend of the wife and children, permitted. *Wake v. Parker*, 2 Keene, (ch.) 59.

10. Upon a bequest by a testatrix of a fund for the separate use of her daughter for life, and afterwards for her executors and administrators, for their own absolute use and benefit, the daughter being separated from her husband, made a will, appointing the stock, but the will was not proved, and the husband took out administration; held, that the daughter had no power to appoint the fund, and he was entitled to the stock. *Wallis v. Taylor*, 8 Sim. (ch.) 241.

11. Bequest to testator's daughter of a sum, with a direction that if her husband should be indebted to him at the time of his death, the debt should be deducted from the legacy; the husband dying in the testator's life time, held that the personal debt of the husband was not to be deducted from the daughter's legacy. *Davis v. Elmes*, 1 Beav. (ch.) 131.

12. Where premises were demised to husband and wife, and the former let them; held, in an action for an injury to the reversion, that the wife ought to have been joined. *Wallis v. Harrison*, 5 Mees. & W. (ex.) 142.

13. *Semb.* where in a settlement the joint consent of husband and wife is necessary to authorize the fund to be left outstanding on a security, they may jointly file a bill to have the trust executed, although the fund is settled to the wife's separate use. *Kirby v. Mash*, 3 Younge & C. (ex. ex.) 295.

And see *Action*; *Annuity*; *Bankrupt*; *Children*; *Copyhold*; *Dower*; *Indictment*; *Infant*; *Insolvent*; *Libel*; *Pleading*, (c. l.)



## BASTARD.

1. Upon the question of illegitimacy, neither the mother nor her husband are competent to prove non-access; where therefore the husband had been cross-examined with a view of establishing facts from which non-access was necessarily to be inferred, held that the sessions improperly received such evidence, and the order made thereupon quashed. *Rex v. Sourton*, 6 Nev. & M. (x. s.) 575; and 5 Ad. & Ell. 180.

And see 2 Stark. Ev. 139, 2d ed.

2. The application for an order on the putative father, under 4 & 5 Will. 4, c. 76, s. 72, *semb.* must be made to the first sessions after the child becomes chargeable; where no explanation was given for not doing so, held that it was afterwards too late. *Rex v. Heath*, 6 Nev. & M. (x. s.) 345.

3. And held, (per Coleridge, J.) that it is for the justices to determine in each case, whether the application could, under the circumstances, have been made sooner with effect. *Rex v. Oxfordshire Justices*, 6 Nev. & M. (x. s.) 351; and 5 Dowl. (r. c.) 116.

4. The 4 & 5 Will. 4, c. 76, s. 57, making a bastard part of the family of the mother's after-taken husband; held, to be construed with reference to the purpose of maintenance only, and not of settlement, and that where the bastard resided apart from the mother, it was removable to the place of birth, and not to the residence of the mother. *Reg. v. Wendson*, 3 Nev. & P. (q. s.) 62.

5. An order of filiation at sessions upon the evidence of the mother, and corroboration thereof, not stating it to be in some material particular, held bad. *Reg. v. Read*, 1 Perr. & Dav. (q. s.) 413.

6. Where the order of filiation by the sessions did not expressly *adjudge* the defendant to be the father, but only stated the court to be satisfied of that fact, held to be a sufficient allegation; and also the stating generally the child to be chargeable, by reason of the mother's inability, without going on to state the circumstances; the chargeability arising on 8th March, and the application having been made at the following Easter sessions, the hearing was deferred until the Mid-summer sessions, on the ground of the defendant having kept out of the way to avoid service of the notice of application; held, that an order made at the latter sessions was not too late. *R. v. Lewis*, 1 Perr. & D. (q. s.) 112.

7. Where an order of filiation had been made by justices, for the payment of a weekly sum, on the putative father of a bastard child, against which no appeal had been made for being excessive; held, that it was not competent to the justice who was called on to enforce the order to inquire whether the whole sum was expended on the child, and a *mandamus* granted. *Reg. v. Codd*, 1 Perr. & Dav. (q. s.) 456.

8. Where the notice of application to the sessions for an order of filiation, served upon the putative father, was signed by two overseers

and one guardian of the parish, having also two churchwardens, held insufficient; the sections 72 and 73 intending that the majority of the aggregate body constituting the overseers should concur in signing it, and that the sessions, therefore, properly refused to hear the application founded on such notice. *R. v. Cambridgeshire Justices*, 7 Ad. & Ell. (q. s.) 480. *S. P. R. v. Salop Justices*, Ib. 404; and *R. v. Gloucestershire Justices*, Ib. 485.

9. And the notice of application may be signed by the churchwardens and overseers, although the parish forms part of a union, and sends a guardian to the board. *Reg. v. James*, 1 Perr. & Dav. (q. s.) 422.

10. Justices in petty sessions empowered to make orders in bastardy. By 2 & 3 Vict. c. 85.

And see *Evidence; Poor; Sessions; Trespass.*

## BEER.

In trespass against justices for seizing plaintiff's goods under a distress for a penalty under a conviction for having kept open his beer shop at times prohibited by the justices in sessions, held, that the conviction was bad, for not averring that that the sessions made such order, nor at what time the house was kept open. *Newman v. Hardwicke*, 3 Nev. & P. (q. s.) 368.

And see *Indictment.*

## BENEFIT SOCIETY.

See *Bankruptcy; Friendly Society.*

## BILLS.

[A] WHAT SO—CONSIDERATION—VALIDITY—STAMP.

[B] ACCEPTANCE.

[C] TRANSFER.

[D] PRESENTMENT.

[E] NOTICE OF DISHONOR.

[F] ACTIONS IN RESPECT OF.

[A] WHAT SO—CONSIDERATION—VALIDITY—STAMP.

1. Where the instrument contained an absolute promise to pay the amount, and was properly stamped as a note; held, that the terms being added, "and I have deposited title deeds as a collateral security for the same," did not make it less a note assignable within the statute. *Wise v. Charlton*, 6 Nev. & M. (x. s.) 364; and 4 Ad. & Ell. 786.

2. A note payable with interest on demand is a



present debt, and the statute begins to run from its date. *Norton v. Ellam*, 2 Mees. & W. (ex.) 461.

3. In an action against acceptor, the plea being, that the plaintiff received the bill as a security for differences in the price of Spanish stock on a given day; held, that the price of the stock was an immaterial allegation; but *semb.* the plaintiff was entitled to judgment, *non obst. rered.* for the defendant. *Robson v. Faltows*, 3 Bing. N. S. (c. r.) 392; and 4 Sc. 43.

And see *Oakly v. Rigby*, 2 New C. 732.

4. Addition of the place where made payable, after acceptance, held a material alteration, and vitiating the acceptance. *Desbrowe v. Wetherby*, 1 M. & Rob. (N. P.) 438.

5. In the absence of any evidence by the constitution of a joint-stock company, or any authority given by deed or otherwise; held, that the chairman of the board of directors had no implied authority to bind the company at large by his acceptance of bills of exchange, and that payment by members of the company of bills so accepted before they became members, was properly found by a jury as holding out no liability on similar bills issued after they became members. *Bramah v. Roberts*, 3 Bing. N. S. (c. r.) 963.

6. Where the holder of joint and several notes, upon one becoming due, agreed with one of the sureties to accept a sum in full satisfaction of the note due, and of the moiety for which the surety was liable on those not due, which was paid, and the name of the surety erased from the notes; held, that it discharged also the other parties. *Nicholson v. Revell*, 6 Nev. & M. (x. s.) 193; and 4 Ad. & Ell. 675; questioning *ex parte* Gifford, 6 Ves. jun. 805.

7. Where the bill was in the hands of an innocent indorsee for valuable consideration, and before issue joined, the 5 & 6 Will. 4, c. 41, passed, making such bills voidable only; held that the act was prospective only, and that the plaintiff could not avail himself of the act. *Hitchcock v. Way*, 2 Nev. & P. (x. s.) 72.

8. A letter in the terms "I have received the sum of ——l., which I borrowed of you, and I have to be accountable for the said sum, with legal interest;" held an agreement, and not a promissory note, and admissible with an agreement stamp. *Horne v. Redfearne*, 4 Bing. N. S. (c. r.) 433.

9. Where the plaintiff and defendant had signed a note as principal and surety, and after issuing, the name of a third party was added, with consent of all parties, as an additional surety; held not a material alteration, so as to require an additional stamp. *Cattin v. Simpson*, 3 Nev. & P. (q. s.) 248.

10. Where in *assumpsit* against acceptor of a bill at two months, the word *two* appeared to have been written on the word *three*, which had been smeared, the stamp being sufficient for a bill at *two*, but not for one at *three* months; held, that the plaintiff was bound to show by evidence *dehors* the instrument that the alteration had been

properly made. *Knight v. Clements*, 3 Nev. & P. (q. s.) 375.

And see *Bishop v. Chambre*, 1 Mood. & M. 116.

11. An instrument, whereby the party promised to pay a sum with interest, "and all fines according to rule;" held, that it could not be declared on as a note, and the count thereon being joined with one on an account stated, and general damages given, a *venire de novo* awarded. *Ayrey v. Fearnside*, 4 Mees. & W. (ex.) 168; and 6 Dowl. (P. C.) 654.

12. On an agreement for a loan at a usurious interest, to be secured as advanced by notes payable at one month after date, and to be renewed as often as they should become due, and 1s. in the pound be paid on each renewal; held within the protection of the 3 & 4 Will. 4, c. 98. *Holt v. Miers*, 5 Mees. & W. (ex.) 168; questioning *Terwest*, *ex parte*, since reversed by the Lord Chancellor.

And now see & 3 Vict. c. 37.

13. The exemption of 58 Geo. 3, c. 93, of bills and notes given for usurious consideration, in the hands of innocent holders, is confined to the cases where such holders discount or pay a valuable consideration for such bills, and not where they receive them (although innocently) in satisfaction of an antecedent debt; held, also, that the provisions of 3 & 4 Will. 4, c. 98, are not confined merely to bills drawn for a time certain, not having more than three months to run, but apply also to such as are payable on demand. *Vallance v. Seddel*, 6 Ad. & Ell. (q. s.) 932.

14. Bills and notes at less than twelve months date, above 10l., not to be affected by the usury laws. By 2 & 3 Vict. c. 37.

And see *Evidence*; Stamp.

## [B] ACCEPTANCE.

1. In *assumpsit* by indorsee against acceptor, plea that the defendant did not accept the bill *modo et forma*, but generally, and it appeared that the acceptance had been, without his knowledge, altered by the addition of payment at a particular banker's, where, when presented, it was dishonored, and on application to the defendant he denied having accepted it payable there, but was always ready to pay at his own place of residence; held, not to amount to an acknowledgment of a subsisting debt to entitle the plaintiff to recover on an account stated. *Calvert v. Baker*, 4 Mees. & W. (ex.) 417; and 7 Dowl. (P. C.) 17.

2. Where the declaration alleged a special acceptance, payable at a certain place, "and not elsewhere," which latter words were not on the bill; held, to constitute an allegation of a special acceptance, and the variance fatal, but that the sheriff was bound to have allowed the record to be amended as to such variance, and a new trial granted. *Higgins v. Nichols*, 7 Dowl. (P. C.) 551.



## [C] TRANSFER—INDORSEMENT

In *assumpsit* by holder against prior indorsee of a note, held, that the note was drawn for a debt, and indorsed by the defendant expressly as a security for the debt, and that such debt had been paid and the note delivered back to the party ultimately liable; held, on general demurrer, that the facts stated in the plea sufficiently showed that the note had been satisfied, and by the Stamp Act no longer negotiable. *Bartram v. Caddy*, 1 Perr. & Dav. (q. s.) 37.

And see *Freakley v. Fox*, 9 B. & Cr. 130; and *Thorogood v. Clarke*, 2 Stark. (s. r. c.) 351.

## [D] PRESENTMENT.

1. Where a check on a banker at B. was cashed at M., a branch of the N. W. Co., on the 25th, and forwarded the same day to the principal house of the N. W. Co. at M., a place 12 miles from B., and on the 31st was presented at B. and dishonored; held, the presentment was too late, as it ought not to have been delayed beyond the next day after the receipt at M. *Moule v. Brown*, 4 Bing. N. S. (c. p.) 266.

2. Where a bill was drawn at C., in Newfoundland, on the 12th August, in duplicate, from which place there was a daily post to St. John's and a post-office packet from thence to England three times a week, and the voyage about 12 days, and the bill was not presented for acceptance until the 16th of November and was dishonored when due, and the jury found a verdict for the defendant, the court refused to disturb it. *Straker v. Graham*, 4 Mees. & W. (ex.) 721.

3. In *assumpsit* on a bill by indorsee against acceptor, and plea of payment, a prior indorsee held a competent witness for the defendant, although on the *voir dire* he acknowledged that he received money from the defendant to pay the plaintiff the amount of the bill. 8 Ad. & Ell. (q. s.) 917.

## [E] NOTICE OF DISHONOR.

1. Where verbal notice of the dishonor was left with the wife, held sufficient. *Housego v. Cowne*, 2 Mees. & W. (ex.) 348.

2. A letter written to the drawer of a foreign bill, stating the presentment and dishonor, is sufficient notice, without containing a copy of the protest. *Goodman v. Harvey*, 1 Nev. & M. (x. s.) 372; and 4 Ad. & Ell. 870.

3. Proof that the drawer, being applied to if he was aware of the bill having been dishonored, replied, "Yes, I have had a civil letter from G. on the subject, and will call and arrange it;" held sufficient to dispense with further proof. *Norris v. Salomonson*, 4 Sc. (c. p.) 257.

4. Where the attorney addressed a letter to the defendant, informing him that his note (setting it out) became due the day before, had been return-

ed unpaid, and requested him to remit the amount by return of post, with 1s. 6d. noting; held, a sufficient notice of dishonor. *Hedger v. Steavenson*, 1 Nev. & P. (x. s.) 799; and 5 Dowl. (p. c.) 771.

5. Where the notice only stated that the note became due, and was returned unpaid; held insufficient. *Boulton v. Welsh*, 3 Bing. N. S. (c. p.) 608.

6. Where the bill indorsed in blank was left by the indorsee with an attorney for presentment, who, on being dishonored, wrote the following day to the drawer, stating his name and residence; held a sufficient notice, although not stating on whose behalf, or where the bill was lying. *Woodthorpe v. Lawes*, 2 Mees. & W. (ex.) 109.

7. In an action by indorsee against drawer, where the letter containing the notice of dishonor did not, through misdirection, reach the defendant until two days after the proper time; held, that it was for the jury to say whether the holder had, under all the circumstances, taken due and proper steps to forward the notice. *Siggers v. Brown*, 1 M. & Rob. (s. r.) 520.

8. So, where sent to a wrong address, from the indistinctness of the drawer's name on the bill. *Hewitt v. Thompson*, 1b. 543.

9. Want of effects in the hands of the drawer held to excuse the holder of a bill from the necessity of presenting, as well as of giving notice of dishonor to the drawer. *Terry v. Parker*, 1 Nev. & P. (x. s.) 752.

And see *BANK OF ENGLAND; BANKRUPT*; The case of *Solarte v. Palmer*, affirmed in D. P., 8 Bli. N. S. (p.) 874; and 2 Cl. & F. 93.

10. Where upon the dishonor, the clerk of the plaintiff, the indorsee, gave a notice by letter to the drawer in a printed form, in the terms, "Your bill drawn on T. and accepted by him, is this day returned with charges, to which we request your immediate attention;" held sufficient. *Grurgeon v. Smith*, 2 Nev. & P. (x. s.) 303; and 6 Ad. & Ell. 499.

11. Where H., the holder, gave notice by letter in the terms, "Messrs. H. are surprised that G.'s bill was returned to the holder unpaid," followed by a personal communication from the indorsee, expressing his regret, and promising to write to the other parties, by whom or by himself the bill should be paid; held sufficient. *Houlditch v. Cauty*, 4 Bing. N. S. (c. p.) 411.

12. Where the bill was drawn by the defendant, dated merely "London," on the acceptor, resident also there, but his address was fully stated; held, that a letter put into the post-office by the holder in the country, addressed to the defendant, containing notice of the dishonor, simply London, was evidence to go to the jury of due notice of dishonor. *Clarke v. Sharpe*, 3 Mees. & W. (ex.) 166.

13. A letter by the plaintiff's attorney stating the bill, describing it, "lies due and unpaid at my office;" held insufficient notice of dishonor, not stating it to have been presented and dishonored; but a verbal statement to the drawer that the bill has come back from the drawee dishonor-



ed, the bill being shown with the notary's mark, held sufficient. *Phillips v. Gould*, 8 C. & P. (n. p.) 355.

And see *Solarte v. Palmer*, 2 Cl. & F. 93; and 5 Moore & P. 475.

[F] ACTIONS IN RESPECT OF.

1. The court refused to try the legality of the consideration on an affidavit in support of a motion to discharge the defendant out of custody. *Curzon v. Hodges*, 5 Dowl. (p. c.) 98.

2. Where a bill drawn by defendant and delivered to the plaintiff was stolen, and with his indorsement forged thereon was paid by the defendant's bankers, and returned to him; held, that no title passing by the forgery, the plaintiff was entitled to recover the bill in trover, there being no negligence found on the part of the plaintiff, although six weeks elapsed before the loss was discovered, and notice given to the defendant. *Johnson v. Windle*, 3 Bing. N. S. (c. r.) 225; and 3 Sc. 606.

3. The *bona fide* holder of a bill which has been lost or fraudulently obtained is entitled to recover, unless the circumstances under which it came into his possession amounts to *mala fides* on his part; gross negligence is not sufficient. *Goodman v. Harvey*, 6 Nev. & M. (x. s.) 372; and 4 Ad. & Ell. 870.

4. Where the count on a bill stated the defendant's acceptance and promise, "whereby an action had accrued, &c.;" held to be in substance a count in debt, which was not maintainable by indorsee against acceptor. *Cloves v. Williams*, 3 Bing. N. S. (c. r.) 868.

5. In *assumpsit* on a promissory note, payable by instalments, the whole to become payable on default made in any, averring such default, "whereby," &c.; general demurrer, that, by default made in any instalment, the note did not become due without a demand of it; held bad, as too large, there being a debt as to the instalments due. *Teague v. Morse*, 2 Mees. & W. (ex.) 599.

6. Where at the trial it was found that the declaration omitted the date at which the bill became payable, and the Judge had refused to allow the plaintiff to amend, and non-suited; the court set it aside, on payment of costs, with leave to amend, and the defendant to plead *de novo*. *Pullen v. Seymour*, 5 Dowl. (p. c.) 164.

7. Where the declaration merely stated that the indorsee delivered the bill to the plaintiff without indorsement, held bad. *Cunliffe v. Whitehead*, 3 Bing. N. S. (c. r.) 828.

8. In *assumpsit* against the drawer, the declaration must allege a promise to pay; *aliter*, in the case of acceptor, where the acceptance constitutes a promise. *Henry v. Burbridge*, 3 Bing. N. S. (c. r.) 501; 4 Sc. 296; and 5 Dowl. (p. c.) 484.

9. Declaration on a bill by drawer against acceptor, alleging the bill to have been made on —, payable four months after date, "which pe-

riod has now elapsed;" held sufficient, without averring that it had elapsed before the commencement of the suit. *Owen v. Waters*, 2 Mees. & W. (ex.) 91; and 5 Dowl. (p. c.) 324.

10. The court will not look out of the declaration to see whether the action is commenced before the declaration is filed. 1b.

11. Where the declaration on a note stated that one S. T. made &c., and thereby he promised to pay to the order of defendant at Messrs. T.'s £— two months after date, which period had before the commencement of the suit elapsed, and there delivered the said note to the plaintiff, and promised to pay the same according to the tenor and effect thereof; but that Messrs. T. did not, nor did the said S. T., nor the defendant, at any time pay, &c., although the said note, when due, was presented at Messrs. T.'s on the day of its becoming due, of which defendant had notice; held, on motion in arrest of judgment, that the promise was well stated, and the breach sufficient. *Hedger v. Stevenson*, 1 Nev. & P. (x. s.) 799; and 5 Dowl. (p. c.) 771.

12. Where the declaration on bills set out the name of the plaintiff only by the initial of one Christian name, as it appeared on the instruments; held to be cured by the 3 & 4 Will. 4, c. 42, s. 11. *Lindsay v. Wells*, 5 Dowl. (p. c.) 618.

13. In *assumpsit* by the executor, on a note payable to the order of his testator, alleging a promise to the plaintiff; held, that the plea *non assumpsit* was good. *Gilbert v. Platt*, 7 Dowl. (p. c.) 748.

14. In *assumpsit* by payee against maker; plea, that it was given for money and goods to be thereafter lent and supplied, and that plaintiff had not lent, &c.; replication, that the defendant broke his promise without the cause in his plea in that behalf alleged;" held proper. *Watson v. Wilks*, 5 Ad. & Ell. (x. s.) 237.

15. Where in an action on a check the defendant pleaded only that it was given for a gambling debt, the court refused leave to add another plea that it had been drawn more than 15 miles from where the bankers resided. *Jenkins v. Creech*, 5 Dowl. (p. c.) 393.

16. In *assumpsit* by indorsee against indorser; plea, that defendant did not make or draw the bill as in the declaration alleged; held good in substance, although bad in form, every indorser being in law a new drawer, and that the plea could not be treated as a nullity. *Allen v. Walker*, 2 Mees. & W. (ex.) 317; and 5 Dowl. (p. c.) 460.

17. Where the plaintiff, an executor, declared on a bill payable to his testator, laying the promise to pay to himself as executor; held, that a plea of *non assumpsit* to the plaintiff as executor as aforesaid was good, not being a promise contained in the note, nor implied out of it. *Timmis v. Platt*, 1 Nev. & P. (x. s.) 720.

18. Where the plea in *assumpsit* by an indorser against acceptor merely alleged that the payee received the bill for the purpose of paying the proceeds to the defendant, and had failed to do so, without averring any fraud in the transaction;



held, not sufficient to call upon the holder to prove consideration. *Jacob v. Hungate*, 1 M. & Rob. (s. r.) 445; questioning *Thomas v. Newton*, 2 Carr. & P. 606; and *Heath v. Sansom*, 2 B. & Ad. 291.

19. Where the defendant pleaded that the note was made on certain terms, and indorsed by the plaintiff without consideration, and the plaintiff replied that £—— was given for it, the issue being on the defendant, and he called no witness; held, that the plaintiff was entitled to recover that sum. *Edwards v. Jones*, 7 C. & P. (s. r.) 633.

20. Where the drawers of the bill kept account with the plaintiffs as bankers, which they indorsed to them, and, upon its being returned dishonored, it was entered on the debit side of the account, which at the time was considerably against the drawers, and remained so at the commencement of the action; the bankers had, on former occasions, allowed the drawers to overdraw their accounts, but they were under no obligation to do so; held, that such entry was no evidence in support of a plea that the bankers had received that sum in satisfaction of the bill. *Ryder v. Wyllett*, 7 C. & P. (s. r.) 603.

21. In *assumpsit* by indorsee against maker; plea, that it was given for a gaming debt, and without consideration, and indorsed to plaintiff with notice; replication, that it was indorsed without notice of the illegality, and for good consideration; held, that, upon such issue, the defendant was bound to give evidence to connect the plaintiff with the parties illegally concocting the note, and that the plea did not amount to an admission of any existing illegality, and that the jury could only draw inferences of it from facts. *Edmunds v. Groves*, 5 Mees. & W. (ex.) 642; and 5 Dowl. (p. c.) 775.

22. Where the only issue raised was, whether the bill was indorsed after it became due; held, that the *onus* of establishing it lay on the defendant. *Lewis v. Parker*, 6 Nev. & M. (s. n.) 294; and 4 Ad. & Ell. 838.

23. In an action against drawer, upon plea that he did not make the note, evidence of imbecility of mind could not be gone into. *Harrison v. Richardson*, 1 M. & Rob. (s. r.) 504.

24. Plea in *assumpsit* by indorsee against maker, that he gave two bills to the plaintiff to take up the note, and in lieu thereof, and that defendant was a party liable on the bills to the plaintiff, and that they were outstanding in the hands of the plaintiff; held, that it was for the jury to say if the bills were given in lieu of and in satisfaction of the note, or only to gain time for the payment; if the former, it was a good defence, although the latter part of the plea was not proved; if the latter, it ought to be shown that both were outstanding at the commencement of the action. *Goldshede v. Cottrell*, 2 Mees. & W. (ex.) 20.

25. Plea to a declaration on a note payable absolutely with interest, that it had been substituted for a note given on an agreement for a share in a partnership, and that it had been thereby stipu-

lated that the principal was to be paid out of the defendant's yearly share of the profits, and that unless the defendant failed in his part of the agreement, the plaintiff would not call suddenly for the payment of the balance on the note; the original note also contained a similar statement as to the mode of liquidation; and the jury found that the note for which the action was brought was substituted for and given on the same conditions; held, that, although the replication limited the issue to the question whether the plaintiff had given reasonable notice of enforcing the note, it was competent to the defendant to show the whole circumstances of the transaction, and of the substitution of the note for the original one, but that, although the plaintiff might not be entitled to recover the balance of the principal due, he was entitled to a verdict for the interest. *Baylis v. Ringer*, 7 C. & P. (s. r.) 691.

26. Upon plea to a declaration by a second indorsee against acceptor, that the bill was an accommodation bill given to R., and that the indorsement was made after the bill became due; it appearing that at the time of accepting the bill R. and the defendant were friends, but subsequently quarrelled, and the bill was not put in suit until five years after it became due, and neither party called R.: held to amount to *prima facie* evidence on the part of the defendant to go to a jury. *Bounsall v. Harrison* 1 Mees. & W. (ex.) 611; and 1 Tyr. & Gr. 925.

27. In an action by indorsee against acceptor, an order having been obtained for inspection, plea denying the acceptance, indorsement, &c. and also that it was on paper improperly stamped under 3 & 4 Will. 4, c. 97, s. 17, the latter being admissible under the plea of non-acceptance, was ordered to be struck out. *Dawson v. Macdonald*, 2 Mees. & W. (ex.) 26.

28. In *assumpsit* by indorsee against acceptor; plea, that after the bill became due, he tendered the amount of the bill with interest, held bad on demurrer; a tender after the day cannot be pleaded by the acceptor. *Poole v. Tumbridge*, 2 Mees. & W. (ex.) 223.

And see *Hume v. Peploe*, 8 East, 167.

29. In *assumpsit* against acceptor on a bill indorsed to a banking company; held, that an allegation in a plea that the plaintiffs were a banking company, consisting of more than six persons, and that they were illegally associated during the privileges granted to the Bank of England by 3 & 4 Will. 4, c. 98, as compounded of law and fact, was therefore traversable. *Ransford v. Copeland*, 1 Nev. & P. (s. n.) 671.

30. In debt by the holder against acceptor; plea, as to part, *actio non*, because he received no consideration, but had delivered it to a third person to get it discounted, from whom the plaintiff detained it for his own debt, and only advanced the part admitted, and issue joined that the defendant was indebted beyond that sum, which was found for the defendant; held, that although such plea was bad, yet the plaintiff having chosen to go to trial, he let the defendant into any defence which he might have to the action.



*Finleyson v. Mackenzie*, 3 Bing. N. S. (c. r.) 824.

31. In *assumpsit* against the acceptor; plea, that after, &c., the defendant was resident in Scotland, and executed an assignment of his personal property for the benefit of his creditors, and notice thereof to the plaintiff, who authorized his attorney by writing to concur in such deed and receive his dividend, alleging such proceedings to be in conformity with the law of Scotland, and that by reason of the premises and by force of the laws there he was absolutely discharged; held, 1st, that by issue on such plea the law of Scotland was put in issue, and the defendant bound to give evidence of it; and 2ndly, that no deed of composition having been executed by the plaintiff, nor any act done binding him not to sue his debtor, there was nothing on the face of the plea amounting to a defence to the laws of this country. *Woodham v. Edwards*, 1 Nev. & P. (x. s.) 207.

32. Where the declaration by an indorsee against indorser of a note described the defendant as the maker, and to whom no notice of dishonor had been given; held, that the rule that an indorser stood in the situation of a new maker, applied only to the case of a bill and not of a note, and that the plaintiff was not entitled to recover. *Gwinnell v. Herbert*, 5 Ad. & Ell. (x. s.) 436.

33. Where the clerk of a banking firm of three partners, upon the death of two, continued to manage the business for the surviving partner in order to wind up the affairs, and in the course of such employment using and signing the name of the old firm, drew a bill on H., which was accepted; held, that his own name not being on the bill, he was not personally liable as the drawer, unless that it were shown that he had no authority to draw in the name of the firm, or had not done so *bona fide*. *Wilson v. Barthrop*, 2 Mees. & W. (zx.) 863.

34. Where upon a bill becoming due, the acceptor asked for time, and subsequently gave another bill for the same amount, admitting that something was due for interest, and that the plaintiff should continue to hold the first bill until the second was paid, which was done shortly after it fell due; held, that that the plaintiff was entitled still to sue on the first for the interest due on it, and that the facts did not establish an agreement alleged in the plea that the acceptance of the latter discharged the defendants from such interest. *Lumley v. Musgrave*, 4 Bing. N. S. (c. r.) 9; and 3 Sc. 230, 238.

35. In *assumpsit* on a banker's check; held, that under the general plea that the defendant did not make, &c. he might show the check to be post dated, without pleading it specially, and that he was not precluded from the objection by its having been read before the objection taken. *Field v. Wood*, 8 C. & P. (x. r.) 52.

And see *Dawson v. Macdonald*, 2 Mees. & W. 26.

36. In *assumpsit* by indorsee against acceptor, where the plea was bad for duplicity, and the replication *de injuria*; held, that no objection

could be made by demurrer on the ground of several matters being put in issue, being occasioned by the defendant's plea. *Reynolds v. Blackburn*, 6 Dowl. (r. c.) 19.

37. Where the making of the bill was admitted on the record, and the only issues raised were, the indorsements, presentment, notice of dishonor, and consideration; held, that it was not incumbent on the party producing the bill to explain an alteration which appeared to have been made in the date. *Sibley v. Fisher*, 2 Nev. & P. (q. s.) 430.

38. Where there are counts on the consideration of the bill as well as on the bill, the plaintiff will be entitled to enter his verdict on such as apply to the consideration, if the subject be stated in the particulars, and may recall a witness to prove such part of the consideration after he has closed his case. *Ryder v. Ellis*, 8 C. & P. (x. r.) 357.

39. Upon a plea in *assumpsit* on bills, that the defendant, if liable, was only so as surety; held, that he was not entitled to inspection of a deed, by which it was said time had been given to the principal, to which the surety was not a party. *Smith v. Winter*, 3 Mees. & W. (zx.) 309; and 6 Dowl. (r. c.) 386.

40. In *assumpsit* against the defendant as joint maker of a note; plea that the defendant joined merely as a surety, of which the plaintiff had no notice of its not having been paid until the commencement of the action, and that the plaintiff gave time to the party without the defendant's knowledge or consent; held ill on general demurrer. *Clarke v. Wilson*, 3 Mees. & W. (zx.) 208.

41. Where until inspection of the check on which the action was brought it could not be known that it required a stamp, being post dated; held that it was not too late to take the objection after it had been read, and the fact of post dating need not be specially pleaded. *Field v. Woods*, 2 Nev. & P. (x. s.) 117; and 6 Dowl. (r. c.) 23.

42. In an action by payee against maker, a party who was a joint maker, and for whom the defendant was surety, held an inadmissible witness, being liable, not only for damages and costs recovered by plaintiff, but for the defendant's own costs, and that he could not be rendered competent by an indorsement on the *postea* under 3 & 4 Will. 4, c. 42, s. 26. *Stanley v. Jobson*, 2 M. & Rob. (x. r.) 103.

43. In any action against the acceptor of a bill or maker of a note, the defendant to be allowed to have the proceedings stayed on payment of the debt and costs in that action only. *Reg. Gen. 3 ev. & P.* (q. s.) 370.

44. Where, in an action against acceptor, he pleaded that the acceptance was obtained by force of duress and that he never had any value for the acceptance; held bad, on demurrer for duplicity, and that the objection was not removed, by reason of the second branch of the plea being ill pleaded. *Stephens v. Underwood*, 4 Bing. N. S. (c. r.) 655; 6 Dowl. (r. c.) 737; and 6 Sc. (c. r.) 402.



45. In an action by the indorsee against the maker, and issue on the fact of presentment; a promise by the defendant, after the note became due, to pay, held to be a sufficient admission of the presentment having been duly made. *Croxon v. Worthen*, 5 Mees. & W. (xx.) 5.

46. Plea, in an action by the holder against the acceptor, that the bill was accepted in part payment of a larger debt from the defendant to the drawer, and that, before it became due, the defendant being in embarrassed circumstances, he entered into a composition with his creditors, to which the drawer was a party, and averred a payment of the composition and receipt thereof in satisfaction of all claims in respect of the bills or otherwise; held, that amounting to matter of discharge and not of excuse, the replication *de injuria* was bad. *Jones v. Senior*, 4 Mees. & W. (xx.) 123; and 6 Dowl. (p. c.) 701.

47. In *assumpsit* by indorsee against drawer, plea that the bill was drawn and indorsed in payment of the price of hops as of a certain planter, and to answer certain samples, and alleging that the plaintiff had not delivered any hops answering such samples, "or any hops whatever;" held, that the latter allegation was immaterial; the plea showing a total failure of the consideration, and that if the plaintiff relied on the defendant's having accepted those delivered, though of inferior quality, he should have replied it. *Wells v. Hopkins*, 5 Mees. & W. (xx.) 7.

48. Where in trover for a bill the defendant pleaded that the plaintiff indorsed it in blank, and that the party who became the holder pledged it with the defendant as a security for a debt; replication, that at the time the defendant received it, he knew that the party had no authority to pledge it; held good. *Hilton v. Swan*, 5 Bing. N. S. (c. r.) 413.

49. Where the plea, in an action against the drawer by a second indorser, denied the indorsement to the first indorser, held not distinguishable from a traverse that he did not indorse the bill *modo et forma* within the meaning of the Judge's order to plead in the latter terms. *Waters v. Thanet, Earl of*, 7 Dowl. (p. c.) 251.

50. A count by the payee against the acceptor of a bill, in the form given by Reg. Trin. 1 Will. 4, held properly joined with other *indebitatus* counts in debt. *Crompton v. Taylor*, 4 Mees. & W. (xx.) 138; and 6 Dowl. (p. c.) 660.

51. Where the issue joined in an action against the drawer was, whether due notice of dishonor had been given; it appearing six months after it became due, the drawer requested the holder to exhaust all his influence to obtain payment from the acceptor, as the bill had been merely drawn for his accommodation; held, that in the absence of any unconditional promise, the judge properly directed the jury to say whether they could presume from the circumstances that the defendant had received notice of dishonor. *Hicks v. Duke of Beaufort*, 4 Bing. N. S. (c. p.) 229.

52. Upon a plea that the defendant had not a notice from the plaintiff of the non-payment; held, that notice proved from another party, the

indorser's clerk, was sufficient. *Newen v. Gill*, 8 C. & P. (n. r.) 357.

And see *Bail*; *Banker*; *Bankrupt*; *Insolvent*; *Landlord*; *Pleading*. (c. l.)

## BOND.

1. Where the husband, reciting an intended marriage, and that he was to be possessed of her stock in trade, and that he had agreed to execute a bond in a sum payable to the children of her late husband within 12 months after the wife's death, in the event thereafter specified, and the condition was, that he should pay, &c. "if upon taking an account of the stock in trade, if then carried on by him, the same should amount to £. — —;" held, that a plea by the obligor that he had discontinued the business, was an answer to an action on the bond, having exercised a power of closing the concern, which was reserved to him by the condition. *Beswick v. Swindells*, 3 Ad. & Ell. (x. s.) 868; affirming the judgment in King's Bench.

2. Where upon an arrangement between a father and son for the payment of the debts of the latter, he executed a bond which was agreed to be deposited in the hands of certain referees, being intended as a security for the son's future behaviour, and who were empowered within a certain period to direct it to be cancelled if they thought fit, which they omitted to do during the life-time of the father; the court, under the circumstances, being of opinion that it was not intended to operate as a security for the debt, but for collateral purposes, which had been fully satisfied, and that, if that were doubtful, the conduct of the obligor during a long period and dealing with the instrument amounted in equity to a release, decreed it to be delivered up to be cancelled. *Flower v. Marten*, 2 Myl. & Cr. (ch. 459).

3. Although the transaction constitutes a debt in the first instance, a debtor is at liberty to show that the creditor subsequently altered his intention and treated it as a gift. *lb.*

4. A bond executed by defendant as a surety, conditioned for the payment of interest on £ — —, on the 1st March of the first year, the like at the end of the second year, and the principal and like sum of interest at the end of the third; the first interest was not paid until the 30th March; held, that the bond was thereby forfeited, and the forfeiture not waived by the acceptance of the interest; and, on the defendant's bankruptcy, was proveable under his commission, and the debt therefore barred by his certificate. *Skinner's Company v. Jones*, 3 Bing. N. S. (c. p.) 481; and 4 Sc. 271.

5. Where the son, having executed a bond to his father for 1,000*l.* and interest, afterwards became surety with his father in a bond to a third party for 500*l.*, and a memorandum was indorsed on the son's bond, that it had been agreed that the son should not be called on for the principal sum until the father's bond were paid off; held, first, that it did not relieve the son from the inter-



est on the principal money; and, secondly, that the son having afterwards, by arrangement, got rid of and discharged the father's bond, could not, as surety, take the benefit beyond the sum actually paid; his own contract with the principal being indemnity, it was his duty to make the best terms he could for the party in whose behalf he was acting. *Reed v. Norris*, 2 Myl. & Cr. (ch.) 361.

6. In debt on bond to the guardians of an union, on a contract for the supply of bread, in loaves of 4 lbs. weight, conditioned for performance of the contract, *inter alia*, that the defendant would deliver such bread in loaves, and of which a bill of particulars should be sent with such articles, at the time of delivery thereof, or within one month from such delivery, provided that if such articles were not duly served, or should be deficient in the weight stated, or if delivered without such bill of particulars, that the board might return them, or give notice to the defendant to fetch them away; the defendant pleaded performance generally; and the replication assigned for breaches, first a delivery of loaves deficient in weight; second, a delivery without any bill of particulars, whereupon the plaintiffs returned them, and incurred great charges in obtaining a supply; held, that evidence of the loaves being brought to the house, and part handed out, and, on being weighed and found deficient, returned and refused to be taken, was a sufficient delivery to support the issue on the first breach; and, secondly, that the board having a right to return the articles unless a bill were delivered with them, an issue whether it was dispensed with at the time was not an immaterial issue, although, *semble*, it might have been, if found for the plaintiff, as there could be no dispensation by parol of an instrument under seal. *Elliott v. Martin*, 2 Mees. & W. (ex.) 13.

7. In debt on bond conditioned for securing the payment of 1,400*l.* on a day named; plea, as to 800*l.*, parcel, &c., payment after the day, and, as to the residue, a release to the executor of a joint obligor deceased; held, as to the first, that the penal sum being forfeited, and the payment only as to part of the sum mentioned in the condition, the plea was bad; secondly, that nothing appearing to show the defendants to be only sureties, the release was no discharge of the surviving obligor; held also, that it was not necessary to aver a breach in the non-payment of the sum, if enough appeared on the declaration to show that the money was due. *Ashbee v. Pidduck*, 1 Mees. & W. (ex.) 364; and 1 Tyr. & Gr. 1016.

8. Plea to debt on bond, that it was given on a corrupt agreement for articles of apprenticeship to the plaintiff, as an apothecary and surgeon, for two years, but that the deed should be ante-dated, to enable the defendant to be admitted as an apothecary at the end of two instead of five years, contrary to the 55 Geo. 3, c. 19, s. 15; after a verdict for the defendant, the court refused judgment for the plaintiff, *non obst. vered.* *Prole v. Wiggins*, 3 Bing. N. S. (c. r.) 230; and 3 Sc. 601.

9. Where the plea to debt on bond by execu-

tors disclosed matter showing the bond to be void; held, that as the plaintiff might have then abandoned the suit, he was liable to the costs. 1*b.*

10. Where A. and B. became jointly and severally bound for the payment of an annuity to C. for life in manner following; viz., one moiety by A. during her life, and the other moiety by B. during A.'s life, and after her death, the whole by B. during the life of C.; held, after the death of A., B. failing to pay the annuity, that A.'s estate was liable. *Church v. King*, 2 Myl. & Cr. (ch.) 220.

11. Where it once is shown that the party executing the deed is aware of its contents, evidence that the party was induced to execute it by previous fraudulent misrepresentations held inadmissible, upon the plea that it was obtained by fraud and covin. *Mason v. Ditchbourne*, 1 M. & Rob. (s. p.) 460.

12. Where money was advanced by bankers in London to a partner in a banking firm in Ireland, and bonds executed in Dublin for the amount in sums of—*l.* sterling, "with legal interest" and warrants of attorney for entering judgments in the K. B. in Ireland recited the sums in the same terms as in the bonds; credit was given in the books of the English banking house for the full sum, and bills accepted by them drawn by the banking company in Ireland; held, that the debt was payable in English currency and with English interest. *Noel v. Rochfort*, 10, Bli. N. S. (r.) 483; reversing the judgment below, 2 Younge & J. 330, An. Dig. 1829, 128.

13. In an action by the assignee of a bond on a promise to pay at a given time, in consideration of a forbearance to sue; held, first, that there was sufficient mutuality and a good consideration for the promise; secondly, that the plaintiff being a third party sustaining detriment by forbearing to enforce his right to sue in the name of the obligee, the promise was not *nudum pactum*; and lastly that the bond being forfeited before the agreement, it was in no respect varied by the parol contract entered into between the plaintiff and defendant. *Morton v. Burn*, 2 Nev. & P. (s. n.) 297.

14. Where the obligee had sued one of two obligors on a joint a several indemnity bond, and received a sum in discharge of the debt and costs; he afterwards sued the other, who pleaded the acceptance of the sum so paid in satisfaction; held, that the *onus* lay on the defendant to show that it was taken as a settlement of the entire cause of action, and the court refused to set aside the verdict found for the plaintiff. *Field v. Robins*, 3 Nev. & P. (q. n.) 226.

15. Where no proceedings were taken on a bond for three years after the death of the obligor, and the obligee who was aware of the consideration had allowed an injunction in Ireland to issue, and the bill to be taken *pro confesso*, without securing himself the liberty of proceeding in the action, and his representatives, the defendants, being in possession of all his papers, were unable to give any account of the consideration, the



court continued the injunction, and the question being whether there was any debt, it would not impose the terms of bringing the money into court. *Milltown, Earl of, v. Stewart*, 3 Myl. & Cr. (cn.) 18.

16. On a bond to pay any balances due to bankers in Scotland; held, that where the drafts were in fact drawn beyond the statutory distance, or wrong dated as to time or place, and made void by 55 Geo. 3, c. 184, s. 13, and which mode of drawing was known to the bankers, no debt arose upon the bond. *Swan v. Bank of Scotland*, 10 Bli. N. S. (r.) 627; (reversing the judgment below), *S. C. Swan, ex parte*, 1 Deac. 746; 2 M. & Ayr. 656.

17. Where the respondent signed a bond as surety for a party, trustee of a bankrupt's estate, for faithfully accounting, and by the practice in Scotland, the creditors appointed commissioners to superintend the proceedings of the trustee; held, in suit on the bond, that the default was not by the default, concealment or connivance of the commissioners, and that the surety was not discharged. *M'Taggart v. Watson*, 10 Bli. N. S. (r.) 618.

18. Where a bond was given by a merchant to his bankers as a security for a balance and for future advances, to which the respondent became a party as surety, afterwards the bond being defective, a fresh one was executed in a larger sum, as was alleged to secure a floating balance, but in the common form, with interest, from the date of the execution, which was also signed by the respondent as surety, but the purpose was not explained to him; held, that he was liable only for the balance then actually due, subject to an account of payments subsequently made to the bankers by his principals. *Walker v. Hardman*, 11 Bli. N. S. (r.) 223.

19. Where the defendant, W. F. B., executed the bond in the name of W. B., and appeared at the time to be known by the latter name, and the declaration was against W. F. B., sued by the name of W. B.; upon the plea *non est factum*, held, that the bond was not void, and that the objection, if valid, could not be available under that plea. *Williams v. Bryant*, 7 Dowl. (r. c.) 502.

20. In debt on bond; plea, averring the bankruptcy of the plaintiff and appointment of assignees, who, by reason of the premises, became entitled to the bond debt; a replication, that the plaintiff had, by indenture, assigned the bond as a further security for a debt, with a proviso for redemption, and that the action was brought for the benefit of such creditor; on special demurrer, held, 1st, that the plaintiff was not bound to make proof of the indenture; 2nd, that the replication properly stated facts, showing that the bond did not vest in the bankrupt's assignees; and, lastly, the bond being of less amount than the balance due on the debt for the security of which it had been assigned, and so no benefit to arise to the bankrupt's estate, and no other available security, the transfer of the plaintiff's interest in the bond, although only stated to be a further security was complete. *Dangerfield v. Thomas*, 1 Ferr. & Dav. (q. n.) 287.

21. Where R. and S., partners, executed joint and several bonds to O., on an advance of money to the firm, and before the day of payment of the first, S. died, and K. being introduced as partner, the firm, in consideration of the effects and outstanding debts, agreed to pay a certain sum to the executors of S., and indemnify against the bonds, amongst other scheduled partnership debts; the new firm continued to pay O. the interest, and he subsequently, without the consent of S.'s executors, extended the time of payment of the bonds for three years, and on a further advance, took a collateral security, reserving his right against S.'s executors, but the arrangement was concealed from them; held, that by such indulgence, the representatives of S. were discharged from liability (affirming the judgment below of the Master of the Rolls). *Oakeley v. Pasheller*, 4 Cl. & Fi. (r.) 207.

22. Where parishioners at a vestry agreed that the overseers should give their bond for a debt due from the parish, and by a minute resolved that they should be indemnified out of the rates, and the obligee, a parishioner, signed the agreement and resolution of the vestry; he subsequently received for many years the interest out of the rates, without calling on the obligors for the principal; held, that the parishioners having no power to bind the parish, and the obligee having acceded to the resolutions only so far as they would bind the parish, the liability of the obligors, who undertook personally to pay, was not affected thereby. *Jaquet v. Lewis*, 8 Sim. (cn.) 480.

23. In debt on bond, where the breaches were assigned in the replication under the statute; held, that the jury might assess the damages without any special venire. *Scott v. Starey*, 4 Bing. N. S. (c. r.) 724; 6 Sc. 598; and 6 Dowl. (r. c.) 714.

And see *Quin v. King*, 1 Mees. & W. 42.

24. Where the assignee of a bond obtained from the obligee a mortgage as a collateral security, which being sold, proved insufficient; held, that the creditor was not entitled to an order in the suit, for satisfaction of the balance due, but must resort to his remedy at law on the bond in the name of his assignor. *Keys v. Williams*, 3 Younge & C. (xx. xq.) 462. It is not, however, a general principle, that in no case will a court of equity give effect to an equitable assignment.

And see *Bankrupt; Creditor; Pleading; Stamp; Surety; Will.*

## BOROUGH RATE.

1. Where county justices had exercised concurrent jurisdiction with the borough justices, and the expenses of prisoners and prosecutions for offences within the borough had been paid by the county; held, that the borough could not support an exemption from the county rate on immemorial prescription on a lost grant, on the ground of never having contributed, and always having maintained its own bridges and gaol, and inquisi-



tions before its own coroner. *R. v. Hayward*, 6 Ad. & Ell. (x. n.) 590.

And see *CERTIORARI, CORPORATION*.

### BOROUGH COURTS.

Proceedings in borough courts, under Municipal Corporation Act, regulated by 2 & 3 Vict. c. 27.

### BOUNDARY.

1. Upon a question of boundary between two farms, evidence of the boundary of the plaintiff's farm having been given that it was the same as that of a hamlet; held, that evidence of reputation as to the boundary of the hamlet was receivable as of a fact relevant to the issue. *Thomas v. Jenkins*, 1 Nev. & P. (x. n.) 588.

2. The case of *Godfrey v. Little*, 1 Russ. & M. (ch.) 59, affirmed on appeal. *Ib.* 630.

3. Where the boundary between two manors is shown to be a natural boundary, upon a question as to the boundary of one of those manors and an adjoining one, the finding of the former by commissioners of boundaries is admissible in evidence to enable the jury to say whether the continuation of the natural boundary is not also the boundary between the latter manors; held, also, that although the verdict might not strictly be evidence of reputation, yet, that it was a record of proceedings of such a public nature as to make it admissible. *Brisco v. Lomax*, 3 Nev. & P. (q. n.) 388.

### BRIDGE.

1. The Court will interfere by injunction to prevent a nuisance to a public road; where, therefore, one county was proceeding in the repair of a public bridge over a river, dividing two counties, in such a manner as to create a nuisance, unless the other county proceeded in a particular manner with the repairs on their side, an injunction granted; and held, that the surveyor and contractors, under the circumstances, were properly made parties. *Attorney General v. Forbes*, 2 Myl. & Cr. (ch.) 123.

2. A prescriptive liability to the repair of a public bridge, in the absence of any evidence to the contrary, and by itself, includes a liability to repair the highways at the ends of it within the distance of 300 feet. *Reg. v. Lincoln Mayor, &c.*, 3 Nev. & P. (q. n.) 273.

3. On an indictment for not repairing a bridge *ratione tenuræ*; held, that in order to negative any such immemorial liability, a record of a presentment in 18 Edw. 3, by the men of K. against the bishop of L., for the non-repairs of the bridge, on which the jury negatived the liability of the bishop, and went on to find that the bridge had been built about 60 years, and that they were wholly ignorant who of right was bound to repair it, the verdict being followed soon after by a grant of

portage to the men of K. for the same repairs, were admissible documents, as material to the issue, and good evidence proving it. *Reg. v. Lady Sutton*, 3 Nev. & P. (q. n.) 569.

And see *Manor; Pleading*, [c. l.] *Poor*.

### BROKER.

Where one broker procured the cargo, and afterwards obtained the freight, and another, also referred to by the shipowner, cleared out the ship, and paid the charges; held that, by the usage, he was entitled to share the commission, and could not sue the shipowner. The usage and general course of business must be proved by witnesses speaking to instances in which, to their own knowledge, it has been acted upon. *Hall v. Benson*, 7 C. & P. (n. p.) 711.

And see *Poor*.

### CANAL.

Where the Act for making a canal limits no precise time in which its provisions are to be executed, held that they are to continue until the company think proper to execute the work, and there is no implied limitation as to their being executed within a reasonable time from the passing of the Act; held also, that the power to treat with persons interested in land does not apply to those who have a mere easement or right of passage over land; to them they are only bound to make compensation for any damage they may sustain by reason of the company's works; and where the land is out on lease, the company may treat for the reversion, without making compensation for the subsisting lease, unless they should disturb the tenant during the term. *Thicknesse v. Lancaster Canal Company*, 4 Mees. & W. (x.) 472.

And see *Action; Covenant; Poor*.

### CARRIER.

1. Plea, in an action against a carrier for loss by negligence, that the goods were undertaken to be carried, &c., on an express condition that the plaintiff's servant was to accompany and watch over them, and that the loss was occasioned by his neglect so to do, and not through the negligence of the defendant; held bad, as amounting to the general issue. *Brind v. Dale*, 2 Mees. & W. (x.) 775.

2. Where the mail-coach of the defendant stopped regularly at an inn for parcels, which the innkeeper received; held, that it was not the less a receiving-house of the defendant, because the innkeeper received also parcels for other coaches. It appearing that the parcel directed to London was sent by the plaintiff by the mail-cart from B. to M., where it was delivered to the innkeeper; held that the driver of the mail-cart was to be taken to be the agent of the plaintiff for the purpose of delivering it to go by the defendant's coach, and that he was not to be considered as having anything to do in forwarding it, or for its safety beyond M. *Syms v. Chaplin*, 1 N. & P. (x. n.) 129; and 5 Dowl. (r. c.) 429.



3. Held also, that an objection under the 11 Geo. 4 & 1 Will. 4, c. 63, that the value was not declared at the time of booking, must now be specially pleaded. *Id.*

4. A party letting out his carts, which plied for hire on the public wharfs, to any who would engage them, *semb.*, would not be deemed a common carrier, but liable for loss by the negligence of his servants. *Brind v. Dale*, 5 C. & P. (s. r.) 209.

5. Where the plaintiff desired that the parcel containing prints might be sent for, and the porter of the booking-office accordingly fetched it, and it was put in the defendant's van: the value was not declared at the time of the delivery, nor the increased charge, according to the defendant's notice under 1 Will. 4, c. 63, paid, but on delivery a higher charge was made, on the ground of being pictures, which required more care; held, that the delivery at the office by the defendant's porter was to be taken to be a delivery there by the plaintiff's agent, and no formal declaration having been made, the mere conviction of the contents was not equivalent for what is required by the Act; *semb.*, if the jury should find the loss or injury to have been occasioned through gross negligence, the notice and Act of Parliament would not be a defence. *Boys v. Pink*, 8 C. & P. (s. r.) 361.

6. Where a railroad Act enabled the company to carry passengers and goods, and contained also a clause requiring notice of action to be given in respect of any thing done in pursuance of such Act; a loss having arisen by the carriages getting off the railroad, in consequence of cattle having strayed thereon, through the insufficiency of the fences made by the company; held, that having availed themselves of the permission given by the Act to carry goods, &c., they thereby became common carriers, and liable as such, and that the action being brought against them as such, no notice of action was necessary; held also, that if the evidence as to the negligence and cause of loss did not support the declaration, the objection should have been made at the trial, when the declaration might have been amended. *Palmer v. Grand Junction Railway Company*, 4 Mees. & W. (ex.) 749; 3 Dowl. (r. c.) 232.

7. In an action against carriers for negligence, simply stating the delivery and receipt of the goods to be carried for hire, not alleging the defendants to be common carriers, but that thereupon it became and was the duty of the defendants to take due care of, and to carry, &c.; held, that there being nothing to show that the action was founded on contract, but that the declaration might be read as founded on the general custom of the realm, and that after verdict the court must so read it, the action was to be construed as an action of *tort*, and that one of several defendants might be found guilty. *Pozzi v. Shipton*, 1 Perr. & Dav. (q. n.) 4.

And see *Railway*; *Ship*.

#### CERTIORARI.

1. The rule for a *certiorari*, under 5 & 6 Will.

4, c. 33, s. 1, to remove an indictment for not repairing a road from an inferior court, is absolute in the first instance. *R. v. Leeds*, 5 Dowl. (r. c.) 123.

2. The writ is taken away by 25 Geo. 2 c. 26, s. 10, for removing an indictment for keeping a gaming house, where the application is made at the instance of a defendant. *R. v. Fox*, 5 Dowl. (r. c.) 242.

3. Upon a *certiorari* issued by a parish to remove an order of Sessions, the recognizance must be entered into pursuant to the 5 Geo. 2, c. 19, s. 2, by an inhabitant, on behalf of himself and the other inhabitants, with two sureties. *R. v. Abergele*, 1 Nev. & P. (x. n.) 237.

4. An indictment against several having been removed by *certiorari*, without the consent of one held that he could not be compelled to pay the costs of the trial although he had appeared and pleaded to it, and been tried thereon. *R. v. Hassell*, 5 Dowl. (r. c.) 531.

5. The court, considering the Central Court competent to decide all matters of law, refused a *certiorari* to remove an indictment, on the ground that difficult matters of law might arise. *R. v. Templar*, 1 Nev. & P. (x. n.) 91; and 5 Dowl. (r. c.) 249.

6. Upon motion to quash the writ for removing an order of Sessions, held not sufficient to serve the notice required by 13 Geo. 2, c. 15, on one justice present at the Sessions, and on another not present; and it is competent to the parties to object to the notice before the writ obtained; and it is not too late to object to the service of the notice after the writ issued, although, if quashed, it may be too late to sue out a fresh one. *R. v. Rattislaw*, 5 Dowl. (r. c.) 539.

7. Where upon a plaint in an inferior court, a foreign attachment was issued, and a claim was filed by a third party, on which issue was joined; held, that such issue was within the 21 Jac., c. 23, s. 2, and that if the claimant were enabled to sue out a *certiorari*, he could only do so within the time limited by the statute. *Wait v. Coombes*, 6 Dowl. (r. c.) 127.

8. Where a writ of foreign attachment, in a provincial court, was issued by W. against C., and the goods of the latter seized under it, whereupon a claim was entered by B., alleging the goods to be his, and six weeks after the issue was entered for trial, and upon its coming on for trial a *certiorari* was tendered by B., but refused by the Judge below, and the cause was heard under protest; held, that B. was not entitled to sue out the *certiorari* under 21 Jac. c. 23, s. 2, and a motion for an attachment against the Judge for refusing to receive the writ discharged with costs. *Bruce v. Wait*, 3 Mees. & W. (ex.) 21.

9. The court refused to issue a *certiorari* to remove an inquisition to assess compensation for lands taken under a railway Act, where the inquisition was not set out on affidavit, or the omission accounted for, and only stated that the deponent "objected" that it did not contain the requisite notice to treat, and no matter of fact dis-



tinently alleged from which a question of law might arise. *Reg. v. Manchester and Leeds Railway Company*, 3 Nev. & P. (q. n.) 439.

10. Where the Judge of a borough court improperly received a *certiorari* issued after the time limited by the 21 Jac., c. 23, s. 2, and the record was returned and filed in the superior court, a *procedendo* awarded. *Laverack v. Bill*, 6 Dowl. (p. c.) 111; and 3 Mees. & W. (xx.) 621.

11. The effect of 132 s. of 5 & 6 Will. 4, held to take away the *certiorari*, as to an order of sessions made upon an appeal against a borough rate. *Reg. v. Ripon Justices*, 2 Nev. & P. (q. n.) 411.

12. Where a railroad Act directed the inquisitions taken for assessing compensation, and judgment thereon to be kept by the clerk of the peace, and to be deemed records, &c.; held, 1st, that a *certiorari* would lie, although after judgment; held also, that the rule *nisi* was properly directed to the clerk of the company, although the inquisition was out of his custody. *R. v. Manchester and Leeds Railway Company*, 1 Perr. & Dav. (q. n.) 164.

13. And where the *certiorari*, in respect of all proceedings taken in pursuance of the act, was taken away, held that it applied to cases where compensation had been assessed under it for lands beyond the limits of the prescribed line. *R. v. Bristol and Exeter Railway Company*, 1b. 170, n.

14. Where a former motion for a *certiorari* failed, from defect of the affidavits, the court would not allow it to be renewed on amended affidavits. *R. v. Manchester and Leeds Railway Company*, 1 Perr. & Dav. (q. n.) 164.

15. The statutory regulations held to apply only to the cases of defendants suing out the writ of *certiorari*, and a prosecutor therefore held not bound by 5 Geo. 2, c. 19, s. 2, to enter into recognizances to remove an order of session for quashing a conviction. *Spencer, ex parte*, 1 Per. & Dav. (q. n.) 358.

16. Where the defendant had pleaded to and traversed an indictment for an assault, at the sessions, and without giving the usual notice of his intention to try, according to the practice of the sessions, brought on the trial and obtained an acquittal, a *certiorari*, with the view of setting aside the verdict, refused. *Reg. v. Unwin*, 7 Dowl. (p. c.) 578.

And see *Costs*; *Highway*, 7; *Indictment*; *Sessions*; *Turnpike*.

## CHARGE.

1. Where a testator directed his trustees, at the expiration of three years, to pay a sum, charged on lands devised to his son, to his daughter's husband, he giving sufficient security to them that it should be settled upon certain trusts for the daughter and her children; the son before the expiration paid off the money, and the trustees took a bond from the husband; held,

that the term being for the benefit of the son, it was competent to him to anticipate the time of payment, upon the condition stipulated by the will being performed, and without which the lands would not be discharged, but that under the circumstances, the bond was not such a security as the trustees should have been satisfied with. *Mills v. Osborne*, 7 Sim. (ch.) 30.

2. Where a father, seised of estates in fee and in tail, on his daughter's marriage covenanted to settle an annuity to trustees, to the uses of the marriage, and by deed or will to settle lands of 200*l.* yearly value, or 4,000*l.* in lieu; by a subsequent deed with his son, and no other parties, they agreed to suffer a recovery of the entailed estates, and sell those in fee; and after providing for certain sums for their respective uses, and that 4,000*l.* should be paid pursuant to the former covenant in favor of the daughter, the recovery was suffered, but they afterward abandoned that settlement, and a fresh arrangement took place between the father and son, limiting the lands to the son in fee, who subsequently mortgaged them; held, that the original covenant for payment of the annuity created a charge on the estates and the mortgagee, having notice, continued subject to that charge; but that the first agreement between the father and son, providing for the 4,000*l.*, was merely voluntary, and created no charge, and that it was competent to them to abandon it. *Ravenshaw v. Hollier*, 7 Sim. (ch.) 3. Affirmed by Lord Chancellor.

3. Where the father, being at the time of his death a trader, and indebted both by specialty and simple contract, devised real estates to his son, who on his marriage settled them in trust for his wife and children; held, that the effect of 3 & 4 W. & M. c. 14, and 47 Geo. 3, c. 74, being to make the heir or devisee personally liable to the amount of the assets devised or descended, and not to charge the real estate with the debts of the ancestor, the widow and children of the son were entitled to hold the estates settled, discharged from the debts of the testator. *Spackman, v. Timbrell*, 8 Sim. (ch.) 253.

4. Where a motion was dismissed with costs, for which a *subpoena* had been issued, and every endeavor made to serve the party, the court held that it was like a judgment at law, and that it would enforce the order by charging Government stock of the party, under 1 & 2 Vict., c. 110. *Blake v. White*, 3 Younge & C. (xx. xq.) 434.

And see *Debts*; *Incumbrance*; *Legacy*, [I] 4; *Marriage Settlement*, 2; *Specific Performance*, 4.

## CHARITY.

1. Where estates were devised to a corporation, for the use, interest, and performance of the testator's will, and certain parts of the property were given to his brother for life, and for other purposes not charitable, but also for some charitable purposes; and if the condition upon which the estate was devised was not performed, then a gift over to his brother in fee; held not to be a mere trust, but that the corporation took beneficially, and not for charitable purposes, further than to



the extent of the charges specifically imposed. *Attorney-General v. Cordwainers' Company*, 3 Myl. & K. (CH.) 534.

2. Before the 1 W. & M. c. 21, the commissioners of the Great Seal had no power to issue a commission of charitable uses; and a decree by such, made during the commonwealth, held null. *Attorney-General v. Atherstone School Governors*, 3 Myl. & K. (CH.) 544.

3. And see the principles by which the court is guided in schemes for management and visitatorial jurisdiction over schools. *Ib.*

4. Where the founder of a fellowship in a college directs a preference in favor of scholars to be sent from a particular school; held, that such candidate was not to be deemed exempt from the usual college examinations as to his fitness; a party so endowing is to be presumed conusant of the rules of the society on which he is about to engraft a new member, and to intend that such person shall be subject to the same provisions as other candidates for election; but the refusal to submit to examination having arisen from mistake, held, that he was still entitled to go before the master and fellows and be examined, and that his fitness was of a positive and not relative nature. *Inge, ex parte*, 2 Russ. & M. (CH.) 590.

5. And such candidate, if not found "able," although qualified otherwise as to birth, &c.; held, that another might be legally elected, although not possessed of those qualifications, if possessing the requisite ability. *S. John's College, in re*, 2 Russ. & M. (CH.) 603.

6. Where the declared object of the original founders of a meeting house was simply "for the service and worship of God," yet the court would look to the doctrines at the time not allowed by law to be preached, as assisting in determining the opinions of the persons creating the trust; the decree therefore declared, that it ought not to be applied to the support or teaching of the doctrines of any sect denying the doctrine of the Trinity, which at the time of erecting the meeting-house could not be legally taught or preached therein. *Attorney-General v. Pearson and others*, 7 Sim. (CH.) 200.

7. Where an advowson was granted for the advancement and better maintenance of a grammar-school, and subsequently the hereditaments and personal estate belonging to the school was by Act of Parliament vested in trustees, in trust for the school, except the right of presentation to ecclesiastical benefices, which were declared to be in the mayor, &c., of the town, in which by a clause, preference was to be given to certain persons; held, first, that the corporation were invested with a trust not of benefit, but strictly to present proper persons out of the favored class; and that, secondly, the 5 & 6. Will. 4, c. 76, s. 71, did not apply to such benefices, and that, under the provisions of that Act, the Chancellor was bound to appoint new trustees in the place of the corporation. *Shrewsbury School, in re*, 1 Myl. & Cr. (CH.) 632.

8. Where lands were granted to a corporation created by royal grant, of a master and five poor

men, with a direction that 52s. should be paid to each of the five poor, and that the income and revenues of the lands granted should be applied to the support of the master and poor, and for the repairs of the buildings; held, that the whole funds being given to both, with a certain amount to one, and the unascertained residue to the other, the five poor were not entitled to share the increased revenues of the charity: but that a sum given to the master, on a treaty for compensation for injury to the lands, was not to be considered a personal and accidental benefit to him, but to be treated as a sum received by him as trustee for the charity, and of which he was only to enjoy his share of the annual profit arising therefrom: held, also, that, looking to the duties and objects of appointing the master, residence was essential to the scheme. *Attorney-General v. Smythies*, 2 Russ. & M. (CH.) 717; and 2 Myl. & Cr. 135; and 1 K. 280.

9. Where a testatrix, in 1680, devised a rent-charge, upon trust for the maintenance of a Catholic priest for the help of poor Catholics; upon an information filed before the 2 & 3 Will. 4, c. 115, held that such bequest was for a charitable purpose, and being illegal, the Crown was entitled to direct the application, *cy-pres*, of the fund to other charitable purposes, in a legal mode. *Attorney-General v. Todd*, 1 K. (CH.) 803.

10. Where sums of money were given in trust to a company, to be invested in land for the maintenance of poor alms-men of the company yearly for ever, and the company had never invested, and had mixed the fund with their own, but had in fact properly applied the full income of the gift to the objects of the grantor's bounty; held, that a distinct investment ought to have been made within a reasonable time, but that they were not required to make a distinct establishment, no separate foundation having been directed; and that the company might apply the funds for the benefit of persons already their alms-men; the court, however, looking to what had been done, refused an inquiry as to any loss having been incurred by the neglect to invest, and directed the fund to be laid out in the 3 per cent. consols: costs of the relators, as between party and party, allowed; but extra costs out of the charity fund refused. *Attorney-General v. Fishmongers' Company*, 1 K. (CH.) 492.

11. Where the founder of a school gave lands to a guild for its support, and afterwards gave lands to a college, on condition of their maintaining five scholars, to be chosen from the school by the guild, and gave the master and fellows of the college power of appointing and removing the master of the school; the guild being afterwards dissolved by the Act of Parliament, and the selection of the scholars to be sent to the college given to the schoolmaster, and vicar and churchwardens of the parish, and on their default to the college, and on their like default to the Archbishop of York: held, that the foundations of the school and of the scholarships were distinct, and that one information for alleged abuses in the administration of both was bad for multifariousness; held also, that the Archbishop ought to



have been made a party. *Attorney-General v. St. John's College*, 7 Sim. (ch.) 241.

12. A special visitor can only be where he is so specially named and appointed by the founder, and if so, it will not exclude the jurisdiction of the court; where the patron was such for want of a special appointment, but had never exercised any visitatorial power, the court, in a case where the original foundation and endowment of an ancient hospital were unknown, and the warden, after paying certain small stipends and repairs, retained the surplus to his own use, being declared a trustee only, referred it to the Master to settle a scheme for the application of the revenues. *Attorney-General v. York, Archbishop*, 2 Russ. & M. (ch.) 461; reversing the decision of the Vice-Chancellor.

13. After a reference, and appointment by a Master of new trustees of a charity, the court will adopt his appointment, unless it be clearly shown that the parties appointed are objectionable, and the court will not enter into the question of the fitness of others rejected; an exercise of the appointment by old trustees for political purposes, held a sufficient ground for his not re-appointing them: held also, that there being nothing in the will of the founder showing that the intended benefits were to be confined to members of the church of England, the Master was justified in appointing as trustees individuals not members of that church. *Norwich Charities in re*, 2 Myl. & Cr. (ch.) 275.

14. Where charity lands were, by the operation of 59 Geo. 3, c. 12, s. 17, become vested in the church wardens and overseers, part being sold for the purpose of a local Bridge Act; held, that the petition for investing the purchase-money might be presented in their names; but *semble*, having no corporate seal, they could not authorize an attorney to continue to receive the dividends. *Annesley, ex parte*, 2 Younge, (ex. eq.) 350.

15. The court may direct an account of charity estates in the hands of a corporation, from the date of the foundation of the charity, where the misapplication has been gross; yet, under circumstances, it directed them to be taken only from the last appointment of trustees nominated by the corporation to administer the charity. *Attorney-General v. Newbury Mayor, &c.*, 3 Myl. & K. (ch.) 647.

16. Where the information stated a case wholly inconsistent with the facts really existing, and which were obtained from the answer, but the relators did not amend the bill, or put the case into a shape which might have entitled them to some relief, and no application had been made before filing the bill to correct the alleged abuse, which, if any, arose out of a decree of commissioners in 1686, according to which the trustees had ever since acted; the court dismissed the information with costs. *Attorney-General v. Grocers' Company*, 1 K. (ch.) 506.

The case of *Giblett v. Hobson*, 5 Sim. 651, affirmed on appeal, 3 Myl. & K. 517.

17. A lease of lands and hereditaments for  
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charitable uses, where already in mortmain; held not to be invalidated by 9 Geo. 4, c. 36. *Walker v. Richardson*, 2 Mees. & W. (ex.) 882.

18. Where money given to a corporation, to dispose of it as they pleased, was appropriated by them to the endowment of lectureships, the income to be applied for payment of them; held, not a charitable trust within the meaning of s. 71 of 5 & 6 Will. 4, c. 76. *Oxford Charities, in re*, 3 Myl. & Cr. (ch.) 239.

19. Where certain members of the congregation, and pew-holders, claiming to be trustees of the lease of a chapel for religious worship, according to the doctrines of the Scotch Church, filed a bill against other trustees in whom the lease was vested, alleging the placing ministers not of the Scotch Church therein, and other breaches of trust, praying relief, and that the trusts might be performed: the alleged trust being made out, and the breaches established in evidence, decree as prayed; and held, that the record was properly framed, and that by amendments making the original plaintiffs sue on behalf of all having the same interest, the parties or frame of the record was not so altered as to prevent the depositions taken in the original suit being used in the amended one, and that there would be no difficulty in sustaining perjury on such depositions. *Milligan v. Mitchell*, 3 Myl. & Cr. (ch.) 72.

20. Where a testator endowing a grammar-school contemplated a fixed income of 250*l.*, to arise from loan or investment in land, and after providing for the erection of a school-house, &c., six tenements for alms-folk, six fellowships and scholarships in the college of C., he appointed the master and four senior fellows, after the death of his executors, the supervisors of his will; and, including 5*l.* to the master and 30*s.* to each of the four senior fellows, he distributed the income to the amount of 243*l.* 14*s.* 3*d.*, and willed that the remainder should be from time to time bestowed in such charitable uses as his executors and supervisors should think fit; the fund having been invested in land, and the rents latterly far exceeded the contemplated income, held, that the supervisors took the remainder upon trust for charitable purposes, without application to their own benefit; but the court regarding the intimate connexion intended by the testator between the college and the school, notwithstanding long misappropriation, refused to remove the trustees; and there having been great accumulations through their economical administration, allowed them their costs out of the funds accumulated. *Attorney-general v. Caius College, Cambridge*, 2 Keene, (ch.) 150.

21. Gift to trustees of lands, at the time producing 50*l.* per annum, for decayed "gentlemen" of the devisor's family first, then of others, to be allowed 10*l.* a year so far as the rents would extend; the rental now amounting to 500*l.*, a reference ordered for a scheme as to increasing the allowance, &c., and more accurately to define the objects, excluding minors. *Attorney-general v. Holland*, 2 Younge & C. (ex. eq.) 683.

22. Where one of several trustees was directed to be the acting manager for one year in rotation; held, that a succeeding one was not liable for the



held, not sufficient to call upon the holder to prove consideration. *Jacob v. Hungate*, 1 M. & Rob. (N. F.) 445; questioning *Thomas v. Newton*, 2 Carr. & P. 606; and *Heath v. Sansom*, 2 B. & Ad. 291.

19. Where the defendant pleaded that the note was made on certain terms, and indorsed by the plaintiff without consideration, and the plaintiff replied that £—— was given for it, the issue being on the defendant, and he called no witness; held, that the plaintiff was entitled to recover that sum. *Edwards v. Jones*, 7 C. & P. (N. F.) 633.

20. Where the drawers of the bill kept account with the plaintiffs as bankers, which they indorsed to them, and, upon its being returned dishonored, it was entered on the debit side of the account, which at the time was considerably against the drawers, and remained so at the commencement of the action; the bankers had, on former occasions, allowed the drawers to overdraw their accounts, but they were under no obligation to do so; held, that such entry was no evidence in support of a plea that the bankers had received that sum in satisfaction of the bill. *Ryder v. Wyllett*, 7 C. & P. (N. F.) 608.

21. In *assumpsit* by indorsee against maker; plea, that it was given for a gaming debt, and without consideration, and indorsed to plaintiff with notice; replication, that it was indorsed without notice of the illegality, and for good consideration; held, that, upon such issue, the defendant was bound to give evidence to connect the plaintiff with the parties illegally concocting the note, and that the plea did not amount to an admission of any existing illegality, and that the jury could only draw inferences of it from facts. *Edmunds v. Groves*, 5 Mees. & W. (ex.) 642; and 5 Dowl. (P. C.) 775.

22. Where the only issue raised was, whether the bill was indorsed after it became due; held, that the *onus* of establishing it lay on the defendant. *Lewis v. Parker*, 6 Nev. & M. (N. F.) 294; and 4 Ad. & Ell. 838.

23. In an action against drawer, upon plea that he did not make the note, evidence of imbecility of mind could not be gone into. *Harrison v. Richardson*, 1 M. & Rob. (N. F.) 504.

24. Plea in *assumpsit* by indorsee against maker, that he gave two bills to the plaintiff to take up the note, and in lieu thereof, and that defendant was a party liable on the bills to the plaintiff, and that they were outstanding in the hands of the plaintiff; held, that it was for the jury to say if the bills were given in lieu of and in satisfaction of the note, or only to gain time for the payment; if the former, it was a good defence, although the latter part of the plea was not proved; if the latter, it ought to be shown that both were outstanding at the commencement of the action. *Goldshede v. Cottrell*, 2 Mees. & W. (ex.) 20.

25. Plea to a declaration on a note payable absolutely with interest, that it had been substituted for a note given on an agreement for a share in a partnership, and that it had been thereby stipu-

lated that the principal was to be paid out of the defendant's yearly share of the profits, and that unless the defendant failed in his part of the agreement, the plaintiff would not call suddenly for the payment of the balance on the note; the original note also contained a similar statement as to the mode of liquidation; and the jury found that the note for which the action was brought was substituted for and given on the same conditions; held, that, although the replication limited the issue to the question whether the plaintiff had given reasonable notice of enforcing the note, it was competent to the defendant to show the whole circumstances of the transaction, and of the substitution of the note for the original one, but that, although the plaintiff might not be entitled to recover the balance of the principal due, he was entitled to a verdict for the interest. *Baylis v. Ringer*, 7 C. & P. (N. F.) 691.

26. Upon plea to a declaration by a second indorsee against acceptor, that the bill was an accommodation bill given to R., and that the indorsement was made after the bill became due; it appearing that at the time of accepting the bill R. and the defendant were friends, but subsequently quarrelled, and the bill was not put in suit until five years after it became due, and neither party called R.: held to amount to *prima facie* evidence on the part of the defendant to go to a jury. *Bounsall v. Harrison* 1 Mees. & W. (ex.) 611; and 1 Tyr. & Gr. 925.

27. In an action by indorsee against acceptor, an order having been obtained for inspection, plea denying the acceptance, indorsement, &c. and also that it was on paper improperly stamped under 3 & 4 Will. 4, c. 97, s. 17, the latter being admissible under the plea of non-acceptance, was ordered to be struck out. *Dawson v. Macdonald*, 2 Mees. & W. (ex.) 26.

28. In *assumpsit* by indorsee against acceptor; plea, that after the bill became due, he tendered the amount of the bill with interest, held bad on demurrer; a tender after the day cannot be pleaded by the acceptor. *Poole v. Tumbridge*, 2 Mees. & W. (ex.) 223.

And see *Hume v. Peploe*, 8 East, 167.

29. In *assumpsit* against acceptor on a bill indorsed to a banking company; held, that an allegation in a plea that the plaintiffs were a banking company, consisting of more than six persons, and that they were illegally associated during the privileges granted to the Bank of England by 3 & 4 Will. 4, c. 98, as compounded of law and fact, was therefore traversable. *Ransford v. Copeland*, 1 Nev. & P. (N. F.) 671.

30. In debt by the holder against acceptor; plea, as to part, *actio non*, because he received no consideration, but had delivered it to a third person to get it discounted, from whom the plaintiff detained it for his own debt, and only advanced the part admitted, and issue joined that the defendant was indebted beyond that sum, which was found for the defendant; held, that although such plea was bad, yet the plaintiff having chosen to go to trial, he let the defendant into any defence which he might have to the action.



Finlayson v. Mackenzie, 3 Bing. N. S. (c. r.) 824.

31. In *assumpsit* against the acceptor; plea, that after, &c., the defendant was resident in Scotland, and executed an assignment of his personal property for the benefit of his creditors, and notice thereof to the plaintiff, who authorized his attorney by writing to concur in such deed and receive his dividend, alleging such proceedings to be in conformity with the law of Scotland, and that by reason of the premises and by force of the laws there he was absolutely discharged; held, 1st, that by issue on such plea the law of Scotland was put in issue, and the defendant bound to give evidence of it; and 2ndly, that no deed of composition having been executed by the plaintiff, nor any act done binding him not to sue his debtor, there was nothing on the face of the plea amounting to a defence to the laws of this country. Woodham v. Edwards, 1 Nev. & P. (x. s.) 207.

32. Where the declaration by an indorsee against indorser of a note described the defendant as the maker, and to whom no notice of dishonor had been given; held, that the rule that an indorser stood in the situation of a new maker, applied only to the case of a bill and not of a note, and that the plaintiff was not entitled to recover. Gwinnell v. Herbert, 5 Ad. & Ell. (x. s.) 436.

33. Where the clerk of a banking firm of three partners, upon the death of two, continued to manage the business for the surviving partner in order to wind up the affairs, and in the course of such employment using and signing the name of the old firm, drew a bill on H., which was accepted; held, that his own name not being on the bill, he was not personally liable as the drawer, unless that it were shown that he had no authority to draw in the name of the firm, or had not done so *bona fide*. Wilson v. Barthrop, 2 Mees. & W. (xx.) 863.

34. Where upon a bill becoming due, the acceptor asked for time, and subsequently gave another bill for the same amount, admitting that something was due for interest, and that the plaintiff should continue to hold the first bill until the second was paid, which was done shortly after it fell due; held, that the plaintiff was entitled still to sue on the first for the interest due on it, and that the facts did not establish an agreement alleged in the plea that the acceptance of the latter discharged the defendants from such interest. Lumley v. Musgrave, 4 Bing. N. S. (c. r.) 9; and 3 Sc. 230, 238.

35. In *assumpsit* on a banker's check; held, that under the general plea that the defendant did not make, &c. he might show the check to be post dated, without pleading it specially, and that he was not precluded from the objection by its having been read before the objection taken. Field v. Wood, 8 C. & P. (n. f.) 52.

And see Dawson v. Macdonald, 2 Mees. & W. 26.

36. In *assumpsit* by indorsee against acceptor, where the plea was bad for duplicity, and the replication *de injuria*; held, that no objection

could be made by demurrer on the ground of several matters being put in issue, being occasioned by the defendant's plea. Reynolds v. Blackburn, 6 Dowl. (r. c.) 19.

37. Where the making of the bill was admitted on the record, and the only issues raised were, the indorsements, presentment, notice of dishonor, and consideration; held, that it was not incumbent on the party producing the bill to explain an alteration which appeared to have been made in the date. Sibley v. Fisher, 2 Nev. & P. (q. s.) 430.

38. Where there are counts on the consideration of the bill as well as on the bill, the plaintiff will be entitled to enter his verdict on such as apply to the consideration, if the subject be stated in the particulars, and may recall a witness to prove such part of the consideration after he has closed his case. Ryder v. Ellis, 8 C. & P. (n. f.) 357.

39. Upon a plea in *assumpsit* on bills, that the defendant, if liable, was only so as surety; held, that he was not entitled to inspection of a deed, by which it was said time had been given to the principal, to which the surety was not a party. Smith v. Winter, 3 Mees. & W. (xx) 309; and 6 Dowl. (r. c.) 386.

40. In *assumpsit* against the defendant as joint maker of a note; plea that the defendant joined merely as a surety, of which the plaintiff had no notice of its not having been paid until the commencement of the action, and that the plaintiff gave time to the party without the defendant's knowledge or consent; held ill on general demurrer. Clarke v. Wilson, 3 Mees. & W. (xx.) 208.

41. Where until inspection of the check on which the action was brought it could not be known that it required a stamp, being post dated; held that it was not too late to take the objection after it had been read, and the fact of post dating need not be specially pleaded. Field v. Woods, 2 Nev. & P. (x. s.) 117; and 6 Dowl. (r. c.) 23.

42. In an action by payee against maker, a party who was a joint maker, and for whom the defendant was surety, held an inadmissible witness, being liable, not only for damages and costs recovered by plaintiff, but for the defendant's own costs, and that he could not be rendered competent by an indorsement on the *postea* under 3 & 4 Will. 4, c. 42, s. 26. Stanley v. Jobson, 2 M. & Rob. (n. r.) 103.

43. In any action against the acceptor of a bill or maker of a note, the defendant to be allowed to have the proceedings stayed on payment of the debt and costs in that action only. Reg. Gen. 3 ev. & P. (q. s.) 370.

44. Where, in an action against acceptor, he pleaded that the acceptance was obtained by force of duress and that he never had any value for the acceptance; held bad, on demurrer for duplicity, and that the objection was not removed, by reason of the second branch of the plea being ill pleaded. Stephens v. Underwood, 4 Bing. N. S. (c. r.) 655; 6 Dowl. (r. c.) 737; and 6 Sc. (c. r.) 402.



45. In an action by the indorsee against the maker, and issue on the fact of presentment; a promise by the defendant, after the note became due, to pay, held to be a sufficient admission of the presentment having been duly made. *Croxon v. Worthen*, 5 Mees. & W. (xx.) 5.

46. Plea, in an action by the holder against the acceptor, that the bill was accepted in part payment of a larger debt from the defendant to the drawer, and that, before it became due, the defendant being in embarrassed circumstances, he entered into a composition with his creditors, to which the drawer was a party, and averred a payment of the composition and receipt thereof in satisfaction of all claims in respect of the bills or otherwise; held, that amounting to matter of discharge and not of excuse, the replication *de injuria* was bad. *Jones v. Senior*, 4 Mees. & W. (xx.) 123; and 6 Dowl. (r. c.) 701.

47. In *assumpsit* by indorsee against drawer, plea that the bill was drawn and indorsed in payment of the price of hops as of a certain planter, and to answer certain samples, and alleging that the plaintiff had not delivered any hops answering such samples, "or any hops whatever;" held, that the latter allegation was immaterial; the plea showing a total failure of the consideration, and that if the plaintiff relied on the defendant's having accepted those delivered, though of inferior quality, he should have replied it. *Wells v. Hopkins*, 5 Mees. & W. (xx.) 7.

48. Where in trover for a bill the defendant pleaded that the plaintiff indorsed it in blank, and that the party who became the holder pledged it with the defendant as a security for a debt; replication, that at the time the defendant received it, he knew that the party had no authority to pledge it; held good. *Hilton v. Swan*, 5 Bing. N. S. (c. r.) 413.

49. Where the plea, in an action against the drawer by a second indorser, denied the indorsement to the first indorser, held not distinguishable from a traverse that he did not indorse the bill *modo et forma* within the meaning of the Judge's order to plead in the latter terms. *Waters v. Thanet, Earl of*, 7 Dowl. (r. c.) 251.

50. A count by the payee against the acceptor of a bill, in the form given by Reg. Trin. 1 Will. 4, held properly joined with other *indebitatus* counts in *debt*. *Crompton v. Taylor*, 4 Mees. & W. (xx.) 138; and 6 Dowl. (r. c.) 660.

51. Where the issue joined in an action against the drawer was, whether due notice of dishonor had been given; it appearing six months after it became due, the drawer requested the holder to exhaust all his influence to obtain payment from the acceptor, as the bill had been merely drawn for his accommodation; held, that in the absence of any unconditional promise, the judge properly directed the jury to say whether they could presume from the circumstances that the defendant had received notice of dishonor. *Hicks v. Duke of Beaufort*, 4 Bing. N. S. (c. r.) 229.

52. Upon a plea that the defendant had not a notice from the plaintiff of the non-payment; held, that notice proved from another party, the

indorser's clerk, was sufficient. *Newen v. Gill*, 8 C. & P. (N. r.) 357.

And see *Bail*; *Banker*; *Bankrupt*; *Insolvent*; *Landlord*; *Pleading*. (c. r.)

## BOND.

1. Where the husband, reciting an intended marriage, and that he was to be possessed of her stock in trade, and that he had agreed to execute a bond in a sum payable to the children of her late husband within 12 months after the wife's death, in the event thereafter specified, and the condition was, that he should pay, &c. "if upon taking an account of the stock in trade, if then carried on by him, the same should amount to £. — —;" held, that a plea by the obligor that he had discontinued the business, was an answer to an action on the bond, having exercised a power of closing the concern, which was reserved to him by the condition. *Beawick v. Swindells*, 3 Ad. & Ell. (x. r.) 868; affirming the judgment in King's Bench.

2. Where upon an arrangement between a father and son for the payment of the debts of the latter, he executed a bond which was agreed to be deposited in the hands of certain referees, being intended as a security for the son's future behaviour, and who were empowered within a certain period to direct it to be cancelled if they thought fit, which they omitted to do during the life-time of the father; the court, under the circumstances, being of opinion that it was not intended to operate as a security for the debt, but for collateral purposes, which had been fully satisfied, and that, if that were doubtful, the conduct of the obligor during a long period and dealing with the instrument amounted in equity to a release, decreed it to be delivered up to be cancelled. *Flower v. Marten*, 2 Myl. & Cr. (ch. 459).

3. Although the transaction constitutes a debt in the first instance, a debtor is at liberty to show that the creditor subsequently altered his intention and treated it as a gift. 1b.

4. A bond executed by defendant as a surety, conditioned for the payment of interest on £ — —, on the 1st March of the first year, the like at the end of the second year, and the principal and like sum of interest at the end of the third; the first interest was not paid until the 30th March; held, that the bond was thereby forfeited, and the forfeiture not waived by the acceptance of the interest; and, on the defendant's bankruptcy, was provable under his commission, and the debt therefore barred by his certificate. *Skinner's Company v. Jones*, 3 Bing. N. S. (c. r.) 481; and 4 Sc. 271.

5. Where the son, having executed a bond to his father for 1,000*l.* and interest, afterwards became surety with his father in a bond to a third party for 500*l.*, and a memorandum was indorsed on the son's bond, that it had been agreed that the son should not be called on for the principal sum until the father's bond were paid off; held, first, that it did not relieve the son from the inter-



est on the principal money; and, secondly, that the son having afterwards, by arrangement, got rid of and discharged the father's bond, could not, as surety, take the benefit beyond the sum actually paid; his own contract with the principal being indemnity, it was his duty to make the best terms he could for the party in whose behalf he was acting. *Reed v. Norris*, 2 Myl. & Cr. (ch.) 361.

6. In debt on bond to the guardians of an union, on a contract for the supply of bread, in loaves of 4 lbs. weight, conditioned for performance of the contract, *inter alia*, that the defendant would deliver such bread in loaves, and of which a bill of particulars should be sent with such articles, at the time of delivery thereof, or within one month from such delivery, provided that if such articles were not duly served, or should be deficient in the weight stated, or if delivered without such bill of particulars, that the board might return them, or give notice to the defendant to fetch them away; the defendant pleaded performance generally; and the replication assigned for breaches, first a delivery of loaves deficient in weight; second, a delivery without any bill of particulars, whereupon the plaintiffs returned them, and incurred great charges in obtaining a supply; held, that evidence of the loaves being brought to the house, and part handed out, and, on being weighed and found deficient, returned and refused to be taken, was a sufficient delivery to support the issue on the first breach; and, secondly, that the board having a right to return the articles unless a bill were delivered with them, an issue whether it was dispensed with at the time was not an immaterial issue, although, *semble*, it might have been, if found for the plaintiff, as there could be no dispensation by parol of an instrument under seal. *Elliott v. Martin*, 2 Mees. & W. (ex.) 13.

7. In debt on bond conditioned for securing the payment of 1,400*l.* on a day named; plea, as to 800*l.*, parcel, &c., payment after the day, and, as to the residue, a release to the executor of a joint obligor deceased; held, as to the first, that the penal sum being forfeited, and the payment only as to part of the sum mentioned in the condition, the plea was bad; secondly, that nothing appearing to show the defendants to be only sureties, the release was no discharge of the surviving obligor; held also, that it was not necessary to aver a breach in the non-payment of the sum, if enough appeared on the declaration to show that the money was due. *Ashbee v. Pidduck*, 1 Mees. & W. (ex.) 364; and 1 Tyr. & Gr. 1016.

8. Plea to debt on bond, that it was given on a corrupt agreement for articles of apprenticeship to the plaintiff, as an apothecary and surgeon, for two years, but that the deed should be ante-dated, to enable the defendant to be admitted as an apothecary at the end of two instead of five years, contrary to the 55 Geo. 3, c. 19, s. 15; after a verdict for the defendant, the court refused judgment for the plaintiff, *non obst. vered.* *Prole v. Wiggins*, 3 Bing. N. S. (c. r.) 230; and 3 Sc. 601.

9. Where the plea to debt on bond by execu-

tors disclosed matter showing the bond to be void; held, that as the plaintiff might have then abandoned the suit, he was liable to the costs. 1*b.*

10. Where A. and B. became jointly and severally bound for the payment of an annuity to C. for life in manner following; viz., one moiety by A. during her life, and the other moiety by B. during A.'s life, and after her death, the whole by B. during the life of C.; held, after the death of A., B. failing to pay the annuity, that A.'s estate was liable. *Church v. King*, 2 Myl. & Cr. (ch.) 220.

11. Where it once is shown that the party executing the deed is aware of its contents, evidence that the party was induced to execute it by previous fraudulent misrepresentations held inadmissible, upon the plea that it was obtained by fraud and covin. *Mason v. Ditchbourne*, 1 M. & Rob. (s. r.) 460.

12. Where money was advanced by bankers in London to a partner in a banking firm in Ireland, and bonds executed in Dublin for the amount in sums of — *l.* sterling, "with legal interest" and warrants of attorney for entering judgments in the K. B. in Ireland recited the sums in the same terms as in the bonds; credit was given in the books of the English banking house for the full sum, and bills accepted by them drawn by the banking company in Ireland; held, that the debt was payable in English currency and with English interest. *Noel v. Rochfort*, 10, Bli. N. S. (r.) 483; reversing the judgment below, 2 Younge & J. 330, An. Dig. 1829, 128.

13. In an action by the assignee of a bond on a promise to pay at a given time, in consideration of a forbearance to sue; held, first, that there was sufficient mutuality and a good consideration for the promise; secondly, that the plaintiff being a third party sustaining detriment by forbearing to enforce his right to sue in the name of the obligee, the promise was not *nudum pactum*; and lastly that the bond being forfeited before the agreement, it was in no respect varied by the parol contract entered into between the plaintiff and defendant. *Morton v. Burn*, 2 Nev. & P. (s. n.) 297.

14. Where the obligee had sued one of two obligors on a joint a several indemnity bond, and received a sum in discharge of the debt and costs; he afterwards sued the other, who pleaded the acceptance of the sum so paid in satisfaction; held, that the *onus* lay on the defendant to show that it was taken as a settlement of the entire cause of action, and the court refused to set aside the verdict found for the plaintiff. *Field v. Robins*, 3 Nev. & P. (q. n.) 226.

15. Where no proceedings were taken on a bond for three years after the death of the obligor, and the obligee who was aware of the consideration had allowed an injunction in Ireland to issue, and the bill to be taken *pro confesso*, without securing himself the liberty of proceeding in the action, and his representatives, the defendants, being in possession of all his papers, were unable to give any account of the consideration, the



2. When the warrant of commitment of parties charged with riot under 7 & 8 Geo. 4, c. 30, s. 8, only stated that they had begun to pull down and demolish "in part," a dwelling-house, charging also other acts of bailable misdemeanor; held, that as regarded the former charge, it was defective, and the parties therefore admitted to bail. *Reg. v. Lowden and others*, 7 Dowl. (P. C.) 538.

### COMMON.

1. Where the defendant claimed as appurtenant to his farm the exclusive right of pasturage for sheep and lambs over a certain common; held that his grant as alleged, being limited to those cattle, it would not entitle him to depasture the sheep of others there "on tack," as being injurious to the lord's right as to what was not granted; and although evidence of the commoner having so depastured on tack was admissible, it was not evidence in derogation of the lord's right, as tending to show a usurpation only. *Jones v. Richards*, 1 Nev. & P. (K. B.) 747; and 5 Ad. & Ell. 529.

2. Plea of enjoyment of common right for 30 years before the commencement of the suit, held sufficient although not alleged *next* before, &c. the 2 & 3 Will. 4, c. 71, s. 4, being nothing more than an exposition of proof requisite to support the right. *Jones v. Price*, 3 Bing. N. S. (C. P.) 52; and 3 Sc. 376.

3. A party cannot support a claim of common *per cause de vicinage*, over open downs adjoining his own common, which are the exclusive property of the owner, although there is no boundary fence separating the lands. *Heath v. Elliott*, 4 Bing. N. S. (C. P.) 388.

4. In case for disturbing plaintiff's right of common, plea justifying as for defendant's own commonable cattle, replication that *all* were not the defendant's cattle, *levant and couchant*, &c.; held, that the action being in substance for surcharging, it ought to have been newly assigned, and that the Judge properly rejected evidence respecting it. *Bowen v. Jenkins*, 2 Nev. & P. (K. B.) 87.

And see *Prescription*.

### COMPENSATION.

1. Where the London Dock Company purchased lands adjoining the plaintiff's shop, and in the execution of the works stopped up streets, &c., which the plaintiff alleged to have deprived him of many customers, and thereby diminished the value of his shop; held that it was in the nature of injury to the good will only, and not to the estate and interest in the house within the provision for compensation given by the act. *Rex v. London Dock Company*, 6 Nev. & M. (K. B.) 390; and 5 Ad. & Ell. 162.

2. Where a local act directed the amount of compensation for loss sustained in the execution of the works under the act, when ascertained by

a jury, to be entered up as a judgment on the record of the quarter sessions, but no mode of recovery given, it being doubtful whether *debt* might be maintained on such judgment, and so no certain effectual remedy, a *mandamus* granted for the sum so ascertained; held also that upon such application the court could not go into the question of any irregularity in the previous proceedings for the *mandamus* to the sheriff to impanel a jury to assess such damages. *Rex v. Nottingham Old Waterworks Company*, 1 Nev. & P. (K. B.) 480.

3. Where the local Act empowered road trustees to take lands, making satisfaction to the "owners or proprietors," held to extend to the interests, not merely of owners of the inheritance, but of any person having a beneficial interest in the land, and that a termor was entitled to compensation. *Lister v. Lobley*, 6 Nev. & M. (K. B.) 340.

4. Where the tenant's interest was merely an expectancy of renewal from improvements he had made; held that he was not entitled to claim compensation in respect thereof from the proprietors of a railway company, who had taken the premises, the Act containing no words sufficient to comprehend such an interest. *Rex v. Liverpool and Manchester Railway Company*, 6 Nev. & M. (K. B.) 186; and 4 Ad. & Ell. 650.

### COMPOSITION.

1. Where an hotel-keeper, at the time of his licence expiring, being in difficulties, assigned all his stock in trust to continue the trade, and out of the profits to pay a dividend to such creditors as would execute the deed of assignment; and a licence was afterwards taken out and assigned to the trustee; held, first, that the assignment of the trade, &c. at the time there was no licence, did not render it illegal, it not being certain nor intended that anything illegal should be done; but secondly, that as by sharing the profits, the creditors executing might become partners, a liability they were not bound to submit to, the assignment was not valid. *Owen v. Bode*, 6 Nev. & M. (K. B.) 448; and 5 Ad. & Ell. 28.

2. Where a creditor, holding a policy as a security for his debt, refused to sign the composition deed, unless the policy were assigned to him, which was done; held to be a fraud on the other creditors, and the party assigning having become bankrupt, his assignees were entitled to recover the amount received on the policy, although the composition had never been paid. *Alsager v. Spalding*, 4 Bing. N. S. (C. P.) 407.

And see *Bond*.

### CONDITION.

1. Where the occupier of an hotel, not having obtained a wine licence, and being about to quit and transfer the premises to the defendant, had deposited a sum as an indemnity for the expense of



procuring the licence, and duly attended the meeting of the magistrates for that purpose, and which would have been granted but for the non-attendance, of the defendant; held, that as a case within the 12 sect. of the 9 Geo. 4, c. 61, it was the duty of the defendant to have given the notices required by the Act, and that he could not take advantage of the non-performance of the condition, occasioned by his own neglect, and that the plaintiff was entitled to recover back the sum deposited. *Bryant v. Beattie*, 4 Bing. N. S. (c. r.) 254.

2. Upon a devise for life, remainder to A., a party, the testator's heir, upon condition that within three months after the testator's death he should convey certain leasehold premises, and in default then over; on a special case, stating the will and facts, it not being expressly stated that the heir had notice of the condition within the period limited, the heirs of A. were not precluded by the conditional limitation, and the court could not infer the fact of A. having had such notice. *Doe v. Crisp*, 1 Perr. & D. (q. b.) 37.

And see *Devise; Lease*.

### CONSTABLE.

1. Constables appointed for keeping the peace near public works, justices empowered to order payments to, out of the funds of the company. *By 1 & 2 Vict. c. 80*.

2. County and district constables, establishment of by 2 & 3 Vict. c. 93.

And see *Officer*.

### CONTRACT.

1. Upon a contract for a ship then building, specifying the description and particulars, for a certain sum, "and payment as follows opposite each name subscribed," and which was signed by several, and amongst the rest by the plaintiff for one-fourth; held not to amount to a present bargain and sale, but of the ship when finished, and that until then no part vested so as to enable the plaintiff to maintain trover. *Laidler v. Burlinson*, 2 Mees. & W. (ex.) 602.

2. In *assumpsit* for not delivering possession of premises, agreed to be demised, a small part of which consisted of small cottages, occupied by weekly tenants, of which the plaintiff was aware, and made no objection, held that it was sufficient to justify a finding by the jury in favor of a plea stating the circumstances, and that the plaintiff agreed to accept the attornment of the tenants instead of an actual delivery of possession. *Palmer v. Temple*, 6 Nev. & M. (x. b.) 159.

3. In an action on a contract for not accepting oil "of good and merchantable quality," being the cargo of the ship F., consisting of — casks at — per tun; plea, that at the time of the contract, the casks were not good and merchantable, held bad; the subject of the contract being the oil, and not the casks, which was mat-

ter of description only, and not of the essence of the contract and if the contract, even had been a sale of them also, a defect in any would only go to part of the consideration. *Gower v. Von Dedalzen*, 3 Bing. N. S. (c. r.) 717.

4. Upon a contract to serve as a news reporter, at certain wages, for one whole year, and so from year to year, so long as the parties should respectively please; held to be a yearly service, and could not be terminated but at the end of the current year. The usage in the case of menial servants, to discharge the contract at a month's notice, is only matter of fact, triable by the jury, and not matter of law; and if put on the record as matter of law, the court could not distinguish it from any other yearly contract of service. *Williams v. Byrne*, 2 Nev. & P. (x. b.) 139.

5. Where the defendant had retained the plaintiff as French teacher in his school, at a yearly salary, held, that his having absented himself for two days on the expiration of the vacation, was not such a breach of duty arising out of the contract, express or implied, as could justify the defendant in putting an end to it. *Fillieul v. Armstrong*, 2 Nev. & P. (q. b.) 406.

6. Where several parties opened an account jointly with bankers, held to be a joint and several contract, and that the latter might in equity resort to the estate of one of the parties deceased, although the debt at law only remained against the survivors; and that there is no distinction whether the debt arises on mercantile partnership debts or not; but that the surviving joint creditors must be made parties, although no decree is sought against them, being interested in taking the accounts. *Thorpe v. Jackson*, 2 Younge & C. (xx. eq.) 553.

7. Where the defendants, being four directors of a company, and liable individually on a bill, and being unwilling to make a call, applied to the plaintiff to advance them the amount, which he agreed to do, if they would pay his bill for goods supplied to the company; held, that it was for the jury to say whether the advance was made on the credit of the company, or of the individual directors, to relieve them from a personal liability. *Colley v. Smith*, 2 M. & Rob. (n. r.) 96.

8. In *assumpsit* on a contract for the sale of railway shares, to be conveyed on or before the —, on the first issue, *non assumpsit*, held that the option of time was to be with the party who was to do the first act, viz. the purchaser, and that the verdict ought to be entered for the plaintiffs; and being a matter that would have been material to the parties, it was not a subject of amendment of the record by the Judge at *nisi prius*: secondly, upon the plea that the plaintiffs were not the proprietors of the shares, and had no title to convey them; held, that the mere entry of the names in the transfer book was no proof of title, although their title would have been incomplete without; and, lastly, upon the plea, that the plaintiffs tendered certificates of the shares, held, that the meaning of the contract was, that the party was to convey, and deliver certificates, showing either on the face of them, or from the indorsements,



that the title was in the party conveying. *Hare v. Waring*, 3 Mees. & W. (xx.) 362.

9. In *assumpsit*, for not receiving lead on a contract, deliverable in "I." plea, that the plaintiff was not ready to deliver within a reasonable time, in manner and form, &c., on which issue was joined; held, that the evidence of the broker of the defendant, that at the time of the contract the lead was said to be "ready for shipment," was admissible not to vary the contract, but as material to the issue, what was a reasonable time for delivery; held also, that the usual places of shipment being at G. or L., it was rightly left to the jury to say whether one or other of those places was not to be intended as the place where the goods were ready to be shipped. *Ellis v. Thomson*, 3 Mees. & W. (xx.) 445.

10. A clause in a building contract, in default of completing certain work within the space of four months and half from the date of the contract, of so much per week as liquidated damages, to be deducted from the sum agreed to be paid; the work not being able to be commenced for one month, from the party's inability to enter into possession; held, that the works not being completed within the stipulated time, no forfeiture accrued on account of the delay. *Holme v. Guppy*, 3 Mees. & W. (xx.) 387.

11. In *assumpsit* by assignees for non-performance of a contract to be performed on the 12th June 1835, averring that the bankrupt before, &c., and the plaintiff, as assignees, were always ready and willing, &c.: held, that the bankruptcy and insufficiency of assets were grounds on which the jury might infer that the plaintiff had not always been ready, &c., and that the plaintiffs having taken no steps towards enforcing the contract until January 1838, the jury might properly infer that they had abandoned it. *Lawrence v. Knowles*, 5 Bing. N. S. (c. r.) 399.

12. Where a party agreed with the plaintiff to work for him at a particular trade for 12 months, and so on from 12 months to 12 months, and to give 12 months' notice if he should quit; but he afterwards quitted and went to work for the defendant; in an action against the latter for harboring and detaining his servant, held that the agreement being signed only and binding on one side, without any reciprocal benefit on the other, was void, as *nudum pactum*, and that it was competent to the defendant to raise the objection. *Sykes v. Dixon*, 1 Perr. & Dav. (q. b.) 403.

13. Where a doubt is raised by evidence upon the meaning of a mercantile contract, evidence of the usage or course of trade at the place where the contract made, held admissible, as where in an action for freight of cotton from Bombay, the usage was to calculate it at the screw there; but where the usage appears unreasonable, on account of the difference between the measurement on the merchant's premises and at the time of shipment, evidence of such difference ought to be received as having weight with a jury, whether the usage does or does not exist. *Bottomley v. Forbes*, 5 Bing. N. S. (c. r.) 121; and 8 Sc. 866.

14. Where the defendant, in consideration the plaintiff would receive bills, payable at different dates, in satisfaction of a debt due from D., and

give time, undertook, in case of default, and of the plaintiff issuing a *ca. sa.*, to procure D. to be surrendered into custody of the sheriff, so that he might be arrested on such writ; and if he should fail in so doing, that he would pay the amount of any of the notes as they should become due; held, that as it was not necessarily the effect of the agreement that the arrest of D. should be procured by unlawful means, it did not render the contract unlawful. *Kewis v. Davison*, 4 Mees. & W. (xx.) 654.

15. Where the plaintiff contracted to do certain work for a specified sum, held that he could not maintain an action for the value of the work done, on the ground of fraud in the representation by the defendant of the quantity; for the work he must recover on the contract, although he might sue for the deceit. *Selway v. Fogg*, 5 Mees. & W. (xx.) 83.

And see *Bankrupt; Baron and Feme; Bills; Ecclesiastical Persons; Landlord and Tenant; Ship; Surety; Use and Occupation; Vendor and Purchaser.*

## CONTRIBUTION.

Where one of several stage proprietors had been sued for damage by negligent driving of their servant; it appearing that there was a partnership fund, out of which the expenses were to be first paid, and the residue divided; held, that an action for contribution could not be supported by the one who had paid the damages against his co-proprietors. *Pearson v. Skelton*, 1 Mees. & W. (xx.) 504; and 1 Tyr. & Gr. 848.

And see *Manor; Partner.*

## CONVICTION.

1. Where upon a conviction for forcible entry and detainer, the party traversed the issue, and an inquisition was thereupon had, and an award of restitution indorsed upon the inquisition, the court having upon *certiorari* quashed the conviction; held, that it could not sustain the inquisition as a substantial proceeding, and that it had no discretion, but that re-restitution must be awarded. *Rex v. Wilson*, 6 Nev. & M. (x. v.) 625; S. C. 3 lb. 753; and 1 Ad. & Ell. 627.

2. If either the adjudication of the fact which constitutes the crime, or the judgment thereon, are imperfect, the conviction is bad; where therefore a conviction was framed on 1 Will. 4, c. 32 (Game), which directs the penalty to be paid to the parish officer, and by him to be paid over for the use of the county rate, (but which, by 5 & 6 Will. 4, c. 20, s. 2, was directed as to one moiety to be paid to the informer, and the other as before,) and adjudicated the whole penalty to be paid to the overreer, to be applied according to the direction of the statute in such case &c.; held, that such conviction was bad, and that an imprisonment until so paid was illegal, and that the justices were liable in trespass. *Griffith v. Harries*, 2 Mees. & W. (xx.) 325.

And see *Beer.*



## COPARCENER.

Where one of two parceners alienated her moiety to a stranger in fee, and a deed of partition was executed by the latter and the remaining coparcener to a stranger to the use as to one moiety of the coparcener in fee; held, that she did not take the moiety as purchaser under the conveyance, so as to let in the heir *ex parte paterna* on her death. *Doe v. Crossthwaite v. Dixon*, 1 Nev. & P. (x. n.) 255.

And see *Ejectment*.

## COPYHOLD.

1. Where a party possessed of customary freehold, became bankrupt, and the premises were assigned to assignees, who after his death were admitted; held, that the estate being in the assignees if the title were perfected, or in the heir if not perfected, the lessor was entitled to recover on one or other of those demises. *Doe v. Danson v. Parke*, 4 Ad. & Ell. (x. n.) 616.

2. Where an issue was directed to try whether by the custom the youngest sister of the deceased, or the youngest son of the settlor's youngest nephew, was the customary heir, and the jury, by finding for the defendant, had negatived the plaintiff's title as customary heir, and the effect of the verdict was to establish, within an extensive district, a rule of inheritance, of which there was no distinct precedent in evidence; the Court unwilling to bind the rights by a single trial, and where the Judge had stated the issue to be between a common law heir and a customary heir, and that the former must prevail unless the custom was established by positive evidence, a second trial allowed. *Locke v. Colman*, 2 Myl. & Cr. (ch.) 42.

3. Where a testator seized of copyhold, and having no customary heir or next of kin, devised it to one of his executors upon condition that he should pay the other £——, to be taken as part of the personal estate, out of which his debts and legacies were to be paid, and the residue applied to charitable purposes; the latter bequests being void under the Mortmain Act; held, that as the lord could only take *pro defectu heredis*, and the Crown only by escheats, which could not arise, as it belonged, if at all, to the lord, the devisee took, discharged of the condition. *Henchman v. Attorney-General*, 3 Myl. & K. (ch.) 485.

4. Where different parties claim by different titles, the lord must admit both, that neither may be shut out from making his claim. *R. v. Hexham*, 1 Nev. & P. (x. n.) 53.

5. Where admission was in pursuance of the surrender, or of what by statute was equivalent thereto, and not of a voluntary grant by the lord; held, that the lord's title was immaterial. *Doe v. Thompson*, 1 Nev. & P. (x. n.) 215; 5 Ad. & Ell. 532; and see 1 Coke R., 140, (b).

6. Copyhold held to pass by the devise of an heir, although he had not been admitted nor surrendered to the use of his will; extending 55 Geo. 3, c. 192. *Doe v. Wilson*, 5 Ad. & Ell. (x. n.) 321.

7. Where a person filling the office of clerk of the castle of F., stated it to be usual for him, as well as the steward, to take surrenders; held a valid custom, and evidence of its existence for a jury. *Doe v. Mellerah*, 5 Ad. & Ell. (x. n.) 541; and 1 Nev. & P. 30.

8. Where a devisee of copyhold, on admittance, paid the full fine due by the custom, and afterwards surrendered to the use of himself for life, with remainders over, and on being admitted to his life estate paid a nominal fine of 1s.; held, that in the absence of any custom to warrant it, the remainder-man, on admittance, was not liable to pay any fine; the admission of the tenant for life is the admission of the remainder-man. *Phypers v. Ebwin*, 3 Bing. N. S. (c. r.) 250; and 3 Sc. 634.

9. An immemorial custom in a manor to surrender lands in trust, valid. *Snook v. Southwood*, 5 Ad. & Ell. (x. n.) 239.

10. Where a party seized of customary lands, by marriage settlement covenanted to surrender to trustees, on trust for the settlor's wife, as they should appoint, amongst the children of the marriage, with a limitation, in default of issue of the marriage at the time of the death, to the right heirs of the settlor for ever, according to the custom, &c.; there was issue a daughter, who died before the mother, who survived; the settlor by will reciting the settlement and trusts as to such customary lands, devised all his lands not settled to sell and pay debts, and apply the residue for the maintenance of his daughter, and on her attaining 21, to pay over the overplus; the daughter, by her will, devised all her lands, &c. to J. H.; held, that the youngest sister of the settlor, who at the death of his widow was the heir-at-law of the settlor according to the custom, was entitled to the lands under the trusts of the marriage settlement. *Bush v. Locke*, 9 Bli. N. S. (r.) 1.

11. On an application to enrol a deed of disposition under 3 & 4 W. 4, c. 74, s. 53, it is sufficient if the affidavit discloses the contents without annexing a copy of the deed. *Crosby v. Fortescue*, 5 Dowl. (r. c.) 227.

12. Where by a custom as to lands whereon at the death of the tenant the best beast, &c., was due for a heriot, it was also found that if the tenant let his land, and at his decease the heriot was not answered, the person to whom the land ought to come should pay 40s. instead of a heriot; held, that the lord in such case was entitled only to the pecuniary payment in lieu of the heriot. *Croome v. Guise*, 4 Bing. N. S. (c. r.) 148.

13. The lord as of right is entitled to the custody of the court rolls, and the steward holds them only as his agent. Where he was solicitor also of the testator under whom the parties were entitled, the court made an order for him to deliver them over to the receiver in the cause. *Rawes v. Rawes*, 7 Sim. (ch.) 625.



14. Devise to testator's wife, of "*all my copyhold in H., in the parish of K., and likewise all monies lent on, &c.*," held, that the former part of the bequest alone, or taken in conjunction with the other bequest, were not sufficient to carry the fee, and that the devisee took only a life interest in the copyhold; the devisee having been admitted to hold according to her husband's will, but not the heir of the devisor, and without having ever surrendered to the use of his will, he also devised the estates to his mother; held, that such devise was good, without admittance, but that his mother's life estate merging in the fee, another admittance in respect of the fee devised was necessary, and without which she had no deviseable estate; held also, that her devisees, being heirs also to the original devisor, having been admitted, though as devisees, their admittance had relation to the will of the first devisor, and that they were entitled to recover their devised shares. *Doe v. Lawes*, 2 Nev. & P. (K. B.) 195.

And see *Devise*.

15. In the case of *Locke v. Colman*, 2 Myl. & Cr. 42, the jury having again found in favor of the defendant, the Lord Chancellor refused a third new trial. lb. 635.

16. Upon a devise of copyhold for life, remainder to the devisor's heir at law, who died intestate, and without ever having entered or in any way dealt with the reversion; held, that the right heir of the devisor was entitled to maintain ejectment without admittance. *Doe v. Crisp*, 1 Ferr. & D. (Q. B.) 37.

17. Where, upon a devise of copyhold for life, and a full fine paid upon the admission of the tenant for life, the heir of the devisor had surrendered his reversion; held, that the lord might refuse admittance to the surrenderee, unless on payment of the fines payable in respect of the descent on the heir. *R. v. Dullingham, Lady of the Manor of*, 1 Ferr. & D. (Q. B.) 172.

18. The words "lands of any tenure" in 3 & 4 Will. 4, c. 74, s. 77, held to extend to copyholds, and that by construing that with the 91st sect. a married woman, whose husband was living in America, separated from her, might convey copyhold property devised to her for her sole and separate use, without his concurrence. *Shirley, ex parte*, 7 Dowl. (r. c.) 258.

19. Where large stones (probably fallen from adjoining cliffs, but uncertain when) were embedded in the land of the copyholder at the time of his admission, held that he could not remove them, and that the lord might maintain trover for such as he had removed and sold. *Dearden v. Evans*, 5 Mees. & W. (Ex.) 11.

And see *Charity; Fine; Wills*.

#### COPYRIGHT.

1. Where in debt for penalties under 3 & 4 Will. 4, c. 15, the jury had found that the defendant had represented in a dramatic performance part of the plaintiff's production, the court refused to interfere. *Planche v. Braham*, 4 Bing. N. S. (C. P.) 17; 3 Sc. 242; and 8 C. & P. (N. P.) 68.

2. Benefit of international copyright secured to authors, by 1 & 2 Vict. c. 59.

3. Where the defendant had proposed an arrangement with the plaintiff as to the publication of the work, and the latter had full knowledge of the intention to make large extracts from existing works, and the defendant proceeded without any caution or interference by the plaintiff in the publication of the first volume, the court refused to interpose by injunction to restrain the defendant from proceeding: the court always exercises a discretion as to whether it shall interfere before the establishment of the legal right. *Saunders v. Smith*, 3 Myl. & Cr. (Ch.) 711.

4. The question of piracy does not necessarily depend upon the quantity of the matter extracted, and if there be any doubt as to the exclusive legal title of the party claiming the interference of the court, it will not exercise its jurisdiction until the title be first established at law. *Bramwell v. Halcomb*, lb. 737.

5. Of designs for woven fabrics extended by 2 & 3 Vict. c. 13, 17.

#### CORONER.

1. Payment of expenses of holding inquests regulated. By 1 Vict. c. 68.

2. The court refused a *certiorari* to remove an inquisition purporting to be taken before the coroner, but in fact held before his clerk. *Daws, ex parte*, 1 Ferr. & D. (Q. B.) 146.

#### CORPORATION.

1. The attendance of burgesses at corporate meetings being a public duty, all ought to be summoned; and a qualification of a custom, that the accidental omission to summon one or two should not vitiate the assembling, is not good; there is no valid distinction between the cases of select or indefinite bodies; a dispensation by a corporator is not a sufficient excuse for omitting to summon him. *Rex v. Langhorne*, 6 Nev. & M. (K. B.) 203; and 4 Ad. & Ell. 538.

2. In a suit to which a corporation were parties, and a corporator who had been disfranchised before the trial was tendered as a witness, the charter required all corporate acts to be executed at a meeting whereat the two bailiffs and twelve assistants should be present; held, that a resignation at a meeting where a less number were present was not a valid resignation, and that he was not therefore a competent witness, and that a release by him to the body of which he still constituted a part did not render him competent; held also, that the 2 & 3 Will. 4, c. 42, did not apply to such a case. *Godmanchester Bailiffs, &c. v. Phillips*, 6 Nev. & M. (K. B.) 211; and 4 Ad. & Ell. 550.

3. Where the information against a corporation possessed of borough funds and charity estates, charged in mere general terms a proposed misapplication, demurrer allowed, for not stating facts clearly showing a breach of trust; if there be any



possible state of things in which the facts alleged may not amount to breach of trust, the court will rather presume that what is intended to be done is intended to be rightfully done; and *semb.* it would be a rightful application of corporate funds to pay the expense of opposing *quo warranto* informations going to impeach the very legal existence of the corporation. Attorney-General v. Norwich Mayor, &c., 2 Myl. & Cr. (CH.) 400. Affirming the judgment of the Master of the Rolls, 1 K. (CH.) 700.

4. Parties having duties cast upon them in the administration of a fund are entitled to reimburse themselves out of such fund the expenses incurred in performing those duties. *Id.*

5. Where the old council of the town of L., in the interval between the passing of 5 & 6 Will. 4, c. 76, and the election of the new council, raised money on mortgage of corporate property, and appropriated it to increase the permanent endowment of the clergy there, and the information contained no allegation of fraud, collusion or impropriety, or injury to the inhabitants, but the object likely to be beneficial to the town, and the new council took no steps to call in question the application of the borough funds, the court allowed the demurrer to a bill to set aside the mortgage, and restrain the application. Attorney-General v. Aspinall, 1 K. (CH.) 513.

6. In a proper case the particular remedy given by s. 97, does not exclude the jurisdiction of the court. *Id.*

7. *Semb.* the Municipal Reform Act does not create a new corporation. (Per Patteson, J.) Ludlow Corporation v. Tyler, 7 C. & P. (N. P.) 537.

8. The insertion of a place in the Municipal Reform Act is *prima facie* evidence of a municipal corporation there; but where it appeared by affidavits that there never had been an incorporation, but that the borough-holders were grantees of certain freehold burgages for purposes of trade, the court refused a *mandamus* to compel the delivery of the documents and surrender of the property. Rex v. Greene, 1 Nev. & P. (K. B.) 631.

9. Where a corporation seized of a watercourse were by Acts of Parliament authorized to impose water rents on the inhabitants, for the purpose of improving the supply; held, that such rates could not be applied by them to the discharge of debts incurred in improvements before the passing of the Acts, nor in compensation of services of new or old officers. Dublin Corporation v. Attorney-General, 9 Bli. N. S. (N.) 395.

10. The notice of appeal against a rate under the Municipal Corporation Act must state a grievance or facts from which it must necessarily be inferred. R. v. Poole Recorder, &c., 1 Nev. & P. (K. B.) 756; 1 Nev. & M. (K. B.) 556.

11. Where, prior to the passing of 5 & 6 Will. 4, c. 76, the office of clerk to the justices of the borough had always been held and exercised by the town-clerk, and after that Act, and the granting a separate commission to the borough, another

clerk to the justices had been appointed, and upon application to the Lords of the Treasury the former clerk had been held entitled to an annuity as a compensation for the loss of the office; held, that the word "office" in the Act, was not to be strictly construed, and that the office of which the party had been deprived was one intended to be compensated, and as to which, the Lords of the Treasury having jurisdiction, their decision was final. Rex v. Bridgewater Mayor, &c., 1 Nev. & P. (K. B.) 466.

12. Where, previous to the 5 & 6 Will. 4, c. 76, there existed bailiffs in the city O., having some duties analogous to those of sheriff, but no sheriff, held that such officer created by the Act did not supersede the duty of the county sheriff to execute process from the superior courts. Granger v. Taunton, 3 Bing. N. S. (C. R.) 64; 3 Sc. 393; and 5 Dowl. (P. C.) 190.

13. The provision of the Municipal Corporation Act for raising rates being prospective only, held that without reference to the general rule a rate made retrospectively for the payment of expenses, which had been incurred, could not be supported. Woods v. Reed, 2 Mees. & W. (EX.) 777.

14. Municipal Corporation Act amended by 1 Vict. c. 78.

15. Rates, provisions for levying in such corporations. By 1 Vict. c. 81.

16. Under 5 & 6 Will. 4, c. 76, ss. 60. 65, county justices have jurisdiction over corporate officers, although the corporation has magistrates of its own. Gateshead Justices in re, 6 Ad. & Ell. (K. B.) 550.

17. Where a local Act authorized the corporation of P. to appoint or displace certain port officers, and amongst other a quay-master, and assign salaries out of the wharfage dues; held, that the town council, under 6 Will. 4, c. 76, being by sect. 72, made trustees for executing all acts relating to the borough, having removed the quay-master appointed before that Act, were to be deemed to have so displaced him under the local Act, and that he was not entitled to compensation under the Municipal Reform Act; held also, that if the office were not a borough office, the lords of the Treasury had no jurisdiction to award compensation, and a rule for a *mandamus* to the corporation, to execute the bond for payment of an annuity awarded, refused. Reg. v. Poole Mayor, &c., 3 Nev. & P. (Q. B.) 119.

18. Where the appointment to the office of town clerk was made pending the Bill, although in the usual form for life, and the right to compensation nominal, and had been rejected by the Lords of the Treasury, the court refused a *mandamus*; and *quer.* if the court has jurisdiction to review their decision. Lee, ex parte, 2 Nev. & P. (K. B.) 63.

19. Where in 1794 a party was appointed by the corporation to assist the chamberlain in his business, with a salary, for so long as he should behave himself well therein, and the office was continued down to the period of the Municipal Reform Bill, when it was abolished; held, that



not being a chartered officer, he was not entitled to compensation within s. 66 of the Act. *Harvey, ex parte*, 3 Nev. & P. (q. s.) 159.

20. Where compensation had been awarded to a town-clerk, under the provisions of the 5 & 6 Will. 4, c. 76; held, on demurrer, that an information could not be sustained in a Court of Equity, either on the ground of the compensation being excessive, and founded on a computation of profits arising from other offices, or of the adjudication having been obtained by fraudulent adjournments and alteration in the constitution of the town council, there being no facts which could be relied on as forming a foundation for the charge of fraud. *Attorney-general v. Poole Corporation*, 2 Keene, (ch.) 190.

21. Where by the local Act, the corporation were authorized to appoint one or more minister or ministers to churches erected under the Act, and the applicant had been appointed lecturer under a minister, and filled the office above seven years; held, that the compensation clauses under the Municipal Corporation Act, being to be construed liberally, that he was to be deemed a minister within the meaning of the Municipal Act, and not of the local one, and that he was entitled to compensation; and it made no difference that the office was created voluntarily by the corporation, and not by the local Act. *Reg. v. Liverpool Corporation*, 3 Nev. & P. (q. s.) 290.

22. The order of the Master of the Rolls, overruling the demurrer in *Attorney-general v. Aspinall*, 1 Keene, 513, set aside on appeal. 2 Myl. & Cr. (ch.) 613.

23. Notice of appeal against a borough rate, served on the town-clerk, held sufficient, as the servant of the parties making the rate: the Act giving the appeal, and empowering the recorder to hear and determine, as in the case of appeals against county rates. *Reg. v. Carmarthen Recorder, &c.*, 3 Nev. & P. (q. s.) 19.

24. In the case of a borough divided into wards, the court of revision of the burgess lists, held, to be constituted by the mayor and assessors for the mayor's ward, and not by the mayor and assessors for the whole borough, under sect. 43, and the irregularity a ground for a *quo warranto*; but where it was occasioned under legal advice, and under no improper motive, nor attended with any serious consequences, the court, acting on its discretionary power, refused the writ, the granting it having a probable tendency to dissolve the entire corporation; held also, that a party who had been a candidate, and voted at the election of the officer whose title was impeached by the defect in the burgess roll, was not competent to become a relator; but that an inhabitant to whom the objection did not apply, might use the affidavits of such party in support of his own which might be insufficient to sustain the application: a burgess would be a good relator, although the effect of the information, if granted, might be to dissolve the corporation. *Reg. v. Parry*, 2 Nev. & P. (q. s.) 414.

25. Where a councillor's name has been expunged from the burgess roll, the writ of *quo warranto*, and not of *mandamus*, to hold a fresh election,

is the proper mode of trying his title to the office. *Reg. v. Ricketts*, 3 Nev. & P. (q. s.) 151.

26. Where one vacancy had been duly declared by the council, according to the provisions of s. 52 of the Municipal Act, and another happening, the mayor alone gave notice, and at the election, some of the voters gave votes for two candidates jointly, and others singly for another; held, that the latter being only valid votes, the others were thrown away, and the party receiving such single votes duly elected. *Reg. v. Leeds Mayor, &c.*, 3 Nev. & P. (q. s.) 145.

27. But where votes were given for a candidate rendered ineligible, but of whose disqualification no express notice was given to the voters; held, that a party having a minority of votes, was not duly elected, and having accepted the office, a *quo warranto* directed to issue. *Reg. v. Hiorns*, 3 Nev. & P. (q. s.) 149.

28. Where the parties were declared to be elected town-councillors by the mayor, and they accepted the office, and made the declaration required, a *mandamus* to admit other candidates on the ground of improper votes having been received, refused. *Rex v. Winchester Mayor, &c.*, 2 Nev. & P. (x. s.) 274.

29. It being strictly necessary, under 5 & 6 Will. 3, c. 76, s. 69, that the minutes of proceedings by the council should be signed by the chairman at the time of the meeting, and not afterwards, the court refused a *mandamus* commanding the mayor and town-clerk to enter a resolution passed at a meeting in the minute book. *Reg. v. Evesham Mayor, &c.* 3 Nev. & P. (q. s.) 351.

30. A corporation was authorised to make bye-laws, with penalties, to the use of the corporation; held, that a bye-law, imposing a fine for not taking an office, reserving the penalty to the master, &c. for the time being, for the use of the corporation, was valid. *Graves v. Colby*, 1 Ferr. & Dav. (q. s.) 235.

31. But where the action of debt was brought by the master, &c., who were such at the time of the fine being incurred, but had ceased to be so at the time of the action being commenced; held, on demurrer, that a plea, that the plaintiffs were not master, &c., was good; and *semble*, the right of action did not pass to the succeeding master, &c. lb.

32. In the election of town councillors, under 5 & 6 Will. 4, c. 76, the returning officer's duty is only ministerial, to return the candidate who has the actual majority, and the elector must take it upon himself to decide whether the candidate for whom he votes is properly qualified or not; the voting papers are the proper evidence of the election, although not the record of it; but when produced, held that they must be proved to be the same that were given in at the election. *Reg. v. Ledgerd*, 3 Nev. & P. (q. s.) 513.

33. Under the 9 Geo. 4, c. 17, s. 2, requiring a party elected to a corporate office to make the declaration "within one month next before, or upon his admission;" held, that he had a right to



be admitted previous to making it. *R. v. Humphrey*, 3 Nev. & P. (q. n.) 681.

34. Under the 5 & 6 Will. 4, c. 76, the power of appointing inspectors of weights and measures under 5 & 6 Will. 4, c. 63, has devolved upon recorders of the boroughs. *R. v. Hull Recorder*, 3 Nev. & P. (q. n.) 595.

35. Upon an application under 1 Vict. c. 78, s. 24, for a *mandamus* to restore the name of a person expunged from the burgess list, the court is bound to require proof of title, and it will not re-instate simply on the ground of the notice of objection being bad; and *quære* if such notice being submitted, with the objector's name and place of abode, would be a sufficient compliance with the form prescribed by 5 & 6 Will. 4, c. 76, s. 17? *Reg. v. Harwich Mayor, &c.*, 1 Perr. & D. (q. n.) 134.

36. The decision of the Vice-Chancellor, directing a corporation to make compensation out of general corporate property, not given upon special trust, for losses by breaches of trust, which the corporation were declared liable to make good, reversed, the plaintiff being left to enforce his remedy by the usual process against a corporation. *Attorney-General v. Retford Bailiffs, &c.* 3 Myl. & Cr. (ch.) 484. S. C. 2 Myl. & K. 35 (An. Dig. 1835), 62.

37. Where the declaration in debt stated that certain lands were, in 1762, enclosed by Act of Parliament, reciting the fee simple to be in B., and that the Mayor and burgesses of S. were entitled to the right of pasturage; and it directed that — acres should be allotted to the corporation, who might, in common-hall assembled, grant such leases as should be thought reasonable; and that they did, by a bye-law, direct that parcels of the land should be leased to the burgesses at certain rents, out of which certain annual payments should be made to the 12 senior burgesses, but that no benefit should ensue to any lessees, and the remainder to the benefit of the corporate body, and that such burgesses should receive their portions, to be paid by the common attorney of the borough (an office extinguished at the passing of the Municipal Act); held, that such bye-law was not unreasonable, and gave a just foundation for an action by the parties entitled to receive such payments against the corporation; and, *semble*, the Municipal Act, which gives the new corporation the right to receive, would impose on them the obligation of paying, and the action be therefore now maintainable against the corporation at large; the plea, alleging that the defendants had applied all the rents of the lands in question, and of others, in payment of debts due and owing from the corporation, and payable in priority and preference to the payments due to the burgesses, held bad on special demurrer, for not stating that the payments by the corporation were ever made for antecedent debts, and that upon the true construction of the Municipal Act the corporation had no right in priority to the claims of the corporators to pay any thing more than the interest of the debts charged on the corporate property. *Hopkins v. Swansea Corporation*, 4 Mees. & W. (ex.) 621.

And see *Action; Agreement; Attorney; Charity; Costs; Covenant; Mandamus; Pleading*, (c. L.); *Poor*.

## COSTS.

[A] TITLE TO.

[B] SECURITY FOR.

[C] SUGGESTION TO DEPRIVE OF.

[D] ENFORCING—ATTACHMENT.

[A] TITLE TO.

1. Where in case for obstructing a way, claimed in the first count as a public, and in the second as a private right of way, the first of which was negatived by the jury, and the second affirmed, and a verdict, under the direction of the Judge, entered for the defendant, but a new trial was afterwards granted on the issue in the second count only, but nothing was said as to the costs; held, that the defendants were entitled to costs of the issue found for them on the first trial, and that the Reg. Hil. 2 Will. 4, s. 64, did not apply to such a case. *Bower v. Hill*, 5 Dowl. (r. c.) 183.

2. In *assumpsit* for work and labor, goods sold, &c., pleas as to part, first, *non assumpsit*; secondly, as to other part, payment; thirdly, as to another part, that the work was done under a contract, and special damage as to such part, by breach of contract; fourthly, a set-off; and, lastly, payment of a sum into court; the action was referred to an arbitrator, who was to say how the verdict was to be entered on the issue joined in the 4 first pleas, who awarded for the plaintiff on the general issue, and for the defendant on the others; held, that the pleas covering the whole of the demand, the defendant was entitled to the general costs. *Probert v. Phillips*, 2 Mees. & W. (ex.) 40; and 5 Dowl. (r. c.) 473.

3. In *assumpsit* for money had, &c. pleas, first, as to all except — *l.*, *non assumpsit*; secondly, as to all except the same sum, a set-off, and as to that sum, payment into court; replication, admitting the set-off, that he would not further prosecute except as to the said sum, and that he took out of court; held, that the plaintiff was entitled to costs as to that part of the cause of action in respect of which the money was paid into court, and the defendant to the costs of the other issues. *Goodee v. Goldsmith*, 2 Mees. & W. (ex.) 202; and 5 Dowl. (r. c.) 288.

4. Where two defendants in trespass severed in pleading, all the pleas going to the whole action, and one succeeded on one issue, and the other on all; held, that they were entitled to separate costs each upon the issues found for them; but the attorneys being partners in the same firm, and the Master having taxed as if they had appeared by the same attorney, the Court refused to disturb the taxation. *Gambrell v. Earl of Falmouth*, 5 Ad. & Ell. (K. B.) 403.

5. Where there being issues in fact and in law, the plaintiff took down the former to trial, which was found for him: afterwards, the issue in law



was found for the defendant, so that on the whole record it appeared that the plaintiff had no cause of action; held, that he was nevertheless entitled to the costs on the issue found for him, including costs of the trial; and that it was no objection that the plaintiff should not have taken down the issue for trial until after judgment on the demurrer. *Bird v. Higginson*, 5 Ad. & Ell. (x. s.) 53; reviewing the cases and overruling *Cooke v. Sayer*, 3 Burr. 753; 2 Wils. 85.

6. Where after a new trial granted, on the ground of the reception of improper evidence, and a special jury moved for, the defendant withdrew his plea, and suffered judgment by default, and damages were assessed; held, that the rule for a new trial being silent as to costs, the plaintiff was not entitled to the costs of the first trial. *Peacock v. Harris*, 1 Nev. & P. (x. s.) 240.

7. Where after the defendant had obtained a rule for a new trial, (without mention of costs,) which was drawn up, it was afterwards abandoned by him, the Court directed the plaintiff to have the *postea* delivered to him, and to have the costs of the trial, but refused the costs of the rule, and application for the *postea* and costs to plaintiff. *De Rutter v. Lloyd*, 5 Add. & Ell. (x. s.) 463.

8. On a repleader awarded, neither party is entitled to costs. *Plummer v. Lee*, 2 Mees. & W. (xx.) 501; and 5 Dowl. (r. c.) 755.

9. Where the defendant had surrendered and put in a plea, obtained a rule to stay proceedings, but failing to pay the debt and costs, the plaintiff signed judgment, and the defendant was afterwards superseded; held, that the plaintiff in an action on the judgment was not entitled to the costs under 43 Geo. 3, c. 46, s. 4, and the Court could not separate the costs of the false plea. *Hall v. Pierce*, 5 Dowl. (r. c.) 603.

10. Where the plaintiff discontinued before any notice of trial; held, that the defendant was not entitled to the costs of the drafts of briefs. *Doe v. Neale*, 2 Mees. & W. (xx.) 732.

11. Where the plaintiffs, immediately after issue joined, made up and passed the record; held, that it was in the discretion of the Master to allow the costs of passing it, and an order having been obtained for payment of debt and costs, the Court refused to interfere. *M'Keene v. Smith*, 2 Mees. & W. (xx.) 85; and 5 Dowl. (r. c.) 206.

12. In an action against parish officers for an act done under the 13 Geo. 3, c. 78, (repealed by 5 & 6 Will. 4, c. 50,) the plaintiff having been nonjoined before the latter Act took effect, although judgment was signed after; held, that the Court could not award treble costs under the former. *Charrington v. Meatheringham*, 2 Mees. & W. (xx.) 228; and 5 Dowl. (r. c.) 313, 464.

13. Where after the Judge had certified under the statute of Eliz., to deprive the plaintiff of costs, but facts were afterwards at chambers shown by affidavits, which did not appear at the trial, the certificate ordered to be annulled. *Anderson v. Sherwin*, 7 C. & P. (n. r.) 527.

14. The reduced scale of Reg. Hil. Vac., 4 Will. 4, for taxing costs, held, not to apply to writs of

inquiry in actions of covenant for unliquidated damages. *Croft v. Miller*, 3 Bing. N. S. (c. r.) 975.

15. Where the defendant paid the debt and costs indorsed on the writ and 5s. more, which was demanded; held, that as he paid the latter sum unnecessarily, it could not be included in the taxation, so as by having one-sixth struck off, to be entitled to the costs of taxation. *Ward v. Gregg*, 5 Dowl. (r. c.) 729.

16. Where the writ issued for a sum above 20l., and before execution the plaintiff gave credit for a cross demand, not pleaded, and thereby reduced the debt below that sum; held, that the Master was to tax the costs upon the reduced scale. (Patteson, J. dissentient.) *Savage v. Lipscombe*, 5 Dowl. (r. c.) 385.

17. Interlocutory costs allowed to be set off against final costs, without respect to the lien of the attorney. *Holliday v. Laws*, 5 Dowl. (r. c.) 636.

18. The Court refused an application that costs of proceedings in the Court of Bankruptcy might be set off against the damages and costs recovered in a suit in the Common Pleas. *Woodroffe v. Wootton*, 4 Sc. (c. r.) 364.

19. Where money paid into Court is at first refused, but afterwards taken out, it is to be taken *prima facie* as vexatious, and the plaintiff liable to the subsequent costs, unless good cause shown; where the defendant subsequently offered a larger sum, the Court refused a rule for setting off his subsequent costs. *Willis v. Darke*, 1 Tyr. & Gr. (xx.) 503.

20. So, where the amount of accruing interest on the debt was not tendered, together with the amount of the debt. *White v. Cobham*, 1 Tyr. & Gr. (xx.) 507.

21. The Court cannot award costs on criminal proceedings in the Court below, although incurred by the improperly suing out a *certiorari*, afterwards quashed. *Rex v. Higgins*, Nev. & P. (x. s.) 50; and 5 Dowl. (r. c.) 375; overruling *Stacey v. Evans*, 13 Pri. 449; and *Jones v. Davies*, 1 B. & Cr. 143.

And see *Rex v. Passman*, 1 Add. & Ell. 603.

22. A *habeas corpus* may issue at the instance of a defendant, for costs, against a plaintiff in custody at the suit of others; and it is not necessary that there should be any affidavit of the circumstances under which the writ has been sued out. *Furnival v. Stringer*, 3 Bing. N. S. (c. r.) 96; 3 Sc. 551; and 5 Dowl. (r. c.) 195.

23. Where a juror was withdrawn and the cause referred, but no award made, and the cause again taken down, and the plaintiff succeeded; held not entitled to costs of the first trial. *Thomas v. Lewis*, 5 Dowl. (r. c.) 395.

24. Where the sum indorsed on the process was an amount recoverable in a court of Requests, the court left the defendant to his suggestion, and refused to relieve him from costs of trial on payment of that sum into court. *King v. Myers*, 5 Dowl. (r. c.) 686.



25. The rule requiring the delivery of a copy of the bill of costs and affidavit of increase, one day previous to the time of taxing, is imperative, and the party proceeding to tax without doing so is irregular. *Wilson v. Parkins*, 5 Dowl. (r. c.) 461.

26. Where an action on an attorney's bill, after being partly heard, was referred to the Master, who found a small balance; held, that although the judge had power to certify, yet, not having done so, the Master had properly taxed the costs upon the reduced scale. *Parker v. Serle*, 6 Dowl. (r. c.) 334.

27. Where the defendant took out a summons to stay proceedings, on payment of a sum and costs, in addition to the set-off, and the plaintiff refusing to accept it, the defendant pleaded *non assumpsit* and a set-off, but did not pay the sum offered into court; held, that the plaintiff could not be liable to the subsequent costs; *aliter*, if the sum tendered had been paid into court. *Gower v. Elkins*, 6 Dowl. (r. c.) 335; and 3 Mees. & W. (xx.) 216.

28. Upon a rule obtained for a new trial, on payment of costs, held that the costs of admitting documents used on the first trial were costs in the cause, there being no necessity for fresh admissions, but that the costs of preparing briefs and of full fees, should be allowed as costs of the trial, regard being had by the Master to necessary amendments. *Lord v. Wardle*, 6 Dowl. (r. c.) 174; and 3 Sc. (c. r.) 398.

29. Where, after an offer of a sum which the plaintiff refused, the defendant obtained an order to pay it into court, but did not do so, and the plaintiff being afterwards willing to accept it, gave notice that, unless it were paid, he should proceed; and no notice being taken, he filed his declaration, on which the defendant paid in the money, and the plaintiff took it out; held, that he was only entitled to costs up to the time of the order. *Parsons v. Pitcher*, 4 Bing. N. S. (c. r.) 306; and 6 Dowl. (r. c.) 432.

30. Where an action of *assumpsit* was referred, and a less sum than 20*l.* awarded; held to be a sum recovered, although no verdict taken, and the costs to be taxed on the lower scale. *Wallen v. Smith*, 6 Dowl. (r. c.) 103; and 3 Mees. & W. (xx.) 138.

31. Where the action against the sheriff was for an escape, but the evidence not establishing that, but an omission to arrest, the judge had refused to allow the record to be amended, but directed the facts to be indorsed, and the court subsequently gave judgment for the plaintiff, according to the right of the case; held, that he was entitled to the general costs, and the defendant to the costs of the issues found for him, and each to bear his costs of the motion for judgment. *Guest v. Elwes*, 2 Nev. & P. (x. s.) 230.

32. And *semb.*, where the jury find the facts specially under 3 & 4 Will. 4, c. 42, s. 24, the court has no power to amend the record. *Ib.*

33. Where the writ was indorsed for one only of two demands claimed in the particulars, the

other not being disputed, and which being paid into court, the plaintiff took out in satisfaction of the whole; held, that being under 40*s.*, and the defendant residing within a local jurisdiction, the plaintiff was not entitled to his costs, but that the defendant not having put himself in a situation to stay the proceedings without costs, he was not entitled to them. *Thompson v. Gill*, 6 Dowl. (r. c.) 155.

34. The circumstance of witnesses not being called is no ground for disallowing their expenses if the Master find that their attendance was reasonably necessary; held also, that neither party is entitled to the costs of a special jury, where one issue is found for the plaintiff and the other for the defendant; and an application to the judge to appoint a day for the trial, are not costs of the trial. *Morison v. Harmer*, 5 Sc. (c. r.) 411.

35. Where the admission of documents was refused, and the judge made an order thereupon for costs, under Reg. Hil. 4 Will. 4, c. 20, upon the certificate indorsed by the judge at the trial; held that, notwithstanding the verdict set aside, and a new trial granted without costs, the party producing was entitled to costs of proof. *Lewis Howell*, 6 Ad. & Ell. (x. s.) 769; the judge presiding when the documents are proved is the only person to give the certificate.

36. Where to a bill filed to compel a party necessary to the conveyance, to execute it, a charge of fraud was set up, which he entirely failed to support, the court held that he was liable to the costs of suit, and that it was not necessary to direct an inquiry as to the fraud alleged; held also, that a married woman living apart, and by whose misconduct the suit was rendered necessary, was not entitled to costs. *Times v. Negus*, 3 Younge & C. (xx. xq.) 90.

37. Where the defendant put in and perfected special bail, without being actually arrested, held that it was not a case within the 43 Geo. 3, entitling him to costs. *James v. Askew*, 3 Nev. & P. (q. s.) 435.

38. The fact of the defendant calling no witnesses in an action on an I. O. U. for 1,000*l.*, held not sufficient ground for the master's disallowance of two counsel and the presence of the country attorney and of consultation, where so much depended on the cross-examination of the plaintiff's witnesses, and the attorney most cognisant of the circumstances of the case. *Madison v. Bacon*, 5 Bing. N. S. (c. r.) 246.

39. Costs of issues include also the costs of trial, and costs of opposing an unsuccessful application for a new trial are costs in the cause; if a rule for taking money out of the court is silent as to costs, the party succeeding is entitled to the costs of the application. *Eyre v. Thorpe*, 6 Dowl. (r. c.) 768.

40. Where some issues are found for the plaintiff and some for the defendant, the latter will be entitled to the costs of witnesses called exclusively in support of the issues found for him, but not of, and also to disprove, the issues found for the plaintiff. *Crowther v. Elwell*, 4 Mees. & W. (xx.) 71; and 6 Dowl. (r. c.) 697.



41. The court cannot make an order as to costs against an individual who is not party to the record, although he may be interested in the event or the real party in the suit. *Hayward v. Giffard*, 4 Mees. & W. (ex.) 194; and 6 Dowl. (p. c.) 699.

42. Where the plaintiff, in an action for mesne profits, was nonsuited, with leave to enter a verdict for nominal damages, and, on motion, a new trial was ordered, but the plaintiff, after serving the rule absolute, obtained a rule to discontinue on payment of costs, having brought another action in the name of the nominal plaintiff; held, that he was not liable to pay the costs of the former trial. *Jolliffe v. Mundy*, 4 Mees. & W. (xx.) 602; and 7 Dowl. (p. c.) 225; reviewing the cases and overruling *Sweeting v. Halse*, 9 B. & Cr. 369.

43. Where the defendant being entitled to costs, on a rule of the plaintiff being discharged, part whereof was paid, but the residue only claimed without a formal demand, and the plaintiff having subsequently signed judgment for want of plea and taxed his costs, the defendant, to avoid execution, paid the debt and costs, the court afterwards made a rule absolute for the payment of the residue of costs due to him by the plaintiff. *Abernethy v. Paton*, 5 Bing. N. S. (c. r.) 276; and 6 Sc. 586.

44. In case of injury to a water course, stating various wrongful acts, to which the defendants pleaded the general issue and various pleas, and the verdict was found for the defendants on the general issue, and for the plaintiff on the other issues; the defendants being an incorporated company, and entitled, under their Act, to treble costs in any action brought against them for any thing done in pursuance of the Act; held, that they were only entitled to treble costs on the issues raised on those counts in respect of acts done under color of the Act; held, also, that the course of taxing was to treble the defendant's costs and then to deduct those of the plaintiff. *Wilson v. River Dun Company*, 7 Dowl. (p. c.) 369; and 5 Mees. & W. (ex.) 89.

45. Where, of two pleas in *assumpsit*, one was found for the plaintiff and the other for the defendant, and the judge certified that the defendant had probable cause to plead the second plea; held, that the Master had properly refused the costs of the second issue to either party; the new rules, Hil. 4 Will. 4, were not intended to repeal the 4 Ann. c. 16, but to apply to such pleas as merely vary the same ground of defence. *Robinson v. Messenger*, 3 Nev. & P. (q. b.) 583.

46. Where the lessor of plaintiff recovered a verdict and taxed his costs in 1834, but the writ of execution was never returned nor the judgment revived by *sci. fa.*, and the defendant afterwards, in 1837, obtained a rule to set aside the writ of possession for irregularity, with costs; held, that the plaintiff was not entitled to set off the costs, as interlocutory costs, against the costs of the cause. *Doed v. Stevens v. Lord*, 1 Perr. & Dav. (q. b.) 368.

47. Where a trial was postponed on terms of paying costs of the day to the plaintiff, held, that a demand by the attorney was sufficient to found

the motion for an attachment for non-payment. *Inman v. Hill*, 4 Mees. & W. (xx.) 7; and 6 Dowl. (p. c.) 666.

48. Where both plaintiff and defendant took down the record for trial, and the plaintiff having withdrawn his, the defendant might have tried the cause by *proviso*, and both parties having agreed to make it a *remanet*, neither were entitled to costs of the day. *Blow v. Wyatt*, 4 Mees. & W. (xx.) 407; and 7 Dowl. (p. c.) 86.

And see *Reading v. Grafton*, cited, lb.

49. Where the defendant, in ejectment, having failed, brought trespass against the lessor of the plaintiff for seizing goods on the premises, and was nonsuited, but obtained a rule for a new trial, the Court refused to stay the proceedings on such rule until the costs in the ejectment had been paid. *Carnaby v. Welby*, 7 Dowl. (p. c.) 315.

50. Where in trespass for an assault, the defendant pleaded one plea, denying the assault, which was found against him, and a justification of *son assault demesne*, which was found for him; held, that he was liable to the costs on the former issue. *Mullins v. Scott*, 5 Bing. N. S. (c. r.) 423.

51. Where husband and wife were parties to the suit, the Court would only grant an attachment for nonpayment of the costs against the husband. *Doe v. Caulfield and Wife*, 6 Dowl. (p. c.) 523.

52. Where the rule required the costs allowed by the Master to be paid to the sheriff, who having since gone out of office, a power of attorney had been executed by the undersheriff, held sufficient to support the attachment. *Reg. v. Matthey*, 6 Dowl. (p. c.) 515.

53. No costs are allowed of a rule to refer back for a review of the taxation by the Master. *Parsons v. Pitcher*, 6 Dowl. (p. c.) 600.

54. The costs of settling a bill of exceptions, held to be costs taxable in the Court of Error. *Doe v. Francis*, 7 Dowl. (p. c.) 193; and 4 Mees. & W. (xx.) 331.

55. The Court refused prospectively to direct their officer in what manner to tax particular costs. *Roe v. Cobham*, 6 Sc. (c. r.) 146; and 6 Dowl. (p. c.) 628.

56. Where after plea of set off, the plaintiff obtained leave to amend by increasing the amount of damages, and the defendant afterwards having paid money into Court, one of his pleas became unavailable; held, that having become so by his own act, he was not entitled to the costs of such plea. *Gould v. Oliver*, 5 Bing. N. S. (c. r.) 115; and 6 Sc. 884.

57. Where the declaration contained nine counts, and the plaintiff recovered on two, which were the material issues on which the verdict was entered for him, and for the defendant on the others; held, the costs of those counts might be set off against the costs of the issues found for the plaintiff. *Newton v. Harland*, 6 Dowl. (p. c.) 644.

58. Where the defendant agreed to withdraw his plea, and judgment be signed for a sum under 20*l.*, and that on payment thereof, with costs



to be taxed, proceedings should be stayed; held, that the costs were to be taxed on the reduced scale applicable to that amount. *Cooke v. Hunt*, 5 Mees. & W. (zx.) 161.

59. Where a cause was referred, but no power given to the arbitrator to certify that the cause was fit to be tried at *nisi prius*, and the sum awarded was under 20l.; held, that the Master had properly taxed the costs on the reduced scale. *Wallen v. Smith*, 5 Mees. & W. (zx.) 159; 7 Dowl. 394.

60. Where the cause was referred at *nisi prius*, but the award afterwards set aside, and the cause was tried again, held to be analogous to the case of a *venire de novo*, and the party ultimately succeeding entitled to the costs of the first trial. *Wood v. Duncan*, 5 Mees. & W. (zx.) 87.

61. Where an order to change the *venue* was drawn up, "on payment of the costs *bona fide* incurred, and rendered useless by that rule;" held, that it was conditional only, and not of obligation; and the rule being afterwards abandoned, the costs of witnesses who attended at the trial, which but for the rule would have been tried, were only costs in the cause. (*dis. Maule, B.*) *Pugh v. Kerr*, 3 Mees. & W. (zx.) 164.

62. In case for infringement of a patent, the defendant having obtained a verdict on one issue, going to the whole cause of action; held, that he was entitled to the costs of that issue, and of the general costs, after deducting the costs of the issues found for the plaintiff: the notice of objections delivered with the pleas, under 5 & 6 Will. 4, c. 83, s. 5, does not interfere with the practice of taxation in other respects. *Loesche v. Hague*, 7 Dowl. (p. c.) 495.

63. The Judge who tries the cause can only give the certificate to entitle the plaintiff to have his costs taxed on the higher scale, where the verdict is under 20l.; where he died before the application, the plaintiff held to be without remedy. *Southwell v. Bird*, 7 Dowl. (p. c.) 557.

64. In case for disturbing plaintiff in the use of a well, the right being in issue, held to be an interest in land, and the plaintiff obtaining a nominal verdict, entitled to full costs, notwithstanding the certificate of the Judge to deprive him of costs, under 43 Eliz., c. 6. *Tyler v. Bennett*, 6 Nev. & M. (x. s.) 826.

And see *Award*; *Bankrupt*; *Ejectment*; *Executor*; *Information*; *Justices*; *Libel*; *Mandamus*; *Practice* (zx.) (c. l.); *Quo Warranto*; *Sheriff*; *Trespass*.

#### [B] SECURITY FOR.

1. Where a foreign sovereign was suing in this country; held, that residing abroad, he could not be distinguished from any other suitor. *Brazil, Emperor of, v. Robinson*, 1 Nev. & P. (x. s.) 817; & 5 Dowl. (p. c.) 522.

2. Where a plaintiff gives a false description of his place of residence in his bill, he will be made to give security. *Calvert v. Day*, 2 Young, (xx. xq.) 217.

3. So, where the plaintiff had misdescribed his residence in the bill, ordered to find security. *Sandys v. Long*, 7 Sim. (cn.) 140.

4. The court will grant a rule *nisi* for security, although the affidavits do not show in what stage the cause is. *Cole v. Perry*, 1 Tyr. & Gr. (zx.) 1000.

5. The court refused to add to a rule for giving security, the alternative that the defendant might be at liberty to sign judgment as in case of a nonsuit absolute. *Kelly v. Brown*, 5 Dowl. (p. c.) 264.

6. After an order for security, and that the defendant have seven days to plead after security given, before which the defendant cravedoyer; held, that the time of pleading ran from the grantingoyer, if subsequent to the giving security or rescinding the order, and not in that case from the time when such security given or order rescinded. *Cahill v. Macdonald*, 4 Ad. & Ell. (x. s.) 1004.

7. It is only necessary to make a demand where it is also part of the rule that proceedings be stayed in the meantime. *Fountain v. Steele*, 5 Dowl. (p. c.) 331.

8. On an application for a rule *nisi* for security, it is not necessary to show in what stage the proceedings are. *Cole v. Beard*, 5 Dowl. (p. c.) 161.

9. Where proceedings on the bail-bond are pending, the defendant cannot apply for security. *Bonnefor v. Russell*, 5 Dowl. (p. c.) 555.

10. Where, after joinder in demurrer, the plaintiff became bankrupt, and his assignees refused to interfere, the court refused the application for security. *Beckham v. Knight*, 4 Bing. N. S. (c. r.) 74; 2 Sc. 336; and 6 Dowl. (p. c.) 227.

11. Where the affidavit only stated that it "believed" the plaintiff was resident abroad; held insufficient, but the court would call on the attorney by rule to state the residence of his client. *Sandys v. Hohler*, 6 Dowl. (p. c.) 274.

12. A foreign sovereign, suing in this country to enforce a contract, is liable to give security for costs, and the defendant held not precluded by having pleaded to the original declaration, where he applied promptly after it had been materially amended; where no previous application had been made by the defendant, and the rule for security was not drawn up with a stay of proceedings, the court made the rule absolute, without payment of costs by the defendant. *Greece, King of, v. Wright*, 6 Dowl. (p. c.) 12.

13. Where there is no false description, the mere circumstance of the plaintiff being in the habit of moving from place to place, is not a sufficient ground for giving security. *Fraser v. Palmer*, 3 Young & C. (xx. xq.) 279.

14. The mere notice of application for security does not dispense with the necessity of making a previous demand; and the affidavit, on the motion for security, must show the stage in which the proceedings are. *Huntly v. Bulmer*, 6 Sc. (c. r.) 247.

15. Where an action of trespass was brought against justices, for turning out the defendant



from premises claimed by the parish as part of the poor-house, upon a warrant under 59 Geo. 3, c. 12, s. 24, the Court refused to call on the plaintiff for security, on the ground that he was instigated by a party who had petitioned the House of Lords on the subject, and had declared that, on public grounds, he would see the plaintiff reinstated. *Hearsey v. Pechell*, 5 Bing. N. S. (c. p.) 466; and 7 Dowl. (p. c.) 437.

16. The lessor of plaintiff in ejectment having become bankrupt, and uncertificated, held not a ground for compelling him to give security, although the assignees had declined to proceed in the action, and it was carried on for his benefit. *Doe d. Colnaghi v. Blick*, 5 Sc. (c. p.) 714.

17. The Court refused, in an action of libel, to increase the amount of security, on the ground of the sum ordered (400*l.*) being inadequate to cover the expected expense of foreign witnesses, &c. *Pizana v. Lawson*, 5 Sc. (c. p.) 418.

18. So in an action on a note, on the ground that the expected amount of costs would exceed the sum fixed. *Kent v. Poole*, 7 Dowl. (p. c.) 572.

19. Where a rule was made for security for costs, the Court refused a motion by the surety to cancel the bond on affidavits showing that the plaintiff had returned to this country. *Badnall v. Hall*, 7 Dowl. (p. c.) 19; and 4 Mees. & W. (xx.) 535.

20. Where the lessor of plaintiff was an infant, and a pauper, the Court required the father to be substituted for John Doe. *Doe v. Roberts*, 6 Dowl. (p. c.) 556.

21. Three days' notice of intention to apply for security, held not equivalent to a demand and refusal, to entitle the defendant thereto. *Huntley v. Bulmer*, 6 Dowl. (p. c.) 633.

22. Where the plaintiffs resided out of the jurisdiction, held to be no answer to the application that there was no defence to the action, the defendant having admitted the debt; nor that the plaintiffs had property in the country, as Exchequer bills; nor did the agreement by the defendant, generally to take short notice of trial, preclude him from applying for security. *Edinburgh and Leith Company v. Dawson*, 7 Dowl. (p. c.) 573.

23. Where the plaintiff was a lieutenant in the navy, and employed as harbor-master in an English colony, the Court would intend that he was not a foreigner, and the rule discharged with costs. *Evering v. Chiffenden*, 7 Dowl. (p. c.) 536.

*And see Attorney; Infant; Information; Pauper; Requests.*

#### [C] SUGGESTION TO DEPRIVE OF.

1. Where the arrest was for 20*l.* 2*s.* 1*d.*, and for want of proof of delivery the plaintiff only recovered 10*l.*, the substantial issue being the defendant's infancy; the court, notwithstanding the whole of the goods were sworn to have been delivered, allowed costs under 43 Geo. 3, c. 46, the damages recovered being *prima facie* evidence of

the sum due. *Ballantine v. Taylor*, 1 Nev. & P. (x. s.) 219.

2. Where the defendant had been arrested on an attorney's bill for 200*l.*, which was by an order referred to be taxed, upon the terms of being at liberty to sign judgment for the amount taxed, and an undertaking to pay that amount and the costs of the action; the Master having reduced the bill to 149*l.*, by disallowing certain expenses imprudently incurred. held, that there was probable cause for the arrest, and that the defendant was estopped by the order from complaining of the arrest. *Watkins v. Mahon*, 1 Mees. & W. (xx.) 722; and 5 Dowl. (p. c.) 178.

3. Where the plaintiff had actually disbursed money for the defendant, his client, which the Master on a reference had disallowed him, and which made up the difference between the sum for which the arrest had been made and that found to be due; held, that no stipulation having been made as to costs on account of the arrest, he was estopped from complaining of it by the order. *Watkins v. Mason*, 1 Tyr. & Gr. (xx.) 1023.

4. The rule as to costs of taxation, where one-sixth is taken off, does not apply when the taxation is applied for after action brought. 1*b.*

5. In *assumpsit* by indorsee against acceptor, plea, that by agreement between the defendant and the drawer the note was not to be enforced except on certain terms, which had not been complied with, and that the plaintiff received the note without consideration; the plaintiff entered a *nolle pros.* except as to part, for which he obtained a verdict; held, that in the absence of proof of the plaintiff's knowledge of such agreement, it was not an arrest for want of probable cause for the whole amount, entitling the defendant to a suggestion for costs under 43 Geo. 3, c. 46, s. 3; *quare*, if the defendant be discharged from the arrest in consequence of a defect in the affidavit of bail, he cannot be said to have been "arrested and held to bail" within the meaning of the statute. *Edwards v. Jones*, 2 Mees. & W. (xx.) 414; and 5 Dowl. (p. c.) 584.

6. The court has no power to deprive a plaintiff of costs on a trial before the sheriff, where less than 40*s.* is recovered, although the sheriff has no power to certify with that view. *Story v. Hodson*, 5 Dowl. (p. c.) 558.

7. Where the verdict was reduced under 40*s.* by the court, on the ground of the plaintiff not being entitled to recover part of the demand, not being a duly licensed apothecary, and so to be taken as if no debt, the defendant was entitled to enter a suggestion under the Middlesex Court of Requests Act. *Wells v. Langridge*, 5 Dowl. (p. c.) 509; and (*per Littledale, J.*), such suggestion might be made by the court where the trial had been before the sheriff.

8. Where the verdict on a writ of trial before the sheriff, or a judge of an inferior court, is under 40*s.*, he has no power to certify under 43 Eliz. c. 6, s. 2, to deprive the plaintiff of his costs; if the action is brought to recover less than that sum, that should be shown for cause, on application to have the cause so tried. *Jones v. Barnes*, 2 Mees. & W. (xx.) 313.



9. The suggestion may be made under 31 Geo. 2, c. 23. (W. H. Brixton Court of Requests), where the debt is under 5*l.*, and the plaintiff need not be resident within the jurisdiction; it is sufficient if the defendant were so at the time of the suit being commenced. *Hamley v. Hutton*, 5 Dowl. (p. c.) 332; S. P. as to the County Court; *Pritchard v. Macgill*, Ib. 731.

10. Where upon a writ of inquiry, the damages having been assessed under 20*l.*, the Master had taxed the costs as in cases tried before the sheriff, which was stated by the officer to be the practice, the court refused to interfere. *Hooppell v. Leigh*, 3 Sc. (c. p.) 188; and 5 Dowl. (p. c.) 40.

11. Where after final judgment, and execution issued, the defendant applied to enter a suggestion, and it appeared that delay arose from his having applied to a Judge at chambers, who had refused to interfere, the court allowed the application. *King v. Erle*, 5 Dowl. (p. c.) 595.

12. The court will not be guided alone by the amount of the verdict. *Graham v. Beaumont*, 3 Sc. (c. p.) 287; and 5 Dowl. (p. c.) 49.

13. The defendant held not to preclude himself from the benefit of entering a suggestion under the Birmingham Court of Requests Act, by plea of payment into court, or having consented to an order for trial before the under-sheriff. *Turner v. Barnard*, 5 Dowl. (p. c.) 170.

14. Where, after refusal to accept the arrears, in an action for salary due on a wrongful dismissal, the plaintiff afterwards having obtained a more lucrative employment, took the money out of court; held, that as such acceptance might operate in reduction of damages, it was sufficient to rebut a vexatious refusal of the sum tendered, and the defendant not entitled to costs. *Cumming v. Columbine*, 6 Dowl. (p. c.) 373.

15. Where, after an arrest for 28*l.*, and plea of the statute of Limitations as to 11*l.*, the plaintiff recovered only 17*l.*, but the defendant was proved to have promised orally to pay the former sum; held, that, as the plaintiff might reasonably have presumed the statute would not have been pleaded, the defendant was not entitled to costs under 43 Geo. 3. *White v. Prickett*, 4 Bing. N. S. (c. p.) 237; and 6 Dowl. (p. c.) 445.

16. Where the plaintiff knows, from the nature of his claim, that he cannot sustain it by legal evidence to the extent for which the arrest is made, the defendant will be entitled to his costs under 63 Geo. 3, c. 46, s. 3. *Robinson v. Whitehead*, 4 Dowl. (p. c.) 292.

17. On an exception in the local court of Requests Act, of case where the action is brought for the balance of an account originally exceeding 5*l.*; held, not to apply to a running account, where payments having been made from time to time, there was at no time so much as 5*l.* due. *Pope v. Banyard*, 3 Mees. & W. (xx.) 424.

18. Where one of several chests was, after delivery, found to be damaged, and an allowance for the supposed amount, and the affidavits were

contradictory as to whether such reduction had been agreed to be made or the chest returned, and the jury gave a less sum, upon the understanding that the plaintiff was to have back the damaged chest; held, not a case within the statute entitling the defendant to costs. *Clare v. Cooke*, 4 Bing. N. S. (c. p.) 269.

19. In an action on a judgment the application for costs under 43 Geo. 3, c. 46, s. 4, must be made by the plaintiff either to a judge at Chambers or the Court, and not at Nisi Prius. *Jones v. Lake*, 8 C. & P. (N. P.) 395.

20. In an action for an architect's commission, which having been referred, a less sum was awarded than that for which the defendant had been held to bail, there being a difference of opinion as to the estimates of the expense, and the defendant not showing the actual amount; held, that it was not a case of want of probable cause, entitling him to costs under 43 Geo. 3, c. 46. *Day v. Clarke*, 2 Bing. N. S. (c. p.) 117; 7 Dowl. (p. c.) 147; and 6 Sc. 886.

21. Although, *semble*, a Judge has power to revoke his certificate, he must do it within a reasonable time. *Whalley v. Williamson*, 5 Bing. N. S. (c. p.) 200; and 7 Dowl. (p. c.) 253.

22. To entitle a defendant to the suggestion under the Westminster Act, 6 & 7 Will. 4, c. 137, s. 86, he must swear distinctly and in terms, that he was at the time of the commencement of the action residing or inhabiting within the jurisdiction. *White v. Seffert*, 5 Sc. (c. p.) 744.

23. There is no distinction since 3 & 4 Will. 4, c. 42, s. 18, between trials before the sheriff and at *nisi prius*, and a suggestion may be entered after execution issued in vacation in the following term, without any previous motion to stay the execution. *Johnson v. Veal*, 7 Dowl. (p. c.) 487.

24. Where the plaintiff sued for 2*l.* 15*s.*, the balance of a demand of 5*l.* 15*s.*, but which the jury found to have been originally under 5*l.*, and obtained a verdict for 1*l.* 2*s.* 6*d.*, the local court of Requests Act (Blackheath) having jurisdiction over demands not exceeding 5*l.*, not being the balance of any account originally exceeding that sum, and a subsequent Act gave the superior courts concurrent jurisdiction, where the sum *sought to be recovered* was 40*s.*: held, that those words were to be taken to mean the sum which the plaintiff actually recovers, and that the plaintiff having no right to sue in the superior court, the defendant was entitled to a suggestion for his costs. *Cross v. Collins*, 5 Bing. N. S. (c. p.) 194.

And see *Arrest; Requests*.

#### [D] ENFORCING—ATTACHMENT.

1. Where an order for taxing the attorney's bill, and delivering up deeds, &c., was "upon payment," &c.; held not to amount to a direction or undertaking to pay, and the usual undertaking filed at chambers not having been made a rule of



Court, no attachment could issue. *Price v. Philcox*, 7 Dowl. (p. c.) 559.

2. A demand by the attorney of a party entitled to receive costs under an order, held sufficient, without an express power of attorney. *Mason v. Whitehouse*, 4 Bing. N. S. (c. r.) 692; 6 Sc. 246. 575; and 6 Dowl. (p. c.) 602.

3. Where the Act directed that no judgment should be entered on the verdict where the suit was commenced in the superior court, held, that advantage could only be taken of the Act by plea, and not by suggestion. *Jackman v. Cother*, 5 Mees. & W. (xx.) 147.

### COVENANT.

1. Covenant by L., the lessee of a term if C. should so long live, with the assignee that notwithstanding any act done by him the lease was good and effectual at the time of the assignment, and the term in no wise forfeited, surrendered, determined, &c., otherwise than by effluxion of time, and that he had full power to assign, &c.; before the assignment C. had died, which L. knew; held, that the whole covenant was to be restricted to any acts done by L., and that he was not liable on the covenant on an eviction of the assignee by the party entitled after C.'s death; held also that payment of rent by L. to such party after C.'s death did not amount to an act done by L. affecting the lease, as converting it into a yearly tenancy, the lease having already expired. *Stannard v. Forbes*, 1 Nev. & P. (x. s.) 633.

2. Where a party, in consideration of love and affection, by release, conveyed a specific freehold house, and assigned a particular leasehold, and "all other the property, real or personal, to which he might be then entitled, upon trust for his sisters, he being at the time seized of a share in another freehold house, of which no mention was made in the release; held, that the general words being, from the tenor of the deed, only applicable to leasehold and personal estate, the latter freehold did not pass by them, and that the release did not operate as a covenant to stand seized. *Doungworth v. Blair*, 1 K. (ch.) 795.

3. Upon a covenant in a lease of mines to work them not below the level of the bottom of the mine at a particular point; held, that evidence of the meaning of the covenant according to the custom and understanding of miners, was admissible, and that it was for the jury to decide on its effect, and to say what was the contract between the parties; and upon a reference as to the meaning of the term level, the arbitrator having found it according to the custom, &c. of miners "throughout that district," the court could not take upon themselves to say that the parties used it in the sense attached to it within the particular district, but it was to be determined by a jury, and a new trial granted. *Clayton v. Gregson*, 6 Nev. & M. (x. s.) 694.

4. Where under a local navigation Act, authorising the undertakers to raise money on the

security of the canal and dues, the same were assigned by deed, in the form prescribed by the Act, to the lenders, as a security for the money lent, the interest on which was "to be paid half-yearly;" held, not to amount to a personal covenant on the part of the proprietors, rendering them personally liable to an action of covenant. *Pontet v. Basingstoke Canal Company*, 3 Bing. N. S. (c. r.) 433; and 4 Sc. 137.

5. Where upon the sale of the business of a carrier, the plaintiff covenanted that he would serve the defendant in such trade, and would not exercise it during his life, except as assisting the defendant, in consideration whereof the defendant covenanted to pay him a weekly salary for life; held, that the covenant to serve for life was not void as in restraint of trade, being made on sufficient consideration, and securing some public benefit. *Wallis v. Day*, 2 Mees. & W. (xx.) 273.

And see 15 Vin. Abr. 323. tit. Master and Servant, (N.) 5.

6. In covenant by the assignee of the reversion against lessee, plea, not denying that it was the plaintiff's deed, but alleging that the intended lessor had not executed the lease, nor was it signed by any agent lawfully authorized, in writing; it appeared that J. H., being seized in fee, by deed executed by the defendant, demised the premises for a term of eleven years, under which the defendant entered and was possessed thereof; J. H., by will, devised the estate to his widow for life, remainder to the plaintiff for life; the declaration alleged the death of J. H. and of the widow, whereby he became and was seized of the reversion for the term of his life; held, that the covenants being annexed to a mere tenancy at will, (the only interest that passed upon the assent of J. H. to the lease), and which tenancy determined on his death, the subsequent occupation for more than a year created a different tenancy to which the covenants were annexed, and that the plaintiff could not maintain the action. *Cardwell v. Lucas*, 2 Mees. & W. (xx.) 111.

7. Where L. and S., the fathers of the intended husband and wife, mutually covenanted by the marriage articles, viz. L. to pay —L., and convey estates, upon the marriage, and S. to pay —L., and convey estates, upon the wife attaining 21; held, that although in terms the covenants were made to depend upon the performance by the other, yet the intention being clear, they were not to be construed as conditional, but on the marriage taking place the liability attached, and that the liability of L. to convey was not removed by the failure of S. to perform his covenant. (Supporting the decision of the Vice-Chancellor). *Lloyd v. Lloyd*, 2 Myl. & Cr. (cn.) 192.

8. In marriage contracts there can be no resistance on the part of one because the other contracting party fails to perform his part of the agreement. *Id.*

9. Upon a covenant in articles between the captain and owners of a South Sea whaler, *inter alia*, that he would proceed to the fishery, and procure a cargo or as great a proportion as might



under all circumstances be obtained, would obey instructions, and take proper care of stores, &c., in consideration whereof the defendants covenanted to pay him a certain proportion of the net proceeds; held, that the covenants were independent, and that the owners' remedy was in damages on the covenants for any loss occasioned by the breach thereof. *Stavers v. Curling*, 3 Bing. N. S. (c. p.) 355; and 3 Sc. 740.

And see *Ritchie v. Atkinson*, 10 East, 295; *Boone v. Eyre*, 1 H. Bl. 273 n.

10. Upon a lease of premises to L., reciting that the defendant agreed to enter into the covenant for securing the payment of the rent; and the lease then stated the agreement to demise to be in consideration of the covenants by L., and of the covenant entered into by the defendant, and then followed the usual covenant; held, to amount to a joint covenant that both should pay the rent, and that L. should keep the premises in repair, and that the defendant was jointly liable with L. to repair as well as to pay rent. *Copeland v. Laporte*, 3 Ad. & Ell. (x. s.) 517.

11. In covenant for payment of rent, the breach assigned being, that during the term, to wit, on 25th March, £— was due, for two quarters ending the day aforesaid; plea, that no quarter's rent, ending on 25th March became due in manner and form, &c. held bad; the substantial allegation of the breach being that the rent became due during the term, and *riens in arriere* is no plea to a covenant for payment of rent on a particular day. *Baden v. Flight*, 3 Bing. N. S. (c. p.) 685; and 4 Sc. 412.

12. Under a covenant to keep and leave a messuage in repair; held, that it is satisfied by substantial repair, and that in order to ascertain the relative sufficiency, the jury may be directed to inquire whether at the time of the demise the house were new or old. *Stanley v. Towgood*, 3 Bing. N. S. (c. p.) 4; and 3 Sc. 313.

13. Where, upon the sale of copyhold lands by K. to M., with covenants to surrender, and for title, and the surrender made, M. afterwards sold in like manner to B. and surrendered to him; held, that the original covenants, being to be taken as one assurance, might be enforced by B. against K., either as running with the land, or by suit in M.'s name. *Riddell v. Riddell*, 7 Sim. (cn.) 529.

14. Covenant lies for rent reserved on a lease accruing before entry for a forfeiture, although the lessor was thereby to have the premises again, as if the indenture had never been made. *Hartshorne v. Watson*, 4 Bing. N. S. (c. p.) 178; and 6 Dowl. (r. c.) 404.

15. Where, by a covenant on a demise for lives, a forfeiture was to take place in case the lessee did not produce one of the lives named (living abroad) or otherwise make it appear by a good and sufficient certificate that he was living; held, that an affidavit, showing by circumstances that he was alive within seven years, was not a sufficient compliance with the terms of the covenant. *Randle v. Lory*, 6 Ad. & Ell. (x. s.) 218.

16. Where a father, by agreement, covenanted

with his son to transfer a sum to trustees for the benefit of four natural daughters, and the son covenanted to pay the father's debts; the son having paid some of the latter, died before performance of the agreement by the father, having bequeathed the whole of his property to his father, who was also his sole representative; on a bill filed by one of the daughters to have the agreement carried into effect as against the estates of the father and son; held on demurrer, that however the one of them might have enforced the covenant of the other, the plaintiff, a mere stranger, had no right to enforce it against the two. *Coley v. Countess of Mulgrave*, 2 Keene (cn.) 81.

17. Where a testator, by a voluntary deed, covenanted for payment by his executors of a sum to be invested in the corporate names of the vicar, of the churchwardens, and of the archdeacon, upon certain charitable trusts; held, that it was no answer on the part of the executors that they could not so invest, because the parties named as trustees were not corporations for such purpose, it not appearing that the covenant was impossible, nor that the Bank had refused to allow the investment. *Tufnell v. Constable*, 3 Nev. & P. (q. s.) 47.

18. In covenant for not keeping in tenantable repair; held, that the defendant might ask generally as to the state of the buildings at the commencement of the term, but could not go into detail as to particular parts. *Mantz v. Goring*, 4 Bing. N. S. (c. p.) 451.

19. In covenant for not keeping the premises in sufficient repair, the jury may take into consideration the condition at the commencement of the demise. *Burdett v. Withers*, 2 Nev. & P. (x. s.) 122.

20. Where the declaration contained breaches on several covenants, the assignments of which would have been bad on demurrer, but the defendant, amongst others, pleaded payment of £— into court, and that the plaintiff had sustained no greater damages in respect of the causes of action in the declaration mentioned; held, that such plea must be taken to admit some damage upon every part of the breach of covenants in the declaration, and that the defects in the allegations were thereby waived. *Wright v. Goddard*, 3 Nev. & P. (q. s.) 361.

The judgment in the case of *Pitt v. Williams*, (2 Ad. & Ell. 419; and 4 Nev. & M. 412) reversed; 5 Ad. & Ell. 885.

21. Upon an agreement between the plaintiff on the one part, and the defendant with others on the second part, for the execution of a lease, with the usual covenants, and for the performance each of the parties did bind himself in a penalty, to be recovered as liquidated damages; held, that on default, that sum was to be deemed a penalty, and not liquidated damages; and the declaration describing it as an agreement between the plaintiff and defendant, who had alone executed it, held, that the variance, whether fatal or not, was one which the court, under 3 & 4 Will. 4, c. 42, s. 23, might amend, as it would not vary the substantial defence to the action. *Boys v. Ancell*, 5 Bing. N. S. (c. p.) 390.



22. The generality of the covenant in law contained in the word *demise*, is restrained by a subsequent express covenant for quiet enjoyment. *Line v. Stephenson*, 4 Bing. N. S. (c. r.) 678; 6 Sc. 447; and affirmed in Exchequer Court, 5 Bing. N. S. (c. r.) 183.

And see *Noke's Case*, 4 Rep. 80, b.

23. Where the crown lessee of duchy lands had underlet on a building lease, with a covenant that he would apply for and do his utmost to procure a renewal, but his offer was only of a fine to the amount of two years' rack-rent, paid by the occupiers, the crown requiring as a fine a sum short of three years annual value of the premises; held, that the covenant was to be construed to impose on the covenantor no more than to pay a reasonable fine, but that the fine so claimed by the crown being found by the jury as reasonable, and that the covenantor having declined to renew on those terms, could not be said to have done his utmost endeavor to obtain a renewal within the meaning of the covenant. *Simpson v. Clayton*, 4 Bing. N. S. (c. r.) 758; and 6 Sc. 469.

24. On an agreement for relinquishment of a trade for a consideration, and covenant against exercising at any time thereafter the trade of a common carrier to and from certain places; held, that the court could not enter into the reasonableness of the restraint in respect of the consideration, nor declare the covenant void by reason of the restriction being unlimited. *Archer v. Marsh*, 6 Ad. & Ell. (q. n.) 959; and 2 Nev. & P. 562.

And see *Hitchcox v. Coker*, Ib. 438; overruling *Horne v. Graves*, 7 Bing. 735.

25. Where the lessee of premises, demised as a public-house, covenanted that he would use his best endeavors to keep it open as a licenced house, and it having been underlet to several tenants, at length, through the misconduct of one, the license was refused by the magistrates; held, that it lay on the defendant to show that after the withdrawal of it, he did some act to obtain the renewal of the license, but that it was for the jury to say whether the plaintiff, in never having himself taken any steps to obtain the grant of the license, had sustained any substantial damage, and if not, that he was entitled only to nominal damages. *Linder v. Pryor*, 8 C. & P. (n. r.) 518.

26. Where the contract for the purchase of leasehold premises amounted only to an equitable agreement and there was no legal assignment, held that, being equitable assignee of the whole interest, the obligation was co-extensive with that interest, and that he was liable to indemnify the plaintiff, the equitable assignor, against all damages incurred by reason of breaches of covenant on the lease subsequent to the date of the agreement. *Close v. Wilberforce*, 1 Beav. (ex.) 112.

27. Where in covenant for quiet enjoyment, the declaration alleging the eviction, left it uncertain whether the party claiming title might not have come in under the plaintiff himself; held, bad. *Brookes v. Humphreys*, 5 Bing. N. S. (c. r.) 55; 6 Sc. 756; and 7 Dowl. (p. c.) 118.

And see 2 Saund. 180 c.

28. In covenant by lessor against the executor of the assignee of the lessee, become insolvent, for rent accruing subsequently to the death of such assignee; held, that if the latter assented to the assignment made under the 7th Geo. 4, c. 57, and acted as tenant of the premises, his executor was liable as representing the assignee; held, also, that the husband of a party entitled to an annuity settled to her separate use and charged upon the premises, which were vested in the plaintiffs as trustees, was a competent witness for them, his interest, if any, being too remote. *Abercrombie v. Hickman*, 3 Nev. & P. (x. n.) 676.

29. In covenant for non-repair, the defendant may examine the plaintiff's witnesses generally as to the state of the premises at the time of the demise, but not as to particular defects, and when they arose. *Young v. Mantz*, 6 Sc. (c. r.) 227.

And see *Stanley v. Towgood*, 3 Sc. 313; and 3 Bing. N. S. 4.

And see *Accord; Annuity; Assumpsit; Costs; Deed; Fraud; Forfeiture; Joint Stock Company; Lease; Ship; Trade.*

## COUNTY CLERKS.

Custody of documents deposited with the clerk of the peace under the Standing Orders of the House of Commons regulated by 1 Vict. 83.

## COUNTY COURT.

1. Entries in the sheriff's county court book, being only notes of the various times of proceedings in the court below, allowed to be amended by completing them fully, or certifying the practice of the court, and what was intended by such entries. *Overton v. Swettenham*, 3 Bing. N. S. (c. r.) 786; and 5 Dowl. (p. c.) 641.

2. A bill of exceptions held to lie to a county court, and in a case of nonsuit. *Strother v. Hutchinson*, 4 Bing. N. S. (c. r.) 83; 6 Dowl. 238; and 3 Sc. 346.

3. A return to a writ of false judgment in the county court, that the plaintiff in error has not given security for costs, held bad, the 19 Geo. 3, c. 70, s. 6, applying only to causes removed before judgment. *Crookes v. Longden*, 5 Bing. N. S. (c. r.) 410.

And see *Sheriff*.

## COUNTY RATE.

Under 12 Geo. 2, c. 29, s. 8, the right of inspecting and of taking copies of county rates, and orders for expenditure thereof, and orders of cession made thereon, and documents relating thereto, when deposited with the county records with the clerk of the peace, is confined to the justices of the peace for the county, and the ratepayers have, neither at common law nor by statute, such right; and a *mandamus* to the justices and clerk of the peace to permit such inspection, &c., refused. *Rex v. Stafford Justices*, 1 Nev. & P. (x. n.) 260.

And see *Borough*.



## COURTS.

The Courts empowered to sit it *Banco* in vacation, by 1 & 2 Vict. c. 32.

## CREDITORS.

Fitzgerald v. Stewart, 2 Sim. 333; affirmed, 1 Russ. & M. (ch.) 457.

And see *Practice*, (xq.); *Partner*.

## CREDITORS' SUIT.

1. On a bill filed by a creditor for the common benefit of all creditors, the interest of the general body is administered by the court in the same manner as when administered by one of its own officers; where there had been great delay, not duly accounted for, both in the completion of sales and payment of monies received into court, a reference directed to the Master to appoint a proper person, the Court rejecting a creditor proposed who appeared to be acting as solicitor for one of the accounting parties. *Price v. North*, 2 Young & C. (xx. xq.) 628.

2. Where, in a creditor's suit, bond creditors had been allowed and received for principal and interest an apportionment to the extent of the penalties, held that, upon further funds becoming available, they were entitled, until the penalty was exhausted, to calculate interest on the sum in the condition, and not on the remainder of the penalty unsatisfied. *Walters v. Meredith*, 3 Young & C. (xx. xq.) 264.

3. In a suit on behalf of specialty creditors, it appearing that the debtor had covenanted with certain specialty creditors scheduled for payment, and be thereby engaged, in the event of non-payment at a stated time, "to sell so much of his real estate as should be necessary;" held not to create a lien on the estate, but to amount to a mere personal undertaking, and not to entitle those creditors to come in *pari passu* with judgment creditors; and in such a suit bond creditors held not entitled to come in *pari passu* with judgment creditors, merely because the bill was filed on behalf of all specialty creditors, and assets had been distributed *pari passu* in the behalf of them, not being a deficiency. *Berrington v. Evans*, 3 Young & C. (xx. xq.) 384.

And see *Bond*; *Practice*, (xq.)

And see 2 & 3 Vict. c. 39.

## CROWN DEBT.

Where a crown debtor dies insolvent after an extent issued, the writ of *diem clausit extremum* is absolute in the first instance. *Rex v. Lord Crewe*, 5 Dowl. (p. c.) 158.

## CROWN GRANT.

1. Where a manor and lands were granted in tail by the crown, in consideration of love and affection to an illegitimate child, held that, notwithstanding the 34 Hen. 8, c. 20, the entail was well barred by a bargain and sale enrolled under 3 & 4 Will. 4, c. 74, s. 15. *Grafton, Duke of, v. London and Birmingham Railway Company*, 5 Bing. N. S. (c. p.) 27; and 6 Sc. 719.

2. Where at the date of the letters patent mines were granted within the province of N. S., held to pass all mines in B., which, before that date, had become a part of the province of N. S. *Taylor v. Attorney-general*, 8 Sim. (ch.) 413.

And see *Grant*.

## CUSTOM.

1. A custom for all victuallers to erect booths on a fair, from a certain day to a certain other day, paying 2d. to the lord, held good. *Tyson v. Smith*, 1 Nev. & M. (x. b.) 784.

2. Where the existence of a custom alleged by the defendant was the substantial question to be tried; held, to entitle him to begin, although the plaintiff alleged that he went for damages; a custom for the stannars of Devon to divert water-courses into their streams, and for that purpose to dig trenches over private lands; held, not sustained. *Bastard v. Smith*, 2 M. & Rob. (n. p.) 129.

3. A custom for the deputy day oyster meters of London to have the exclusive right of shovelling, unloading, and delivering all oysters brought in any vessel along the Thames within the port of London, and to have, as compensation, 8s. a score for the first 100 bushels (double measure), and 4s. a score for the remainder of the cargo; held reasonable by the jury; held, also, that the meters are liable to do all the labor of shovelling, &c. and are also liable to an action if they do not provide men for the work, and the parties may have it done by other workmen. *Layburn v. Crisp*, 8 C. & P. (n. p.) 397.

4. It is no part of a meter's duty, as such, to put the goods into the measure, but only to find the measures. *Ib.*

5. A custom (pleaded in justification of trespass for entering the plaintiff's house), on occasion of perambulating parish boundaries, to enter a particular house neither on the boundary line nor in any manner required in the course of perambulation, cannot be supported. *Taylor v. Devey*, 7 Ad. & Ell. (q. b.) 400; and 2 Nev. & P. 469.

6. And, *semd.*, entries in parish books, recording the fact that parish perambulations had taken a particular line, would be inadmissible. *Taylor v. Devers*, 7 Ad. & Ell. (q. b.) 400; and 2 Nev. & P. 469.

7. The judgment in *Tyson v. Smith*, 6 Ad. & Ell. 745, affirmed in error; 1 Ferr. & Dav. (q. b.) 307.



And see *Copyhold; Covenant; London; Manor; Mandamus; Quo Warranto.*

### CUSTOMS.

Licences to custom-house agents, and bonds for the faithful performance of the duties to the commissioners, under 6 Geo. 4, c. 107, s. 139, held to be continuing and in force under 3 & 4 Will. 4, c. 53, s. 144, although the former Act was repealed by 3 & 4 Will. 4, c. 50. *Rex v. Atkins*, 2 Mees. & W. (xx.) 289.

### DEBT, ACTION OF.

1. In the action of *debt*, where there is no inquiry of damages, if there be no plea of payment, it cannot be given in evidence in reduction of damages. *Belbin v. Butt*, 2 Mees. & W. (xx.) 422; and 5 Dowl. (p. c.) 604.

2. Where the defendant's answer to the plaintiff's demand, to transfer shares agreed to be bought, admitted his inability to do so, and requested time to arrange matters; held, that no tender of the price was necessary; and *semb.* a tender to the broker employed in the sale would be good. *Jackson v. Jacob*, 3 Bing. N. S. (c. p.) 869.

3. On plea in *debt*, of payment, the defendant not appearing to support his plea, *semb.* the plaintiff must prove the amount of his debt, as well as in *assumpsit*. *Mackintosh v. Weiller*, 1 M. & Rob. (n. p.) 505.

4. In debt for work and labor as an attorney, held, that under the plea *nunq. indeb.*, the defendant might show a contract under which he would be liable to a portion of the demand, and that he was not precluded by plea of payment into court of part, from showing a contract different from that alleged in the declaration. *Jones v. Reade*, 5 Dowl. (p. c.) 217.

5. Interlocutory judgment signed in debt, held not irregular. *Mackenzie v. Gayford*, 5 Dowl. (p. c.) 403.

6. Under a plea of *nunq. indeb.*, or set-off in debt, the defendant is not entitled to give in evidence money payments to the plaintiff, which are *prima facie* to be taken as paid in satisfaction of the debt due from the party paying. *Cooper v. Morecraft*, 3 Mees. & W. (xx.) 500.

### DEBTS.

1. A direction to executors to pay debts is *prima facie* evidence of intention that they are to be paid out of funds coming to them as executors. *Wasse v. Heslington*, 3 Myl. & K. (ch.) 495.

2. Where after general words in the commencement of the will, which by implication would constitute a charge of debts on the real estate, the testator afterwards gave to a legatee,

*inter alia*, the rents and profits of his freehold and leasehold premises up to a quarter-day next after his decease, adding, "which rents and profits I charge with the payment of my said debts," &c.; held, that the general charge by implication was controlled by the specific charge in the subsequent part of the will. *Palmer v. Graves*, 1 K. (ch.) 545.

3. Where testator, after directing payment of his debts, devised all his freehold, leasehold and personal estate (furniture excepted, which he bequeathed to his widow for life), in trust for the payment of certain legacies and annuities, and, subject thereto, for his daughter for life, remainder to her children, and in certain events he bequeathed his freehold, copyhold, leasehold and personal estate, to different persons; held, that the personal estate not specifically bequeathed, was to be first applied in payment of simple contract debts, and the surplus of those debts to fall proportionally on the freehold estate and on the furniture given to the widow; that a freehold descended after the will was liable to the specialty debts and mortgage debts, and the surplus of those debts to fall on the estates devised. *Irvin v. Iremonger*, 2 Russ. & M. (ch.) 531.

4. Where the testator bequeathed to his wife several specific articles of personal estate, and also a portion of his real estate, freed from any mortgage affecting the same, and directed that she should have the benefit of certain contracts entered into for the purchase of other real estates, and devised the residue subject to his debts, mortgages, and the contracts; held, that it was clearly his intention that the widow should take the personal gifts, exonerated from his debts. *Blount v. Hipkins*, 7 Sim. (ch.) 43.

5. And the testator, having subscribed for shares in a projected rail road, and paid up some of the instalments, and at his death the shares were at a premium, and no further instalment had been called for; held, that the widow, to whom he had given his personal estate, exonerated from debt, was entitled to have the unpaid instalments paid out of the real estates. 1b.

6. Where a father, a partner in a banking firm, advanced a sum to his son, who assigned as a security his interest on a fund in court, in trust to apply the same in discharge of the loan, and of other sums due to the father, and, subject thereto, in trust for himself; he shortly afterwards died, being indebted to the banking firm, and also largely to the crown; and the firm treating the debt as bad, the share of the loss was carried to the father's account with the partnership; the father also paid under crown process further sums as surety for the son; held, that the father's estate was entitled to the benefit of the fund in court to the extent of the debt due at the date of the assignment, and also of the sums paid to the crown, but not in respect of the sum estimated as the share of the loss on the partnership debt, although no notice had been given of the assignment to the trustees of the fund. *Foster v. Hargreaves*, 1 K. (ch.) 281.

7. Where trustees were, by the will, under an obligation to invest a portion of the assets,



and, by deed poll, one of them acknowledged to have received sums under that obligation; held, that the money was to be taken as a speciality debt to the parties entitled to the fund. *Turner v. Wardle*, 7 Sim. (CH.) 80.

8. Where the transaction amounted, not to an assignment of an original mortgage, with an additional security by the covenant of the assignee, but to a release of the lands from the original mortgage, and a new mortgage, at a new interest, and new equity of redemption; held, to constitute a personal debt of the new mortgagee, and that his personal assets were to be first applied in payment of the mortgage debt. *Barham v. Earl of Thanet*, 3 Myl. & K. (CH.) 607.

9. Where the settlor, on his marriage, conveyed to trustees, in trust to himself for life, and afterwards in trust to raise terms to raise a jointure for the wife, and portions for younger children, with remainder in strict settlement on the sons, remainder to the settlor in fee, with proviso, that the lands conveyed should in the first place stand charged with sums due as portions to the settlor's brothers, and another sum due on judgments and bonds in the schedule annexed; there was also a covenant against incumbrances, except as stated, and for further assurance, with the like exception; part of the debts, and portions were paid by the settlor in his life-time; held, that the debts in the schedule reported unpaid were a burthen on the settled estates, and that the settlor's personal estate in the hands of the executors was exonerated therefrom; (reversing the judgment below). *Vandeleur v. Vandeleur*, 2 Cl. & Fi. (r.) 82; and 9 Bl. N. S. 157.

10. Where the testator, after directing payment of his debts, legacies, &c. as soon as might be conveniently done, afterwards devised a particular estate to trustees to be sold, and the proceeds applied in aid of his personal estate, and devised the residue of his estates in strict settlement; held, that the preliminary direction creating a charge, the subsequent provision did not operate to release the whole of the real estate from being charged with his debts. *Graves v. Graves*, 8 Sim. (CH.) 43.

11. Act for abolition of arrest amended, and remedies of creditors extended, and Insolvent Acts amended by 2 & 3 Vict. c. 39.

12. The 1 Will. 4, c. 47, for payment of debts out of real estate, does not authorize the mortgage of the infant heir's estate for that purpose. *Smethurst v. Longworth*, 2 Keene, (CH.) 603.

13. Where a mortgage sum of 2,000*l.* was clearly established to be the debt of the testator, and by his will he gave certain specified premises, subject to one mortgage, without any direction that they should bear the mortgage, and he gave other mortgaged premises with an express direction that the personal estate should not be called upon to pay them, and he gave the residue of his personal estate, subject to the payment of his debts, except such as were therein excepted; held to amount to a declaration that the personal

estate should bear all such debts as were not specifically excepted, and that it was therefore subject to the payment of the mortgaged debt of 2,000*l.* as the primary fund. *Bickham v. Crutwell*, 3 Myl. & Cr. (CH.) 763.

And see *Noel v. Lord Henley*, 7 Pri. 242; 1 Dan. 211.

14. The provisions of 11 Geo. 4, and 1 Will. 4, c. 47, extended to authorize the mortgage as well as sale of estates; 2 & 3 Vict. c. 60.

15. Payment of, out of real estate, provisions for by 2 & 3 Vict. c. 60.

16. Upon a bill filed by simple contract creditors, to have their debts satisfied out of the personal estate, and if insufficient, then out of the real estate under 3 & 4 Will. 4, c. 104, the executors admitting the debts, there being infants interested, a decree made directing accounts of the debts and personal estate and proof of the will. *Nash v. Benton*, 1 Coop. (CH. c.) 192.

17. Where, on a loan to R. by the plaintiff on mortgage, the defendant was a party to the deed, which contained a covenant by the defendant and R. that for the better security &c. they did covenant to well and truly pay the sum, with interest, on a given day; held, to be an absolute covenant, and on which the action of debt would lie. *Evans v. Jones*, 7 Dowl. (P. c.) 482.

18. Where an annuity was secured by an encumbrance of lands to defendant and another, with a covenant by the defendant for the payment; held, that debt was not maintainable for arrears of the annuity; but that the proper remedy was in covenant. *Randall v. Rigby*, 4 Mees. & W. (EX.) 130.

19. In debt, for work and labor as a performer at the defendant's theatre, a letter, "that the plaintiff must be contented with his present salary until I know what turn the season takes;" held, an admission of the plaintiff being in his service, and not requiring any stamp as an agreement; it appearing that the plaintiff was to be paid for certain nights, although no performance, held that he should have declared for arrears of salary as a hired performer, but the Judge would permit the declaration to be amended; and payments having been made without express appropriation, the plaintiff was at liberty to apply it to parts of his demand really due, and to recover for the rest of his claim. *Frazier v. Bunn*, 8 C. & P. (N. P.) 704.

20. It being no longer necessary in the action of debt to consider the plaintiff's demand as a precise sum, and a defendant being in the same condition, as to pleas of set-off, &c. in debt, as in *assumpsit*; held, that under a plea of set-off to the whole declaration, where the defendant proves a less sum to be due to him from the plaintiff than the latter has established, he is not entitled to have the verdict on the issue found for him as to the part which he has proved, but he is only so entitled where the sum proved under the plea of set-off covers all that is not met by the other pleas. *Tuck v. Tuck*, 5 Mees. & W. (EX.) 109; and 7 Dowl. (P. c.) 373.



And see *Cosin v. Paddon*, 2 Cr. M. & R. 547.

And see *Bond; Heir; Legacy; Pleading;* (c. l.) *Taxes; Trustees.*

### DE CONTUMACE CAPIENDO.

1. The writ *de contumace capiendo* must be addressed to the sheriff of the county of which the party is described in the *significavit*, or the writ will be quashed. *R. v. Ricketts*, 1 Nev. & P. (x. n.) 680.

2. Held also, that the writ, reciting a *significavit* by two judges, of disobedience to the commands of three, is bad, and may be quashed on motion. *Ib.* 685.

3. Where the writ recited the *significavit*, describing the defendant as "now or heretofore of the parish of O., in the county of," &c., such writ might be quashed on motion before the return-day, and the defendant, if arrested thereon, need not be brought into court by *habeas corpus*. *R. v. Hewitt*, 1 Nev. & P. (x. n.) 689; and 5 Dowl. (r. c.) 646.

4. Where a party in contempt in the Ecclesiastical Court, was in custody under a writ *de contumace capiendo*, issued in pursuance of 53 Geo. 3, c. 127, s. 1, the court of King's Bench refused a writ of *hab. corp.* for the purpose of bringing the party up before the Ecclesiastical Court, with the view of clearing the contempt; but *semb.* the court of King's Bench has a concurrent jurisdiction with the court of Chancery. *Strong ex parte*, 5 Dowl. (r. c.) 213.

5. Where the writ set forth the sentence of the Spiritual Court, and awarded costs to be paid, the court refused to quash the writ, on a suggestion that the sentence was invalid in part; the latter part, as to costs, being clear and definite, and the party in contempt for non-payment. *Kington v. Hack*, 3 Nev. & P. (q. n.) 3.

6. Where it appeared on the face of the writ of *capias cum proclama.* that an entire term had intervened between its *tests* and the term in which the writ *de contumace* was returnable, being a discontinuance, the court quashed the former writ. *R. v. Ricketts*, 1 Perr. & D. (q. n.) 150.

### DEEDS.

#### [A] CONSTRUCTION.

#### [B] PROOF—PRODUCTION OF.

#### [A] CONSTRUCTION.

1. Upon a demise of a mill and stream of water, excepting so much as should be sufficient to supply persons with whom previous contracts had been or should thereafter be made for water, with a proviso, that so much should be left as should be sufficient to supply the mill for twelve

hours a day, and covenant for quiet enjoyment; there was no evidence of any act done since the date of the demise, but the quantity of supply had been diminished by the acts of the persons entitled under prior grants; held, that the covenant was not to be construed into an absolute grant of so much water as would supply the mill for the twelve hours a day, and that the proviso was only to be applied as a limit to what the grantors should do in future; and no disturbance having been occasioned by any act of theirs, an action was not maintainable. *Blatchford v. Mayor, &c. of Plymouth*, 3 Bing. N. S. (c. r.) 691.

2. Where a father had executed a conveyance, in order to qualify his son, which the attorney of the former prepared, and had produced it on behalf of the son before magistrates, but it remained in his custody upon an alleged agreement by the son that he should hold it as a security for the general bill of costs, &c., due from the father; after the death of the father, the son paid for the costs of the conveyance; in trover for the deed, held, that if any interest in the property were intended to pass, the deed belonged to the son, and the father could not give a lien thereon, and that the attorney was estopped from saying that no interest passed; the jury having given a general verdict for the defendant, the court granted a new trial, on the ground of misdirection of the judge, who merely left it to the jury whether the deed was the property of the father or son. *Lord v. Wardle*, 3 Bing. N. S. (c. r.) 680; and 4 Sc. 402.

3. Where the settlor, upon his marriage, covenanted to stand seised to the use of himself for life, remainder to the use of his intended wife for life, remainder to the sons and daughters of the marriage, remainder to the use of the heirs and assigns of the wife for ever; there was no issue of the marriage, and the wife having survived, devised the premises to a party, who levied a fine, and died seised twelve years after; upon a case sent from the Master of the Rolls, held, that the wife of the settlor became seised in fee under the rule in *Shelley's case*, and the devise good. *Hood v. Pimm*, 1 Tyr. & Gr. (xx.) 1118.

4. Where a mortgage deed recited a conveyance by A., the tenant in fee, for a term, to C. and H., subject to redemption, and that the subsequent mortgagee, at the request of A., had paid the first mortgagee, and advanced to A. a further sum, and in consideration thereof, C. and H., at the request of A., assigned, and A. did grant, &c. the premises for the residue of the term, subject to redemption; held, that A., having been proved *aliunde* to have been seised in fee, the latter deed was sufficient evidence of title to the possession in the representatives of the second mortgagee, the recital, if taken altogether, showing a title to assign in C. and H., or, if rejected, A. being capable of granting a term, it might be looked at to see what term was intended to pass. *Doe d. Rogers v. Brooks*, 3 Ad. & Ell. (x. n.) 513.

5. Where a party shortly before his death, executed an irregular deed of gift, and delivered it before the attesting witnesses as his last act and deed, but upon it being suggested that if delivered to the party it would take the property from him in his lifetime, he desired a third party to



keep it, and not to give it to the grantee in his lifetime; held, that the delivery was complete; held, also, that if a party execute a deed, supposing it to operate in one way, whereas it really operated in another, such instrument would be invalid. *Doe v. Bennett*, 8 C. & P. (n. r.) 124.

6. Although a deed poll may be framed so as to give a right of action against a party executing it, yet, when made between parties, no one can bring an action on it, except a party, or one claiming through him. *Gardner v. Lachlan*, 8 Sim. (ch.) 126.

7. Where an insolvent, whilst in prison, without consideration or pressure, executed an assignment of all his property to trustees for the benefit of his creditors who should come in under the deed; held to be a voluntary deed, and void within the 7 Geo. 4, c. 57, s. 32. *Binns v. Towsey*, 3 Nev. & P. (q. n.) 88.

8. In debt for rent of a mill and premises, it appeared that the lessee, being insolvent, had by deed, reciting his insolvency, assigned all his debts, stocks, implements, crops, severed as well as not, and all other his personal estate and effects whatsoever and wheresoever, in trust to pay the rent due and accruing up to —, and afterwards to distribute amongst his creditors; held, that the assignees having been found by the jury to have accepted it, the lease of the mill would pass under the assignment. *Ringer v. Cann*, 3 Mees. & W. (ex.) 343.

9. Where the settlor, by a first deed, limited leaseholds and stock to his son for life with remainder to his children, with a power of revocation, which, by a subsequent deed, he exercised, and vested the funds in trustees to pay the income to the son's wife for her sole use and for the maintenance of the children, and after her decease or second marriage, in trust for the children; held, that there being no way of construing the two deeds so as to give full effect to all the words, the second must be construed to be a substitution for the first deed altogether, and alone to have effect. *Angell v. Dawson*, 3 Younge & C. (ex. ex.) 308.

And see *Assumpsit*; *Charge*; *Covenant*; *Executor*; *Lease*; *Marriage Settlement*; *Portions*; *Power*; *Presumption*; *Trespass*; *Use and Occupation*; *Vendor and Purchaser*; *Voluntary Deed*.

#### [B] PROOF—PRODUCTION OF.

1. Where a deed executed by a corporation contained a memorandum written on the paper to which the seal was affixed, purporting that it was sealed by order of, &c., and subscribed "A. B., secretary;" held not to be an attestation, but merely a memorandum, that the act was done by the order, &c. *Doe d. Bank of England v. Chambers*, 4 Ad. & Ell. (x. s.) 410; and 6 Nev. & M. 539.

2. Where the validity and not the execution of a deed is questioned in the suit, it may be proved *visu vocis* at the hearing. *Attorney-General v. Pearson*, 7 Sim. (ch.) 309.

And see the case of *Attorney-General v. Shore*, lb. 309, n.

3. Where one of the two commissioners before whom the acknowledgment of a *feme covert* was taken, being a quaker and a practising attorney, verified the commissioners' certificate by his affirmation; held sufficient. *Scholefield in re*, 3 Bing. N. S. (c. r.) 283; 3 Sc. 657; and 5 Dowl. (r. c.) 363.

4. Where, in ejectment by mortgagee, a prior deed of settlement was produced, found amongst the papers of the mortgagor, lately deceased, he being the tenant for life under it; held, that the custody was sufficient to render it admissible without proof of execution, being above 30 years old. *Doe v. Samples*, 3 Nev. & P. (q. n.) 254.

5. Where the question was whether the defendant's liability accrued as trustee or shareholder; held, that it was essential to produce the deed creating the character of trustee, and that it was not sufficient to dispense with the production of it in evidence that the plea admitted the trust deed referred to in the recital of the deed of covenant. *Gillett v. Abbott*, 3 Nev. & P. (q. n.) 24.

6. Where on an information for tin dues on the part of the Duke of Cornwall, raising the question whether certain lands were part of manorial wastes, it appeared that the defendant being seised of an ancient tenement, a party, tenant in common with the Duke, conveyed to the defendant by indenture his share of all quit rents arising within the manor, reserving the rights of tin and of shooting, &c.; the defendant by his answer set forth a portion of the deed of conveyance to him, and that, as to the boundaries, they would appear from the instrument; held, that the defendant was bound to produce the indenture, that it might be seen whether the answer set it forth correctly, and, also, because the duchy being jointly interested with the party conveying to the defendant, might take advantage of his acts of ownership. *Attorney-General v. Lambe*, 3 Younge & C. (ex. ex.) 102.

7. Where the excuse for not making profert of a deed only stated that it had been delivered to the plaintiff, not going on to state it then in his possession; held insufficient. *Wallis v. Harrison*, 4 Mees. & W. (ex.) 538.

8. Where A., an equitable mortgagee, gave a schedule of the deeds deposited, describing one as executed by B.; in ejectment by the mortgagee against a party coming in under the mortgagor; held, that the subscribing witness ought to be called. *Doe v. Penfold*, 8 C. & P. (n. r.) 536.

9. Where secondary evidence, by proof of the copy of an original deed, not produced, is admitted it is unnecessary to call the attesting witness, although the original appears to have been subscribed by one. *Poole v. Warren*, 3 Nev. & P. (q. n.) 603.

And see *Mortgage*; *Practice*, (xq. c. l.)



## DEVISE.

1. On a devise of lands to be purchased with the proceeds of estates sold by the testator, upon trust to pay the rents and profits to testator's daughter for life, and afterwards for such persons and estates as she should appoint, and for default of appointment to the right heirs of his daughter, he also directed, that as to such part of the proceeds as should not be laid out in lands, his trustees should pay her the dividends for her life, and after her decease to such persons as she should by will appoint, and in default thereof to transfer and assign to her executors, &c.; held, that as the effect of the limitation of the proceeds, if uninvested, were to give it to the daughter absolutely, the intention was to be inferred the same whether it continued in the shape of money or was invested in land, the words of limitation therefore, in the latter case, to the daughter's right heirs, were to be considered not as words of purchase, but as of limitation, and that she might by fine extinguish the power, and make a good title to the lands purchased. *Webb v. Earl of Shaftsbury*, 3 Myl. & K. (ch.) 590.

2. Upon a devise to A. & B. as tenants in common, and the heirs of their bodies, and if either should die without leaving issue, then the share to the survivor of them the said A. and B., and the heirs of his body, and in case both of them should die without issue, then over; held, that the limitation to the survivor of the devisees in case either should die without issue was good by way of executory devise, and that by the word issue in the succeeding clause was to be intended, such issue as were to take under the prior limitation over, and that the limitation over was not too remote. *Radford v. Radford*, 1 K. (ch.) 486.

3. Where a testator devised his freehold to his wife in fee, and his leasehold estates to her during the lives of I. and S., and if they should survive her, to her heirs; the wife devised, but without words of inheritance, all her property to trustees on certain trusts, and also the lands she held under her husband's will, to pay an annuity to D.; she also gave a legacy to W., and certain yearly sums to two grandnieces, until and during the period of apprenticeship, and having appointed the trustees her executors, directed the residue of her real and personal estate, after payment of her debts, to be equally divided between her two grandnieces; she died in 1790, and the grandnieces entered into possession of the rents, &c., subject to the annuity to D.; E. J., one of them, married, and in 1814 died, leaving a child, who also shortly after died, and upon her death the defendant entered into possession, and received the rents of her moiety; the annuity ceased to be payable in 1804, and the legacy to W. was paid in 1812. Upon ejectment brought by the husband of E. J. for her moiety; held, that the fee passed under the will of the testatrix to the trustees, and that a reconveyance could not be presumed, and that, as to the leasehold, the probability was, that it was not for lives, no title to recover a moiety was made out. *Doe v. Williams*, 2 Mees. & W. (ex.) 749.

4. Where testator, an illiterate person, after giving to his wife, her heirs and assigns, all the

residue of his personal estate (there being no other legatee) added, and I do likewise make my wife my full and sole executrix of my freehold house in, &c.; held, that the will appearing to dispose of every thing, and to allude to no other object of bounty except his wife, upon the question of intention clearly to give the freehold to his wife, that the words of the will were sufficient to carry that intention into effect, and that she took the fee. *Doe v. Haslewood*, 1 Nev. & P. (x. s.) 352.

5. The wife having remained in possession for more than 20 years after the husband's death, might not be deemed adverse except as against the heir, as she might have been in possession in right of dower, *ib.*

6. So, where after a direction to the executor to pay debts and funeral expenses, the testator bequeathed annuities to his sister and niece, and 5s. to his heir at law, and then "I appoint W. P. my whole and sole executor of all my houses and land, situate at," &c.; held, that W. P. took an interest in fee. *Doe v. Pratt*, 1 Nev. & P. (x. s.) 366.

7. Where testator by his will devised his messuages, &c., called P., to J. L. for life, with remainders over in tail, and his messuage, &c. called C. to J. P. for life, with like remainders over, in other parts referring to his P. and C. estates: by a codicil, reciting that he had given the said P. estate to J. L., he thereby revoked and bequeathed the P. estate to J. P., and reciting also that he had given the said C. estate to J. P., he revoked the said bequest, and gave the said C. estate to J. L.; held, that the limitations in the will were thereby revoked, and that the said devisees took estates in fee respectively. *Phillips v. Allen*, 7 Sim. (ch.) 446.

8. Devise of lands to trustees in trust to permit his wife to enjoy them for life, and afterwards on trust out of the rents and profits to pay an annuity to testator's brother for ——— years if he should so long live, and also certain legacies; held, that the trustees took only a chattel interest until the annuity and legacies were paid, upon which, being satisfied, their estate ceased. *Doe v. Needs*, 2 Mees. & W. (ex.) 129.

9. Devise to trustees "to the use and interest that they may receive, &c., and pay over to the testator's son for his life, although nothing further was to be done by them, and no devise to support contingent remainders; held to vest the legal estate in the trustees. *Doe v. Homfray*, 1 Nev. & P. (x. s.) 401.

10. Where testator devised all his real estate to trustees, and empowered them to carry on his business, and to pay the profits, or if they should dispose of it, to invest the proceeds and pay the interest to his daughter for life, he also devised the rents and profits of his real estate to her for life, and after her death to her heirs as tenants in common, but if she should die without issue, then he gave certain legacies, and directed a sum to be invested for an annuity for the husband; he also directed the real estate to be sold, and disposed of the residue; held, that the daughter took an estate tail in the real estate, and an absolute interest in the personal estate, and that the legacies



and annuity were charged both on real and personal estate, and were to be borne proportionally by those funds. *Dunk v. Fenner*, 2 Russ. & M. (ch.) 557.

11. Devise to *W. F.* and his heirs male according to their seniority, and respectively attaining 21; the elder son surviving of *W. F.*, and the heirs male of his body, to be preferred to the second or younger son, and in case of failure of issue male of *W. F.* surviving him, or dying, without lawful issue male attaining 21, then over; held to pass an estate tail to *W. F.*, (affirming the judgment below.) *Featherston v. Featherston*, 9 Bli. N. S. (r.) 237; and 3 Cl. & Fi. 67.

12. Where the testator directed that out of the rents and profits of his estate his debts, &c. should be paid, and then gave, subject to the keeping in repair, the rents, &c. to *C. V.* for life, and, after his death, he gave all that freehold premises situate at, &c., unto his three nieces, to and for their own use and purposes equally, and the rest and remainder of his property, &c., be it what it might, be left to *C. V.*; held, that the nieces took only a life estate. *Doe v. Eve*, 5 Ad. & Ell. (x. a.) 313.

13. Bequest of a house to *J.*, the son of *George Gord*, another to *G.* the son of *George Gord*, and another upon the expiration of certain life estates to *George Gord*, the son of *Gord*; testator also bequeathed various legacies, and, *inter alia*, to *John and George*, the sons of *George Gord*, to be paid on attaining 21; held, that parol evidence was admissible to show the person he meant to designate by *George Gord*, the son *Gord*. *Doe v. Needs*, 2 Mees. & W. (ex.) 129.

14. Upon a devise of mixed estate to trustees, with power to sell the real at their discretion, and add the same to his personal estate; and after a gift to his wife for life, and of an estate at *W.* in trust for *G. H.*, and a sum to be paid at 21, and if he should die under 21, that both should sink into the residue; and gave the residue of all his personal estate, after payment of his debts, management and repairs of his real estate, to invest the overplus, and the resulting income to be accumulated until *J. C.* should arrive at the age of 24, and then upon trust to convey and assign all the legal estate and interest in his freehold, copyhold and leasehold premises, and all his personal estate, with a limitation over in the event of *J. C.* dying before attaining that age; held, that the rents of the real estate, until *J. C.* attained that age, did not result to the heir at law, but passed to *J. C.* as part of the trust fund. *Ackers v. Phipps*, 9 Bli. N. S. (r.) 430. (Reversing the judgment below.)

15. Devise of all such property of whatever description, or wherever situated, as the testator should die possessed of, for all his estate and interest therein to his wife, her heirs, and for her use and benefit, and to be disposed of by her by deed or will as she should think fit; held that a freehold estate of which the testator was seized as a trustee passed by the will. *Shaw, ex parte*, 8 Sim. (ch.) 159.

16. Where a testator, after giving a moiety of the estate to his son for life, and the other to his wife for her life or widowhood, provided that

upon her death or marriage, her moiety should go to the son in like manner as that devised to him; and in case of his dying before her, leaving issue, to such issue; but if the son died without issue, the whole to the wife for her life, subject to an annuity; "and in case of the marriage or death of my wife, my son being dead, and leaving no issue," then over; the event was, that the son survived the mother unmarried and intestate; held, that the contingency on which the devise over was to take effect, viz. the marriage or death of the widow at a time when the son was dead, leaving no lawful issue, not having arisen, the devise over failed, and the heir of the testator was entitled. *Dicken v. Clarke*, 2 Younge & C. (ex. ex.) 573.

17. On a devise of lands to testator's brothers, *A.* and *P.*, one-third part each, share and share alike, and the other remaining third to his sisters, *M.* and *L.*, share and share alike, being one-sixth part to each; "and in case of their demise, their respective shares to be equally divided amongst their children or lawful heirs;" and he bequeathed the whole of his personal estate to his brother *P.*; held, that the words, "in case of their demise," applied only to the devise to the sisters, and there being no words of inheritance in the devise to *P.*, that he took an estate for life only in one-third part; that as to the devise to the sisters, those words were to be construed as "after their demise," and that the effect was to give them an estate only for life, with remainder to their children in fee as tenants in common, and as to one of them, not married, her share not being disposed of, would, in the event of her not having any child, descend to the heir at law. *Bowen v. Scowcroft*, 2 Younge & C. (ex. ex.) 640.

18. Where a testator devised to his son *J. S.* (being his heir) copyhold estate, there being no custom of entail, in the terms "to *J. S.* his heirs, and assigns for ever; but if it should happen that he should die without leaving any child or children," then over to natural children of the testator; held, that a fee simple conditional passed thereby to *J. S.*, and having merged in the possibility of reverter, which descended on him as heir of the deviser, he became seized of a fee simple absolute. *Doe v. Simpson*, 4 Bing. N. S. (c. r.) 333.

19. The direction in *Davies dem.*, *Lowndes ten.*, 1 Bing. N. S. 620, on bill of exceptions, held wrong, and a *venire de novo* awarded; 4 Bing. N. S. (c. r.) 478.

20. Where a party, interested only as tenant for life, contracted to sell the estate in fee, held, that the purchaser having no devisable interest at the date of his will, the subsequent acquirement of the fee by the vendor's conveyance to the purchaser did not enure to make the fee pass by the devise. *Duckle v. Baines*, 8 Sim. (ch.) 525.

21. Devise of "all my money, securities for money, goods, chattels, and estate and effects of what nature or kind soever, and wheresoever the same may or shall be at the time of my death;" held, that all the other words of the clause applying exclusively to personal property, and including every species of it, the word *estate* was to be held



to apply to any other property the testator was possessed of, and to pass real estate. *Doe v. Evans*, 1 Perr. & Dav. (q. s.) 472.

22. Upon a devise of leasehold and copyhold for life, and afterwards to be sold and divided into five parts one to be paid to each of the testator's four sons living at the decease of the tenant for life, "and in case of either of their deaths, his share to be paid to his issue, and in case either should die without issue, his share to be divided amongst the surviving children;" one of the sons died in the testator's lifetime, leaving a child, and held entitled to such share as the parent would have been entitled to if he had survived the tenant for life. *Le Jeune v. Le Jeune*, 2 Keene, (ch.) 701.

23. Devise in trust to permit and suffer the testator's widow to receive the *net* rents and profits, subject nevertheless to certain charges; held, that such word being only contradistinguishable from *gross* rents, and implying that the trustees were first to pay land-tax, and any other charges on the estate, and then hand over the net rents to the tenant for life, they took the legal estate: so, wherever the meaning of the testator appears to be that the trustees are in any way to interfere in the execution of the trusts, and certain duties are cast upon them, they take the legal estate, whatever words may be used. *Barker v. Greenwood*, 4 Mees. & W. (xx.) 421.

24. Upon a devise of estates charged to A. for life, remainder to B. for life, and the testator directed that if A. did not, within 18 months after he should come into possession of certain other property, sell the same, and pay off the charges on the devised estates, that the devise to him should cease and determine as if he were dead: A., upon coming into possession of the latter estates, failed to comply with the direction, and under an arrangement with B., incurred the forfeiture, B. undertaking to re-grant the devised estates to him during their joint lives, at a stated rent: by the will of the mother of A. and B., she gave certain interests to B. and his sisters, but that on either of them coming into possession of the first devised estates, such interest should cease: held, that B. was to be deemed in possession of them within the meaning of the condition of his mother's will, and had forfeited the interest given him thereby. *Wynne v. Wynne*, 2 Keene, (ch.) 778.

25. Devise of two houses to testator's wife for life, remainder to all and every his children, equally to be divided between them in tail, and he afterwards, without words of limitation, gave to one daughter one house, and the other house to the other; held, that the effect was to give to each daughter, subject to the life estate of the widow, an estate for life, in severalty, with remainder in both to the two, as tenants in common in tail. *Doe d. Amlot v. Davies*, 4 Mees. & W. (xx.) 599.

26. On a direct devise of real and personal estate to the plaintiff (a *feme covert*) for life, for her independent use and benefit, and afterwards to her husband for life, remainder to the use of the heirs of the body of the wife in tail, with remainders over, and declaration that all the limitations were intended to be in strict settlement, with ultimate

remainders to the testator's right heirs: held, that subject to the prior estate for life, the wife was entitled to an estate tail in the real estate, and an absolute interest in the personality. *Douglas v. Congreve*, 1 Beav. (ch.) 59.

27. On a devise, after estates for lives, to testator's nieces, "equally between them to take as joint tenants, and their several and respective heirs and assigns, for ever;" held, that they took as tenants in common in fee, subject to an estate for their joint lives and the life of the survivor. *Doe d. Littlewood v. Green*, 4 Mees. & W. (xx.) 229.

28. Devise to testator's widow for life, remainder to trustees, to divide the rents, &c. amongst all his brothers and sisters who should be living at the time of her death, "*and to their issue, male and female*," and after the respective deaths of his brothers and sisters, for ever, to be divided equally between them; held, that those words were to be construed as words of limitation, and not of purchase, and that the children of a sister dying in the lifetime of the widow, took no interest in the testator's estate. *Tate v. Clarke*, 1 Beav. (ch.) 104.

29. Upon a devise for lives, remainder to the second son of J. K. in fee; at the date of the will, J. K. had had three sons, but J., the third, only was living, two other sons were born after the date of the will, one only of whom survived the testatrix; and held, that the will was to be construed according to the state of circumstances at the time of the testatrix's death, and that J. was therefore entitled. *King v. Bennett*, 3 Mees. & W. (xx.) 89.

And see *Lomax v. Holmeden*, 1 Ves., sen. 294.

30. Devise of lands to A. for life, and after her death to be sold by her executors in trust, &c.; held to give them a power only. *Doe v. Shotton*, 1 Perr. & Dav. (q. s.) 124.

31. The construction of the devise in the case of *Cursbam v. Newland*, (2 Bing. N. S. 58; 2 Sc. 105; and An. Dig. 1835, 75,) confirmed in the Exchequer, 4 Mees. & W. (xx.) 101.

And see *Charity; Condition; Estate; Foreign States; Heir; Intrusion; Legacy; Limitation; Power; Remainder; Trustee; Waste; Will*.

## DISCLAIMER.

1. Where a party, in entire ignorance of his legal right, and on a representation of a state of things which there was reason to believe was known to be very different by the party making it, renounced all right to interfere with or reserve money legally due to him; held, that his representative was not bound thereby. *M'Carthy v. Decaix*, 2 Russ. & M. (ch.) 614. (Reversing the judgment below.)

2. It is clearly established that a foreign divorce cannot dissolve an English marriage. *Id.*

3. Where a tenant from year to year, by memorandum, agreed to become the purchaser, and the landlord to let the price lie, by paying four per



cent., and a deposit was paid, but neither rent nor interest being paid, the landlord demanded the possession, when the tenant said he had bought the property and would keep it; held, that in the absence of any conveyance, and it being uncertain whether the estate would ever be transferred, the subsequent holding was not to be deemed a surrender of the interest as yearly tenant, and the holding as merely at will, and a notice to quit therefore necessary; held, also, that the declaration of the tenant being no more than an avowal that he should insist on the contract of purchase, and that he was ready to perform it, and not being inconsistent with the continuance of the yearly tenancy, did not amount to a disclaimer, so as to supersede the necessity of such notice. *Doe d. Gray v. Stanion*, 1 Mees. & W. (ex.) 695; and 1 Tyr. & Gr. 1065.

4. Where the defendants, having paid rent to the lessors of the plaintiff (as executors of the original former landlord), before the day laid in the demise, attorned to another; held a sufficient disclaimer, and that an admission of such attornment made after the action brought was sufficient evidence of disclaimer, as against them. *Doe d. Ince v. Letherlin*, 6 Nev. & M. (x. s.) 313; and 4 Ad. & Ell. 784.

5. In a suit against trustees by a party entitled to the fund, in which had been joined parties who had once given notice to the trustees not to part with it, who by their answer simply stated that they did not now, nor ever had claimed; held, upon exceptions, that not having answered the allegations by which the plaintiff supported his title and sought to fix the defendants with costs, it was insufficient. *Graham v. Coape*, 3 Myl. & Cr. (ch.) 636.

And see *Baron and Feme*.

#### DISCONTINUANCE.

1. Where a plaintiff has been incorrectly joined, it must be shown that the mistake did not arise from negligence, but was induced by the defendant's conduct leading to a belief that the party had entered into the contract with both. *Poensgen v. Chanter*, 6 Sc. (c. p.) 300.

2. After plea of bankruptcy and certificate, *puis darr. cont.*, the defendant cannot force the plaintiff to reply, but the latter is entitled to discontinue, without payment of costs. *Wollen v. Smith*, 1 Perr. & Dav. (q. s.) 374.

And see *Bankrupt; Costs*.

#### DISCOVERY.

1. A bill of discovery cannot be maintained in aid of an action for a mere personal *tort*, demurrer therefrom allowed where the whole object was to obtain a discovery of the fact, that by the order of the defendant the plaintiff was illegally assaulted and imprisoned. *Glynn v. Houstoun*, 1 K. ch.) 329.

2. The protection of a defendant from the production of statements for the opinion of counsel, held to extend not exclusively with reference to the defendant's proceedings against the plaintiff, but with reference to them in connection with proceedings contemplated against other parties; but not to letters addressed to the defendant personally, with whom it did not appear that he stood in any confidential relation whatever. *Storey v. Lennox*, Lord G., 1 K. (ch.) 341; and affirmed, 1 Myl. & Cr. 525.

3. Where the answer to a bill of discovery, in aid of an action at law, and for inspection of papers, &c., in effect admitted that the paper described related to the subject-matter of the bill, and were in the defendant's possession, but went on to allege a belief that other suits were about to be instituted, and that the producing such documents or permitting the plaintiffs to inspect them, *might* disclose the names of witnesses intended to be examined, and evidence intended to be examined in the action pending between the plaintiff and defendant and in the other actions and in the *present suit*; held, that such admission was sufficient, as under the ordinary rule, to entitle the plaintiff to inspect, and that the possible effect of the discovery was not a sufficient ground for withholding it. *Storey v. Lennox*, 1 Myl. & Cr. (ch.) 525.

4. *Quere*, if the protection of producing papers, on the ground of professional confidence, can arise from the fact of their having come into existence after litigation was contemplated. The court afterwards suspended the execution of the order pending an appeal to the House of Lords, which would be rendered useless, if the order were executed, and the effect being a delay of the party himself; but the court would impose conditions of the order, to prevent the delay occasioning irreparable loss. *Storey v. Lennox*, 1 Myl. & Cr. (ch.) 685.

5. Upon a bill for discovery, whether an I. O. U. was given for money lent for the purpose of gaming; held, that the defendant was bound to answer whether it was so lent; and *quere*, if such an instrument be a security within the 9 Anne, c. 14, and whether money lent for such purpose is recoverable at law. *Wilkinson v. L'Eaugier*, 2 Younge (ex. xq.) 366.

6. A bill not good for equitable relief is not good for discovery in aid of the defence to an action at law. *Jones v. Maund*, 3 Younge & C. (ex. xq.) 347.

7. Upon an agreement for the purchase of a secret in a manufacturing process, which was not to be divulged, and bill to be relieved from the contract, alleging fraud, and that defendant possessed no such secret; the defendant having demurred to such interrogatories as sought a discovery of the secret, and answered as to the remainder of the bill, denying fraud, and asserting the existence of the secret; held, that he was bound to discover the nature of it. *Carter v. Goetze*, 2 Keene, (ch.) 581.

8. Where statements in the answer to a bill of discovery are suspicious as to parts not disclosed, and inconsistent with each other, the court will



adopt that which is most favorable to the plaintiff, and where the parts disclosed contradict the answer as to other parts, it will order an inspection of the latter. *Bowen v. Firnie*, 3 Myl. & Cr. (Ch.) 632.

9. Where C., the customer of the plaintiffs, in the country, accepted in payment for goods a bill payable at E. & Co.'s, bankers in town, who were agents of the defendant's bankers in the country, and he had deposited a bill with them, and a note directing them to advise the plaintiff's bill due at the bankers in town, which they omitted to do, and they received the proceeds, and applied it to their account, and the acceptance of C. was dishonored, and he subsequently became bankrupt: the plaintiffs having brought an action against the defendants for the amount so directed by C. to meet his acceptance, but C. dying, the plaintiffs were unable to proceed to trial, and the defendants were about to take the cause down by proviso: held, that it being a proper question to try whether the action was maintainable or not, the plaintiffs were entitled to sustain a bill for a discovery, and to stay the proceedings in the action; and upon such a bill, unless the case is very clear, the court will not decide upon the legal rights of the party seeking the discovery. *Thomas v. Tyler*, 3 Younge & C. (x.) 255.

And see *Attorney; Evidence; Patent*.

### DISTRESS.

1. Where a party seised in fee granted a lease to B. for 61 years, and afterwards granted a lease in reversion, to commence at the expiration of the first lease; held, that he did not thereby part with his reversion, so as to preclude his right of distraining for rent under the first lease. *Smith v. Day*, 2 Mees. & W. (x.) 684.

2. Where the notice of distress for paving rates stated the amount and cause of distress truly, but misrecited the Local Act under which made, and an action having been brought was afterwards discontinued; held, that the plaintiff was not precluded from saying that he was really acting under the statute authorizing the distress, and was therefore entitled to treble costs. *Debney v. Corbet*, 5 Dowl. (r. c.) 704.

3. In case for an irregular distress, held, that the landlord not personally interfering, is not liable for the omission of the broker to give a copy of his charges under 57 Geo. 3, c. 93, s. 6. *Hart v. Leach*, 1 Mees. & W. (x.) 560; and 1 Tyr. & Gr. 1010.

4. Where, in case for an excessive distress, the defendant pleaded that the whole sum distrained for was due and in arrear, held, that he was not precluded from taking into the account arrears of rent antecedent to a prior distress, although the notice under such prior distress stated it to be for rent due up to a certain period, and the notice under the latter distress stated it to be for rent accrued since the former distress. *Gambrell v. Falmouth*, Earl of, 4 Ad. & Ell. (x. s.) 73.

5. In case for not leaving the overplus, after sale of distress, in the hands of the sheriff, held

that upon the 2 W. & M. c. 5, s. 2, the overplus was to be taken to mean after satisfying the rent and the reasonable charges of the distress, and that in such action the plaintiff might raise the question of the reasonableness of such charges, whether accepting the balance and giving a receipt by the tenant to the broker, is to be taken as a satisfaction, is for the jury, and whether or not an admission that such was the real balance. *Lyon v. Tomkies*, 1 Mees. & W. (x.) 603; and 1 Tyr. & Gr. 810.

6. Where the landlord was sued for an irregular distress and obtained a verdict; held, that he was not precluded from double costs under 11 G. 2, c. 19, s. 21, by having pleaded specially. *Gambrell v. Earl of Falmouth*, 5 Ad. & Ell. (x. s.) 433.

7. Where the warrant of distress against an overseer for not paying over the balance in his hands, omitted to set out the summons, hearing and refusal to pay, held good, and the magistrates and officers executing it, held liable in trespass. *Harris v. Stuart and others*, 7 C. & P. (n. r.) 779; questioning the form in Burn's Justice, ed. 26.

8. Justices have jurisdiction to inquire into and adjudicate on an information for fraudulent removal, under 11 Geo. 2, c. 19, s. 4, notwithstanding the title to the premises is in dispute, and the rent has been paid to one of the claimants; and where the commitment for non-payment of the penalty adjudicated, and no sufficient distress, referred to the order for payment, which stated the value of the goods removed to have been under 50*l.*, and found the value of the goods removed to be 20*l.*; held, sufficient, and that the justices were not liable in trespass; whether the removal is *bona fide* or fraudulent, is for their determination. *Coster v. Wilson*, 3 Mees. & W. (x.) 411.

9. The collector of land-tax cannot break open a house, without the presence of a constable, to make a distress, the provision overruling the whole of sect. 17 of 38 Geo. 3, c. 5. *Foss v. Raine*, 4 Mees. & W. (x.) 419; 7 Dowl. (r. c.) 53; and 8 C. & P. (n. r.) 699.

10. Distrainers of cattle, damage feasant, are bound to provide a proper pound, and held liable for injury caused by the state of it; where the replication alleged that the pound was *then* wet, and wholly unfit, and whereby, &c., held, that the issue raised expressly its state at the time of impounding, and not whether generally sufficient. *Wilder v. Speer*, 3 Nev. & P. (q. s.) 536.

11. Where, on the expiration of the term, the tenant quitted, and the new tenant entered, but part of the old tenant's stock remained on the premises; held, that the landlord could not distrain, the mere fact of leaving the stock, unaccompanied by any claim, not showing a continuance of possession. *Taylorson v. Peterson*, 7 Ad. & Ell. (q. s.) 110; and 2 Nev. & P. 622.

12. In case for wrongfully refusing to permit the plaintiff to appraise goods distrained, a plea that the goods were taken for arrears of rent,



held an issuable plea, as going to the merits. *Sealey v. Harris*, 7 Dowl. (r. c.) 197.

13. In trespass for seizing goods for highway and poor-rates, but no notice of action given, the defendant being entitled to it under the Highway Acts; held that the action was maintainable in respect of the goods wrongfully taken for the poor-rate. *Lamont v. Southall*, 7 Dowl. (r. c.) 469.

14. Where goods were seized (under a warrant of distress, for churchrates, admitted to be irregular,) on the 27th October, but not sold until the 1st and 2d November, and the action was brought on the 30th January; held, that as the seizure was only conditional, if the amount were not paid, and the subsequent sale the real grievance, the action was in time; and where the demand of perusal and copy of the warrant required it to be within three days, although by 24 Geo. 2, c. 44, no action can be brought until after refusal of such copy, and in six days after demand, held that the right of action was not affected thereby. *Collins v. Rose*, 5 Mees. & W. (ex.) 194.

And see *Annuity*; *Agent*; *Lease*; *Replevin*; *Trespass*; *Friendly Society*.

#### DONATIO CAUSA MORTIS.

Where the obligee of a bond, five days before death, gave it to a niece and signed a memorandum amounting to an immediate and absolute assignment of it, held, that in the absence of evidence of how it came into the donee's possession and the assignment unconditional, and nothing importing its restoration if the donor should recover, it was not to be deemed a *donatio causa mortis*, and a bill praying that the donor might be declared entitled, dismissed. *Edwards v. Jones*, 7 Sim. (ex.) 325.

#### DOWER.

1. Where the tenant in a writ of dower took the lands conveyed by the assignees of a bankrupt, and which in the deed were described as freehold; held, that he was not estopped from proving them to be leasehold only. *Gaunt v. Wainman*, 3 Bing. N. S. (c. r.) 69, 3 Sc. 413.

2. Where testator devised the rents and profits of his freeholds and copyholds in trust for the maintenance of his children, until the youngest should attain 21, charged with an annuity to his widow during widowhood, and he also gave her his furniture, &c., so long as she should continue his widow; held, that she was not excluded from her dower. *Dowson v. Bell*, 1 K. (ex.) 761; *S. P. Harrison v. Harrison*, 1 K. (ex.) 765.

3. Where the husband assigned all the debts, legacies, and other the estate and interest of what kind soever he might be entitled to in right of his wife; held, that it did not pass her claim to dower out of the estate of a former husband; until the

lands to be held in dower were assigned, she had no estate therein. *Brown v. Meredith*, 2 Keene, (ex.) 527.

#### DOWNING COLLEGE.

Under the charter and statutes, a clerical fellow held not ineligible to the mastership, if otherwise qualified: and a party, intended to be a clerical fellow, having been elected in the room of one of the three originally appointed; held, that his election was good, although the period for filling up the remaining number of the fellowships by the crown, upon the completion of the buildings, &c., had not arrived. *Downing College*, in re, 2 Myl. & Cr. (ex.) 642.

#### DRAMATIC PERFORMANCE.

Dramatic performances within 20 miles of London or Westminster, and not in the latter, or the place of the crown's residence, cannot be rendered legal, and a sessions licence, under 25 Geo. 2 (which is confined to music and dancing), held not to apply to dramatic representations, and the Lord Chamberlain's licence under 10 Geo. 2, c. 28, can only be granted within the local situation and limits prescribed. *Levy v. Yates*, 3 Nev. & P. (q. n.) 249.

#### EAST INDIA DOCK DUES.

The number of voyages permitted to and from the East Indies, being by 43 Geo. 3, c. 63, s. 2, extended beyond six, the number, according to the usage of the trade, at the passing the 43d Geo. 3, c. 126, entitling the company to a return of dues in case of any ship "having completed her regular number of voyages;" held, that it applied only to the last voyage of ships taken up for more than six voyages. *East India Company v. Baker*, 3 Bing. N. S. (c. r.) 860.

#### ECCLESIASTICAL COURT.

1. No appeal lies before final sentence; where therefore a cause had been set down in the Prerogative Court for sentence on the second assignment, held, that it was not competent to either party to interpose an appeal; whatever is done after the cause is concluded and comes on for hearing, until the final judgment is pronounced, is to be deemed part of the hearing, and as one continuous act. *Barry v. Butlin*, 1 Moore (r. c.) 98.

2. In criminal suits, the party prosecuting is entitled to appeal, as well as the defendant. *Millar v. Palmer*, 1 Curt. (cons.) 550.

3. The credit of a witness cannot be impeached by articles entirely foreign to the issue and in



contradiction thereto; and such therefore rejected, and judgment affirmed on appeal. *Trevanion v. Trevanion*, 1 Curt. (ARCHES) 406. 486; and reviewing the cases.

And see *Marriage*.

### ECCLESIASTICAL PERSONS.

1. Where an offer being made for the renewal of a lease, the dean and chapter, at a meeting, agreed to accept it, and an entry was made and signed by a majority of the members, the fine to be paid by a day stated; held, that on a contract entered into with a fluctuating body, time was of the essence of the contract, and the money not being paid by the time stipulated, bill for a specific performance dismissed: held also, that such entry did not constitute an agreement binding upon the corporation. *Carter v. Dean, &c.* of Ely, 7 Sim. (CH.) 211.

2. In assumpsit by a curate against his rector for salary, &c., held, that the 57 Geo. 3, c. 99, s. 53, (giving summary jurisdiction to the bishop) was properly pleadable in bar, and not to the jurisdiction; the jurisdiction of the common law courts being entirely taken away (s. 74); and that it was not necessary to specify the nature of the disputes, but only that they existed. *West v. Turner*, 1 Nev. & P. (K. B.) 612.

And see *Parker v. Elding*, 1 East, 352; 3 T. R. 452; *Metcalfe v. Archbishop of York*, 6 Sim. 224; affirmed by Lord Chancellor, 1 Myl. & Cr. (CH.) 547.

3. The trade of a banker held, within the meaning of 57 Geo. 3, c. 99, and a plea that spiritual persons holding benefices were partners in the banking company, (the plaintiffs being the indorsers of the bill,) and the promise laid in the declaration void in law as against the statute, held good. *Hall v. Franklin*, 3 Mees. & W. (EX.) 259.

4. Contracts by banking firms to be valid, although any spiritual persons may be partners. By 1 & 2 Vict. c. 10.

5. On articles against a clergyman for brawling and disrespectful conduct towards his archdeacon, at a visitation, a part only being proved, the party punished, and condemned in ll. expenses; held also, that a visitation is not to be considered in the light of a vestry, as allowing greater latitude of expression, and that the Ecclesiastical Court has jurisdiction to protect the sanctity of the church, not only under 9 Edw. 6, c. 4, but also under the general law; held also, that letters of request from the commissary were properly addressed in the first instance to the Archdeacon, and not to that of the chancellor of the diocese. *Taylor v. Morley*, 1 Curt. (ARCHES) 470.

6. Where after satisfying a sequestration, a surplus remained, which would have been payable to the rector since deceased, and who had been discharged under the Insolvent Act; held, that the succeeding incumbent could only come

in as a creditor for any dilapidations, and that it could only be paid to the assignee. *Little Hallingbury*, in re, 1 Curt. (CONS.) 557.

7. Apportionment of spiritual duties in parishes having more than one cure; by 2 & 3 Vict., c. 30.

And see *Annuit; Lease*.

### EJECTMENT.

[A] WHERE MAINTAINABLE—CONSENT RULE—RECOGNIZANCES IN.

[B] DECLARATION—NOTICE—SERVICE OF.

[C] JUDGMENT—COSTS IN.

[A] WHERE MAINTAINABLE—CONSENT RULE—RECOGNIZANCES IN.

1. Where a lease contained a covenant for repair, and that upon notice of defects the lessor might within two months enter and do repairs, and if the expenses not paid by the lessee, that the lessor might distrain for them; there was also a power of re-entry upon any breach of covenant; the lessor afterwards gave notice that he should do certain repairs at the end of six months and charge the lessee with the expense, and upon the six months having elapsed, the lessor gave notice to the lessee that if he did not comply with certain terms within three days he should hold him to the covenants; held that upon the lessee not complying, the lessor could not maintain ejectment for the forfeiture; having elected the remedy for non-repair, the general power to re-enter did not revive by the three days' notice. *Doe d. Rutzen v. Lewis*, 5 Ad. & Ell. (K. B.) 277.

2. Where the reversion descends to coparceners, one alone cannot maintain ejectment for breach of covenant. lb.

3. Where from payments of interest on the mortgage money, the possession of the mortgagee was not adverse within twenty years before the passing of 3 & 4 Will. 4, c. 27, and the jury had found that the mortgage had not been paid; on ejectment by the heir of the mortgagee, brought within five years after the Act, held that he was not barred by s. 2. *Doe d. Jones v. Williams*, 5 Ad. & Ell. (K. B.) 291.

4. In ejectment by mortgagor against the widow of the mortgagee who died in possession of the premises, which were copyhold, the only evidence of the title of the plaintiff being by a common conveyance of lease and release, and there had been no surrender; held, that having an equitable interest only, he could not maintain the action of ejectment. *Doe v. Webber*, 3 Eng. N. S. (C. F.) 922.

5. Where the premises had been purchased by F. in the defendant's name, and who had been let in to defend under the common consent



rule, but who, it was sworn and not denied, was a pauper; held, that the court had power to interfere if it appeared that the consent rule had been the means of committing a fraud, and that the lessors of plaintiff were not prevented by it from applying to the court by an order for delivery of a particular of the breaches for which the forfeiture was incurred, with a stay of proceedings; but that it being positively sworn that F. was really acting on the behalf and as agent for the defendant, it could not compel him to be a party to the consent rule. *Doe v. Jordan*, 4 Sc. (c. r.) 370.

6. As the rule for bail in ejectment can only be made on production of the agreement or counterpart thereof, unless the instrument be properly stamped at the time, the foundation of the rule fails, and it is not enough that it is stamped before cause shown. *Doe d. Caulfield v. Roe*, 3 Bing. N. S. (c. r.) 329; and 5 Dowl. (r. c.) 365.

7. On an application under 1 Geo. 4, c. 87, it is immaterial that the lessor of the plaintiff was original lessee, and the defendant his sub-lessee. *Doe d. Watts v. Roe*, 5 Dowl. (r. c.) 213.

8. The affidavit for the rule under 1 Geo. 4, c. 87, s. 1, must state the name of the lessor in the title. *Doe d. Watson v. Roe*, 5 Dowl. (r. c.) 389.

9. Where the widow continued to occupy for above twenty years premises which her husband had enjoyed for seventeen years; held, that the heir was barred, unless the jury were satisfied that the mother occupied by permission and not adversely, and her declarations as to repairs were admissible to show that her possession was not adverse; held, also, that the father dying seized, his occupation of an encroachment would not prevent the descent to his heir. *Doe v. Jauncey*, 8 C. & P. (n. r.) 99.

10. Where the directors of a company, before they were enabled to sell or demise lands conveyed to them, granted a lease with power of re-entry on breaches of covenant, and afterwards by an Act the company was incorporated, and all contracts previously entered into were declared valid and effectual as if entered into with the incorporated company; held, that they might support ejectment on such clause of re-entry. *Doe v. Knebell*, 2 M. & Rob. (n. r.) 66.

11. In ejectment for an undivided sixth of premises taken by some of the defendants, and converted into a railway, the latter, with the other tenants in common, having entered into the consent-rule, and defended as landlords; held, that they were not thereby precluded from showing a sub-tenancy in others not properly determined, as showing want of legal title to the possession in the lessor of the plaintiff; and *semb.*, the purposes to which the land had been converted by the company effectually excluding the co-tenants, would amount to an actual ouster. *Doe v. Horn and others*, 3 Mees. & W. (ex.) 333.

12. A mere tenant at sufferance being turned

out of possession by his landlord, having no interest in the land, cannot maintain ejectment, although he may trespass. *Doe v. Murrell*, 8 C. & P. (n. r.) 135.

13. Where the tenancy is only established by payment of rent, and no demise is shown, or that the defendant was let into possession by the plaintiff, it is competent to the defendant to explain the payment, and show on whose behalf it was received. *Doe v. Francis*, 2 M. & Rob. (n. r.) 57.

14. On argument of cross bills of exceptions, held that where a party had not been heard of for seven years, no rule could be laid down that the death should be presumed to have taken place on the last day of the seven years; held also, that since 3 & 4 Will. 4, the doctrine of adverse possession, except in cases falling within s. 15, and of non-adverse possession, is done away with: the court deciding the direction of the Judge at the trial to have been correct, and the verdict wrongly entered for the lessor of plaintiff, a *verdict de novo* awarded. *Doe d. Wright v. Nepean*, 3 Mees. & W. (ex.) 804. S. C. 5 B. & Ad. 86; 2 Nev. & M. 219. An. Dig. 1834.

15. Where the lessor had demised mining premises, &c. to a company, of which he was also a partner, and who had paid rent to him; held, that the company were estopped from disputing his title, although in an answer to a bill in Chancery, which was in evidence, he had admitted that he had no legal title; and that his being a partner was no objection to his maintaining the ejectment. *Francis v. Doe*, 4 Mees. & W. (ex. c.) 331.

16. Where the jury found that the father of the lessor of plaintiff, his son and heir, had been in possession for upwards of 20 years before his death, as tenant at will to the grandfather of the lessor of plaintiff; held, that no right descended, under 3 & 4 Will. 4, c. 27, s. 27, upon the heir to enable him to maintain ejectment even against a stranger. *Doe v. Thompson*, 2 Nev. & P. (q. n.) 656.

And see S. C. 1 Nev. & P. 215.

17. Where two parties, H. and W., occupied a cottage divided, from 1808 till 1821 (as servants of C., and without paying any rent), a year or two before whose death H. having taken L. to live with him, by will devised the moiety occupied by him to W., and L. after the death of H. continued in possession: upon ejectment by W., the defendants coming in to defend as landlords of L., held, that as L. came in under H., who might have maintained ejectment against him, W., who claimed under H., had a sufficient *prima facie* title, and that as the defendants came in to defend L.'s possession, the latter was not a competent witness to dispute the title either of H. or W. *Doe v. Birchmore*, 1 Ferr. & Dav. (q. n.) 448.

18. To a bill to restrain an ejectment the tenant



must be made a party, except where the landlord has been admitted to defend the action. *Poole v. Marsh*, 8 Sim. (ch.) 528.

19. Where, on a former ejectment by the defendant against the plaintiff, who had become tenant under a party tenant in tail, and since deceased, the latter failed in his defence, being held estopped from contesting the title of his landlord, and he afterwards brought an ejectment to recover a different part of the estate, but held under the same title; held, that it was within the rule that the costs of the former ejectment must be first paid before proceeding with his own cause. *Doe v. Shadwell*, 7 Dowl. (r. c.) 527.

20. Where the attorney for the tenant was also the attesting witness to the lease, held that he might be compelled to make the affidavit necessary to found the application for the landlord's rule under 1 Geo. 4, c. 87, s. 1. *Doe d. Avery v. Roe*, 6 Dowl. (r. c.) 519.

And see *Award; Landlord and Tenant; Limitations Stat. of; Mortgage*.

#### [B] DECLARATION—NOTICE—SERVICE OF.

1. Where the declaration was by mistake of a term in the wrong year of the King, but the notice right, held sufficient. *Doe d. Phillips v. Roe*, 4 So. (c. r.) 359.

2. Upon a declaration containing joint and several demises, on motion for judgment as on the several demise of all the lessors, it is sufficient if the names of all are in the title, without showing which are joint and which several. *Doe d. Barles v. Roe*, 5 Dowl. (r. c.) 447.

3. The Court allowed the names of certain lessors to be struck out, the tenants appearing to claim under them, and the action brought to protect their interests against the other lessors, although alleged to be merely trustees, and indemnity offered. *Doe v. Clifton*, 4 Ad. & Ell. (κ. s.) 809.

4. Declaration, entitled 6 Will. 4, instead of 7 Will. 4, held irregular. *Doe d. Gowland v. Roe*, 5 Dowl. (r. c.) 273.

5. But where intitled 8th, instead of 7th, and the tenant must be aware from the date of the notice, and could not be misled, the rule granted. *Doe d. Wills v. Roe*, 1b. 330.

6. In ejectment on demises of A. and B, the plaintiff having tendered evidence in support of the title of both, and the defendant having also offered evidence admissible only against the title of one; held, that the plaintiff might abandon that demise, and that such evidence was not admissible to impeach the title of the other. *Doe v. Wainwright*, 5 Ad. & Ell. (κ. s.) 520.

7. The title of the declaration is considered immaterial, and a mistake is immaterial if it conveys sufficient information to the tenant. *Doe d. Evans v. Roe*, 5 Dowl. (r. c.) 508.

8. Where the declaration was regular but had

two notices annexed, one to appear and the other to enter into recognizances, pursuant to the statute; held, that the latter might be treated as surplusage. *Doe d. Roberts v. Roe*, 5 Dowl. (r. c.) 508.

9. Where the notice required the defendant to appear, by mistake, in Easter Term, instead of Trinity Term, but the tenant could not mistake; held sufficient for a rule nisi. *Doe d. Watts v. Roe*, 5 Dowl. (r. c.) 149.

10. Notice to appear in "next Easter Term," the affidavit showing that the explanation to the tenant was to require him to appear in Trinity; held sufficient for a rule nisi. *Doe d. Symes v. Roe*, 5 Dowl. (r. c.) 667.

11. A mistake in the name of one tenant does not affect the validity of the service on another. *Doe d. Messer v. Roe*, 5 Dowl. (r. c.) 716.

12. The affidavit must swear to the service on the tenant, and mere facts tending to show the party to be such is insufficient. *Doe d. Jones v. Roe*, 5 Dowl. (r. c.) 226.

13. Service on a party in possession admitting his name to be that of the tenant, although he denied that he was so, held sufficient. *Doe d. Hunter v. Roe*, 5 Dowl. (r. c.) 553.

14. In ejectment against overseers in possession, service on one held insufficient to found a judgment against all. *Doe d. Weeks v. Roe*, 5 Dowl. (r. c.) 405.

15. Service on one being a surviving joint-tenant, held to entitle to judgment against him only. *Doe d. Hewson v. Roe*, 5 Dowl. (r. c.) 434.

16. Where there were two tenants, service of the declaration directed to one on the wife of the other, on the premises, held insufficient. *Doe d. Smith v. Roe*, 5 Dowl. (r. c.) 254.

17. Where the affidavits stated that the deponent had "delivered the declaration to the wife on the premises," instead of served, held sufficient. *Doe d. Jenkins v. Roe*, 5 Dowl. (r. c.) 155.

18. Service by delivery to a servant of the tenant in possession, left in the care of the premises, held insufficient, the affidavit not going on to show that the servant had authority to receive papers. *Doe d. Read v. Roe*, 1 Mees. & W. (ex.) 633; 1 Tyr. & Gr. 846; and 5 Dowl. (r. c.) 85.

19. Service on a servant of the tenant on the premises, without any acknowledgment of his having received it before the term, held insufficient even for a rule nisi. *Doe d. Lord Dinorben v. Roe*, 2 Mees. & W. (ex.) 374.

20. Service on part of the premises on the clerk of an incorporated company, held sufficient for a rule nisi, although not empowered to be sued by their clerk. *Doe d. Ross v. Roe*, 5 Dowl. (r. c.) 147.

21. Where the service had been by putting under the door, the tenant shutting himself in and refusing to open the door, held sufficient for a rule nisi. *Doe d. Lord Summers v. Roe*, 5 Dowl. (r. c.) 552.

22. So, where the tenant was abroad, and it



was uncertain when he would return, service on a servant on the premises held sufficient for a rule nisi. Doe d. Mather v. Roe, 5 Dowl. (r. c.) 552.

23. The acknowledgment by the tenant of the declaration having come to his hands after the commencement of the term, is not sufficient for a rule nisi; nor of the wife having received it the day before. Doe d. Finch v. Roe, 5 Dowl. (r. c.) 225.

24. Where the service was only sworn to be on the person last in possession, held insufficient. Doe d. Parker, 5 Dowl. (r. c.) 720.

25. Where the service is quite regular, no application should be made to the court. Doe d. Welchon v. Roe, 5 Dowl. (r. c.) 271.

26. It is no objection that no attorney's name is introduced into the declaration. Doe d. Simpson v. Roe, 6 Dowl. (r. c.) 469.

27. Where the lands were stated in the declaration only as "in the county of S." held sufficient; Littledale, J. dub. Doe v. Gunning, 2 Nev. & P. (x. s.) 260.

28. Where the notice at the foot was to appear in the King's Bench, which it was at the time of serving the declaration; held, that it was not affected by the demise of the crown, by which it became the Queen's Bench. Doe d. Davies v. Roe, 6 Dowl. (r. c.) 36.

29. In ejectment, the plea, with the consent-rule, to be delivered in like manner as other pleas, the defendant's appearance being first entered. Reg. Gen. 3 Nev. & P. (q. s.); 2 & 4 Bing. N. S. (c. r.) 365.

30. Where the day on which the service was made, was by 1 Will. 4, c. 3, s. 3, part of Easter Term; held, not sufficient to entitle the plaintiff to judgment against the casual ejector as of that term. Doe d. Frodsham v. Roe, 6 Dowl. (r. c.) 479.

31. Where in a case of four tenants, lessees of adjoining houses, service had been on three personally, but the fourth having left the premises, the service was by affixing to the door, the court granted the rule nisi for judgment against the casual ejector to be served in the same way, although the landlord might have proceeded as on a vacant possession. Doe d. Hindle v. Roe, 3 Mees. & W. (xx.) 279; and 6 Dowl. (r. c.) 393.

32. Where there were several tenants, and each was rightly named in his own notice, but there were slight mistakes in the copies served on the others; it being sworn that the same persons were referred to, held sufficient. Doe d. Peach v. Roe, 6 Dowl. (r. c.) 62.

33. Service on one of several joint-tenants held sufficient. Doe d. Clothier v. Roe, 6 Dowl. (r. c.) 291.

34. Service on a servant of the tenant in possession of a close, who on a second attempt to serve it at the residence, gave contradictory answers, held sufficient for a rule nisi, and afterwards made absolute on service of the rule on the same party in the yard of the dwelling-house

adjoining the close. Doe d. Wright v. Roe, 6 Dowl. (r. c.) 456.

35. So service on the wife, at the dwelling-house of the tenant in possession of stables. Doe d. Graeff v. Roe, 6 Dowl. (r. c.) 456.

36. Service on the messenger in possession of the premises, and on the official assignee, the tenant being bankrupt, held sufficient. Doe d. Baring v. Roe, 6 Dowl. (r. c.) 456.

37. Service on the wife, where not on the premises, nor shown to be living with her husband, held insufficient. Doe d. Mingay v. Roe, 6 Dowl. (r. c.) 182.

38. Service on the daughter, the tenant being in a lunatic asylum, held insufficient. Doe d. Brown v. Roe, 6 Dowl. (r. c.) 270.

39. The affidavit for calling on the tenant to enter into the recognizance, &c. under 1 Geo. 4, c. 87, must allege that a regular notice to quit has been given. Doe v. Boast, 7 Dowl. (r. c.) 487.

40. Where the affidavit of service was entitled, "Doe on the demise of C.", there being several demises, held bad. Doe d. Cousins v. Roe, 4 Mees. & W. (xx.) 68; and 7 Dowl. (r. c.) 53.

41. Where the notice served required the defendant, according to the statute, to appear in Trinity Term then next following, and not on the first day of the term, held bad, and that the statute puts the course of notices under 1 Geo. 4, c. 87, s. 1, on the same footing: *semble*, if the agreement annexed were not duly stamped at the time, there would be no sufficient materials to ground the motion. Doe d. Holder v. Rushworth, 4 Mees. & W. (xx.) 75; and 6 Dowl. (r. c.) 712.

42. Where it was sworn that, believing the party at home, the party serving got up to a window and read and affixed the copy on the door, and it was sworn that the tenant was keeping out of the way to avoid service, a rule nisi granted. Doe d. Colson v. Roe, 6 Dowl. (r. c.) 765.

43. In ejectment, to recover possession of a dissenting chapel, service on the surviving lessees and the sextoness, held sufficient. Doe d. Kirschner v. Roe, 7 Dowl. (r. c.) 97.

44. So, where the tenant in possession was abroad, service on the party who had the keys of the chapel, or the wife of the tenant and his servant, a rule absolute for judgment in the first instance. Doe d. Dickins v. Roe, 7 Dowl. (r. c.) 121.

45. In order to make service on the son good, it must be shown that he resides with his father. Doe d. Emerson v. Roe, 6 Dowl. (r. c.) 736.

46. But where served on the son on the premises, and he afterwards stated that his father had received, rule nisi granted. Doe d. Timmins v. Roe, lb. 765.

47. Service on the wife at the dwelling of the tenant (not the premises in question), if it appear that she is living with her husband at the time, is sufficient. Doe d. Boulott v. Roe, 7 Dowl. (r. c.) 463.



48. Where, after service on the daughter of the tenant, at his residence, he afterwards called on the attorney and said the time was coming when something must be done; held sufficient for the rule for judgment. *Doe d. Agar v. Roe*, 6 Dowl. (r. c.) 624.

49. Where the affidavit only stated that the deponent personally served A. B., &c., the tenants in possession, and not that each was personally served, held insufficient. *Doe d. Levi v. Roe*, 7 Dowl. (r. c.) 102.

50. Personal service on the tenant, although residing abroad, held sufficient. *Doe v. Woodroffe*, 7 Dowl. (r. c.) 494.

### [C] JUDGMENT—COSTS IN.

1. Where the declaration contained counts on two demises, on the first of which found for the plaintiff, the plaintiff, with leave, took out immediate execution; held, that he was not thereby precluded from moving to enter a verdict on the second count, for which liberty had been given. *Doe d. Bank of England v. Chambers*, 4 Ad. & Ell. (x. s.) 410.

2. No appearance need be entered for the casual ejector previous to signing judgment by default against him, and the costs of doing so will not be allowed. *Doe d. Morgan v. Roe*, 2 Mees. & W. (xx.) 423; and 5 Dowl. (r. c.) 605.

3. In a country cause, no application need be made to sign judgment in a term subsequent to that in which the tenant is required to appear. *Doe d. Wiggs v. Roe*, 5 Dowl. (r. c.) 662.

4. Where the lessor of plaintiff had been non-suited for want of defendant's appearing at the trial to confess, &c.; held, that a mortgagee of the defendant, an insolvent, not having come in to defend the action, could not oppose the plaintiff's application to issue execution. *Doe d. Marquis of Westminster v. Suffield*, 5 Dowl. (r. c.) 660.

5. Where after two verdicts obtained in ejectment by the father of the lessor, but in a third action the defendants succeeded upon the same title and taxed the costs, which had never been demanded nor paid, and the son, after his father's death, commenced another action against the same defendants; held, that they were within the ordinary rule, and entitled to a stay of proceedings until the former costs were paid. *Doe d. Rees v. Thomas*, 4 Ad. & Ell. (x. s.) 348.

6. Where no cause is shown against making a rule nisi absolute, the affidavit of service on a person at the dwelling-house, who afterwards stated that it had been delivered, must go on to allege that the deponent believes such statement to be true. *Doe d. Hungate v. Roe*, 4 Ad. & Ell. (x. s.) 83, n.

7. Where the defendant never appeared, but the tenant obtained an order for a particular of the premises sought to be recovered, and also an order made by consent that the defendant should have ten days' time to plead after its delivery,

pleading issuable, &c., but no steps were taken by the plaintiff for above four terms; held, that the defendant was nevertheless entitled to a term's notice of any step being taken, and judgment having been signed without, it was irregular. *Doe d. Vernon v. Roe*, 2 Nev. & P. (x. s.) 237.

8. Where the lessor of plaintiff, a mortgagee, suffered more than a year to elapse after obtaining judgment, and a writ of possession was sued out without any *sci. fa.*, under which the sheriff gave possession, but the writ was afterwards set aside, although no order made for restoring the premises; although the court could not award a writ of restitution, yet held that it might mould the rule so as to give restitution: *semble*, a party who has recovered in ejectment cannot, without the authority of the court, by his own act, enter upon and retain possession of the lands recovered. *Doe Lord*, 6 Dowl. (r. c.) 256.

9. In a country ejectment, notice being to appear in one term, the application for judgment may be made in the next, without a rule nisi. *Doe d. Croone v. Roe*, 6 Dowl. (r. c.) 270.

10. Rule nisi granted, under circumstances, for judgment against the casual ejector after the first four days of term. *Doe d. Davies v. Roe*, 6 Dowl. (r. c.) 461.

11. Motion for judgment against the casual ejector may be made on any day during term. *Reg. Gen.* 4 Bing. N. S. (c. r.) 366.

12. Judgment against the casual ejector allowed, although the declaration entitled of a term not arrived, the notice as to the time to appear being right. *Doe d. Crooks v. Roe*, 6 Dowl. (r. c.) 184.

13. Where the affidavit for judgment against the casual ejector stated the reading over the declaration at the time of serving, but omitted to say that it had been explained, held insufficient. *Doe d. Warde v. Roe*, 6 Dowl. (r. c.) 51.

14. On an application under 1 Geo. 4, c. 87, for the landlord's rule, it is not indispensable that the attesting witness to the lease should make the affidavit of execution. *Doe d. Gowland v. Roe*, 6 Dowl. (r. c.) 35.

15. Refused, where the declaration was dated of a term not arrived, nor any date to the notice, notwithstanding personal service on the tenant. *Doe d. Giles v. Roe*, 7 Dowl. (r. c.) 579.

16. Judgment against the casual ejector allowed to be signed, upon terms, although not moved for within the proper time. *Doe d. Beavan v. Roe*, 5 Sc. (c. r.) 618.

17. Where the premises, underlet to tenants, were found unoccupied only recently before the application, and the inquiry had been made only as to the lessee, and the declaration left with his servant, not on the premises, the Court refused to give judgment. *Doe d. Burrows v. Roe*, 7 Dowl. (r. c.) 326.

18. Rule for judgment against the casual ejector allowed, although in the notice served on two of the tenants the Christian name of one of the other tenants was omitted. *Doe d. — v. Roe*, 6 Dowl. (r. c.) 629.

19. So, where all the tenants had been personally



served, held immaterial that in the notices two of them were named "Mrs. M., Mrs. G." *Doe d. Smith v. Roe*, 6 Dowl. (r. c.) 629.

20. In a country ejectment, served before the assign day of the term, in which the tenant was required to appear, held that the lessor of plaintiff was entitled to move for judgment in the following term. *Doe d. Barth v. Roe*, 4 Bing. N. S. (c. r.) 675; and 6 Sc. 443.

### ELECTION:

1. Where the intention to dispose was clearly expressed, and no ambiguity in the expressions used; held, that extrinsic evidence to show that the party bequeathed property as her own which did not belong to her, and intended to leave a considerable residue for charitable purposes, which by reason of the mistake turned out much less than she intended, was properly rejected, and that such circumstances would not raise a case of election. *Clementson v. Gandy*, 1 K. (cm.) 309.

2. Where a testatrix gave a legacy to B., in satisfaction of all claims upon the estate, he having at the time a claim upon the testatrix in respect of a legacy under the will of C.; held, that evidence of there being no other claim by B. against A. was inadmissible, and that B. was not therefore compellable to elect between the benefit under the will of A. and that of C. *Dixon v. Samson*, 2 Younge & C. (xx. xq.) 566.

And see *Baron and Feme*.

### ELECTION OF MEMBERS OF PARLIAMENT.

1. In debt for the costs of a frivolous petition against the return under 9 Geo. 4, c. 22, s. 63; held, that the omission to give notice to the returning officers to attend at the bar of the house on the striking of the committee was of a matter directory only, and not essential to the legal constitution of the committee, the officers having no power of interfering in the choice of the committee; and that the petition being silent in its prayer as to any claim of redress against the returning officers on the ground of misconduct, and only incidentally complaining of impartiality and misconduct, they were not to be deemed parties to the petition, and the report therefore not void by reason of omitting to notice the charge against them; held also, that the recognizance entered into being in the prescribed form, it was sufficient that one of several petitioners entered into it in that form; and lastly, that the Speaker's certificate is conclusive as to the amount of costs for which the verdict is to be entered up. *Ranson v. Dundas*, 3 Bing. N. S. (c. r.) 123; 3 Sc. 429; and 5 Dowl. (r. c.) 207, 489.

2. The court refused to allow a suggestion of facts to be entered on the record, the Speaker's certificate having the effect of a warrant to enter

judgment; after its validity had been established, the court could not interfere by any inquiry as to preceding facts. 3 Bing. N. S. (c. r.) 180; and 3 Sc. 497.

3. And the court having only a statutory power to enter up judgment, they must strictly pursue that power, and can therefore only direct the judgment to be entered for the sum specified in the Speaker's certificate, and the award of costs of the rule for entering the judgment struck out. *Ranson v. Dundas*, 3 Bing. N. S. (c. r.) 556; 1 Sc. 429; and 5 Dowl. (r. c.) 489.

4. Where the defendant was proved to have acted as chairman of the committee of an election candidate, and a party offering his services to the committee, was afterwards at a meeting of the partisans informed that his duties were to be in regulating the supply of refreshments at the different public-houses, and he was furnished with a list and directions, and the agent arranged with the plaintiff's testatrix and others, but he could not prove that the defendant was present at such meeting, although he afterwards told the agent if he met with any difficulty to come to him; held, that to fix the defendant personally, the plaintiff was bound to prove that such agent was either employed by the defendant alone, or by the defendant and others, to give such orders, and that the defendant was not himself acting as agent for others, or that the agent was a principal jointly with the defendant and others, and that it was immaterial whether the plaintiff considered the agent as making the contract on behalf of the candidate, if he was not in fact so authorized. *Thomas v. Edwards*, 2 Mees. & W. (xx.) 215; and 1 Tyr. & Gr. 872.

5. Where the declaration for penalties under 5 & 6 Will. 4, c. 76, (Municipal Corporations) charged the offence as a corrupting the voter, and the evidence established only an offering to corrupt; held that it was for the jury to say whether it was an offer accepted or not, as in the former case the offence would have been committed, but that if not, and the voter had not made up his mind, than the offence would be a mere offer to corrupt, within the sect. 3 of the act. *Harding v. Stokes*, 2 Mees. & W. (xx.) 283.

6. In an action for bribery at an election, effected by the defendant giving a card to the voter in an outer room, which he presented to a person in an inner room, who thereupon gave him money; held to support an allegation, that the defendant gave the money, and in order to show the *scienter* that he gave cards to other persons, who also received money by the like course; it being the regular course for the sheriff to return to the Crown-office the precept annexed to the indentures; held, that an examined copy of the precept was properly received in evidence. *Webb v. Smith*, 4 Bing. N. S. (c. r.) 373.

7. Under the 2 & 3 Will. 4, c. 45, (Reform Act) to entitle a party on the register to vote, the identity of the qualification must continue; but where the voter possessed a qualification *ejusdem generis*, which he had changed since the registry, and acted *bona fide*, and under the opinion of others



conversant with law; held, that he could not be convicted of the misdemeanor. *Reg. v. Dodsworth*, 8 C. & P. (n. r.) 218.

8. Where the name of a freeman of a borough had been struck off the roll of electors for Members of Parliament by the revising barrister, not appearing to possess any corporate property; held, that *quo warranto* did not lie against him; the mere unsuccessful claim to the franchise, or possibility that it might be renewed with success, are not equivalent to that actual usurped possession which the information on a *quo warranto* supposes. *Reg. v. Pepper*, 3 Nev. & P. (q. s.) 155.

9. Where, from the default of the petitioner appearing on the day of hearing, no committee was struck for determining the merits of the petition; held, upon the construction of s. 60 of 9 Geo. 4, c. 22, that the Speaker had power to direct the costs to be taxed, and that the recognizance was forfeited; and, on default of payment, he might certify it as forfeited into the court of Queen's Bench, and that the power of the speaker to tax costs and certify into the Court of Exchequer was not confined to the cases only where there has been a determination of the merits of the petition, but in every case where a petition is presented and the recognizances entered into. *Scott*, in re, 4 Mees. & W. (xx.) 257; and 7 Dowl. (r. c.) 59.

And see *Bruyeres v. Halcomb*, 3 Ad. & Ell. 381.

10. Upon the construction of 9 Geo. 4, c. 22, s. 63, it is in the election of the party entitled to his costs under the Speaker's certificate to demand and bring his action against any one of the persons made liable by the certificate; and the power of the Speaker, being created not for the purpose of imposing, but of ascertaining, the amount of the costs by taxation of certain officers, is to receive a favorable construction and a fair intentment made in support of his jurisdiction: held, also, that the certificate is conclusive as to the amount of costs specified in it. *Fector v. Beacon*, 5 Bing. N. S. (c. r.) 302; and 7 Dowl. (r. c.) 285.

11. Jurisdiction for trial of election petitions amended by 2 & 3 Vict. c. 38.

And see *Agreement*.

#### ENCLOSURE.

1. Where the lessor of the plaintiff claimed under a conveyance from a commissioner of enclosure (not executed according to the power) and he never took possession, but the defendant on a proposal of exchange, had fenced the land and occupied it for 30 years; held, that the plaintiff could not recover, but that he was not bound to prove that the commissioner had duly qualified and complied with the requisites of the Act before executing the conveyance. *Doe d. Nanney, v. Gore*, 2 Mees. & W. (xx.) 320.

2. Where the Act provided that lands awarded

and allotted and exchanged should immediately after such allotment and exchanges made, be and remain and enure to the several allottees to the same uses, *estates*, &c., as the lands, in respect of which the allotments were made, were held by; held that an allottee became seized immediately after the allotment in point of fact was made, and not when the award was completed. *Doe v. Saunders*, 1 Nev. & P. (x. s.) 119.

3. Where the commissioners were empowered to exchange new allotments and old enclosures, so as such exchanges should be ascertained in the award, or some deed executed by the commissioners, and with the consent in writing of the proprietors; the commissioners awarded certain allotments to A. in respect of certain lands, and the lands late A's to B., but omitted to say that they were in exchange, but in the conclusion of the award expressed their approbation of the exchange between A. and B., and there was no consent in writing of A. and B. thereto; the parties remained respectively in possession from the date of the award in 1798, until the sale of the lands of A. in 1813; on a case for the opinion of the court, held, that the vendors could not, under the Act and the award, make a good title thereto. *Cox v. King*, 3 Bing. N. S. (c. r.) 795.

4. Where the Act expressly reserved the right of plaintiff to ingress and egress to and from a certain watercourse, and of cleaning it; held that it was not extinguished by the defendant having made a more circuitous road to the watercourse, according to the direction of the commissioners, and for extinction thereafter of all public roads: held, also, that a tenant of the plaintiff's land affected by the watercourse was a competent witness in an action brought by his landlord for injury to his reversion by obstructing the way. *Adeane v. Mortlock*, 5 Bing. N. S. (c. r.) 236.

And see *Highway; Mortgage*.

#### ERROR.

1. It is no ground of error that the writs of *venire facias* and *distingas* have only one panel annexed to the two writs. *Green v. Smith*, 5 Dowl. (r. c.) 174.

2. On a feigned issue to try the existence of a custom in a manor, and the jury had found for the plaintiffs, subject to the opinion of the court, which also gave judgment in his favor, whereupon the defendant brought error in the Exchequer Chamber, on the ground that the customs stated in the declaration were not legal; the writ quashed, on the ground that error did not lie on a feigned issue. *Snook v. Martocks*, 5 Ad. & Ell. (x. s.) 239; *sed quare* if the Exchequer Chamber has power to quash such writ.

3. Notice of the allowance of a writ of error precludes the charging the defendant in execution, although the grounds of error are not disclosed. *Marston v. Halls*, 2 Mees. & W. (xx.) 60; and 5 Dowl. (r. c.) 292.

4. The writ *coram vobis* is a *superseas* from the time of notice of its being sued out, and not



from that of allowance only, and the 6 Geo. 4, c. 96, s. 1, being *in pari materia* with the statute of James, does not operate to require bail on error in fact. *Levi v. Price*, 2 Mees. & W. (x.) 533; and 5 Dowl. (r. c.) 775.

5. The plea, the common joinder in error need not be signed by counsel; held also that the sheriff having returned the *venire facias* and *distringas*, it was not necessary that he should have annexed two distinct panels, but that he might annex the same panel to both writs. *Archbold v. Smith*, 1 Mees. & W. (x.) 740; and 1 Tyr. & Gr. 949.

6. The common joinder in error does not require counsel's signature. *Grant v. Smith*, 5 Dowl. (r. c.) 107.

7. Where an indictment, upon which an erroneous judgment had been given by the sessions, had been removed by writ of error; held, that the court of K. B. had no authority to pronounce a right judgment, or to remit the record to the sessions. *Bourne v. Rex*, 2 Nev. & P. (x. s.) 248.

8. The court has no power, without the consent of parties, to strike out issues of fact, in order to enable them to proceed at once in error upon the judgment on issues in law. *Carden v. General Cemetery Company*, 7 Dowl. (r. c.) 425. *S. P. Beckham v. Knight*, 7 Dowl. (r. c.) 409.

9. Judgment, on a bill of exceptions, being affirmed on error, the defendant held entitled to double costs of the bill of exceptions; and the plaintiff, in ejectment, having obtained a verdict, affirmed on error; held entitled to double costs of the writ of inquiry of mesne profits. *Francis v. Doe*, 7 Dowl. (r. c.) 523.

And see *Indictment*.

### ESCAPE.

1. In an action for an escape against the marshal, the plaintiff is bound to give a particular of the precise day of the escape if he is aware of it, and if not, to give such information as is in his power. *Davis v. Chapman*, 1 Nev. & P. (x. s.) 699.

2. Where, in an action for an escape, the marshal pleaded that the prisoner escaped without his knowledge, and to places unknown, and afterwards and before the commencement of the suit, voluntarily returned into the custody of the defendant; held insufficient, in not averring that the defendant had no such knowledge during any period of his absence, but leave to amend given. *Davis v. Chapman*, 5 Bing. N. S. (c. r.) 453; and 7 Dowl. (r. c.) 429.

And see *Arrest; Sheriff*.

### ESCHEAT.

Where an illegitimate became the purchaser of lands, which descended to his son, who died without issue and intestate; held, that the heirs of the party last seized *ex parte materna*, were not entitled, but that notwithstanding the 3 & 4 Will. 4,

c. 106, s. 2, the lands escheated to the Crown. *Doe v. Blackburn*, 1 M. & Rob. (n. r.) 547.

And see *Copyhold*.

### ESCROW.

See *Deed*.

### ESTATE.

1. Devise of real estate to the children of testator's sister, then or thereafter to be born, who should attain 21, and the issue of such as should die under that age, leaving issue, and their heirs; and if no child of his sister should attain 21, "or dying without leaving issue," or dying under that age, should not leave such issue, or such issue dying under age, then over; held, that the first limitation, creating a fee in a child who attained 21, was not cut down by the words, "or dying without leaving issue," which, being an interlineation, appeared to have been mistakenly inserted. *Lunn v. Osborne*, 7 Sim. (ch.) 56.

2. Where the testator, after several bequests to relatives, some of his own name, devised to his wife the residue in fee; and immediately before executing his will, added a clause, devising the house in which he lived, and going on, "I also entail my land to the S. male heir, so long as one shall remain" (S. being his own name); held, that the residuary bequest was not affected by the subsequent clauses, not being inconsistent; and that the clause of entail was either unintelligible or inapplicable to the specific bequest to the wife, so as to cut it down to a mere life estate. *Doe d. Spencer v. Pedley*, 1 Mees. & W. (x.) 663; and 1 Tyr. & Gr. 882.

3. Devise of all testator's messuages, lands, tenements, hereditaments, and premises, to W. L. and wife for life, and after their decease to and among such of the children of the said W. L. and wife as shall then be living, share and share alike; held, that the children took only estates for life as tenants in common, and not the fee. *Silvery v. Howard*, 1 Nev. & P. (x. s.) 346.

4. Where testator, after directing his debts to be paid out of the rents and profits of his estate, devised the rents to C. V., subject to the keeping the whole premises in repair during his life, only after his death he gave all that freehold or leasehold situate at M. unto his three nieces, to and for their own use and purpose equally; and he gave other freehold or leasehold premises, and plate, &c., and the rest and remainder of his property, be it what it might, to C. V.; held, that the nieces took only a life estate. *Doe d. Viner v. Eve*, 5 Ad. & Ell. (x. s.) 317.

5. Where testator devised to his sons A. and B. "my estates that I now occupy, with the factory thereon, except the house I now occupy, with the cottages thereon, which I give to my daughters M. and N. jointly," and after charging "the estate heretofore given to my sons," with certain payments, he subsequently gave his son A. an estate, which he held under lease, during the term; held, that the exception out of the general devise to his sons, by necessary intendment, carried the same quantity of estate as that from



which it was excepted, which being an estate in fee, the daughters took also an estate in fee in the house and cottages devised to them. *Doe v. Lawton*, 4 Bing. N. S. (c. p.) 455.

6. Devise of all the testator's real and personal estate to trustees in trust, after a life-estate to testator's wife, who died in his lifetime, to apply the rents, &c. for the maintenance of his daughter, until twenty-five, and then to her and her heirs, &c., but that if she should die without leaving lawful issue, then over to the trustees in fee as tenants in common; and he empowered the trustees to sell in fee any part of the real estate for payment of debts, &c. if his personal estate should be insufficient; held, first, that the daughter took an equitable estate tail, and that it was vested in her on the death of the deviser; secondly, that the trustees took an estate in fee simple for the purposes of the trust, and that the remainder over dependant on the preceding estate-tail, was an equitable remainder, and barred by a recovery suffered by the daughter, although under twenty-five. *Doe d. Cadogan v. Ewart*, 3 Nev. & P. (q. s.) 197. Reviewing the cases; and now as to the construction of the terms, "die without issue," and others of a like import, see 7 Will. 4 & 1 Vict. c. 26, s. 29.

7. Where after a devise of lands to M. for life, remainder to the use of the heir of the body of M. in tail, with remainders over to divers parties for life, and to the heirs of their bodies respectively in tail, the testator added, "the aforesaid limitations to be in strict settlement;" held, that M. took an estate in tail general in the real estates of the testator. *Douglas v. Congreve*, 4 Bing. N. S. (c. p.) 1; and 3 Sc. 223.

8. Devise of all testator's real and personal estate in trust, to be disposed of as the trustee should think best, for the benefit of the testator's daughter during her life, with liberty to will the same to her issue, but in case of her dying without issue, the property to go over; held, that the daughter took an estate tail in the realty, and an absolute interest in the personality. *Simmons v. Simmons*, 8 Sim. (ch.) 22.

9. Devise of estates to the wife for life, and after her decease to testator's son, to be enjoyed by him for his natural life, and that "if he should die without issue, not leaving any children," then to be sold, and the proceeds divided; held, that those words were to be taken as descriptive of dying without issue, and the devise took an estate tail. *Machell v. Weeding*, 8 Sim. (ch.) 4.

10. Possession is *prima facie* evidence of a seisin in fee, until shown that the party has a less estate. *Doe v. Penfold*, 8 C. & P. (x. p.) 536.

11. Where testator devised lands to his two daughters for life, remainder to his sister for life, remainder to M. and N. for life; and if either of them should die without leaving issue male, the whole to the survivor; but if M. should die after the testator's daughters and sisters, and before N., leaving issue male, then a moiety to the first and other sons of M., in tail male, and in default of such issue to N. for life, remainder to his first and other sons in tail male, and in default of such issue to testator's right heirs; and there was a

like limitation as to a moiety in case of N. so dying; and if both M. and N. should die without issue male, or such issue die without issue male, the estate to go over to such person as at the death of the survivor should be the testator's right heir; held, that upon the death of the testator's daughters and sister, and of M. without issue in the lifetime of the daughters, N. took an estate tail in the whole. *Franks v. Price*, 5 Bing. N. S. (c. p.) 37; and 6 Sc. 710.

And see *Crown Grant*; *Deed*; *Devise*; *Will*.

## ESTOPPEL.

See *Landlord and Tenant*.

## EVIDENCE.

- [A] LEGAL PROCEEDINGS—PUBLIC DOCUMENTS.
- [B] PRIVATE WRITINGS—DEEDS.
- [C] SECONDARY—PAROL TO EXPLAIN—HAND-WRITING—REPUTATION.
- [D] DECLARATIONS—ADMISSIONS—CONFESSIONS.

### [A] LEGAL PROCEEDINGS—PUBLIC DOCUMENTS.

1. Where a party having executed a power of appointing funds in settlement in favor of children, after the death of one, the mother and the survivors executed a voluntary conveyance in favor of children of the deceased, and subsequently conveyed the premises to a purchaser, who filed a bill to set aside the voluntary conveyance, and a bill was also filed to establish the sale, by a partner of the purchaser, alleging the consideration to have been paid in part with his money, and a suit was afterwards filed against the two latter parties to establish the conveyance, and set aside the sale as fraudulent and collusive, in which suit an issue was directed as to the *bona fides* of the sale, and payment of the consideration; held, that on the trial the depositions taken in the first suit by the purchaser were properly rejected. *Humphreys v. Pensam*, 1 Myl. & Cr. (ch.) 580.

2. On an indictment for perjury, in an affidavit in support of a petition in the Insolvent Court, and in proof of its materiality, evidence was offered of the practice of the Court; held, that a paper, purporting to be a printed copy of the rules of the Court, but not authenticated, was not admissible as proof of the practice. *Rex v. Koope*, 1 Nev. & P. (x. s.) 828.

3. Depositions of witnesses in a cause, dying, ordered to be read on the trial of an issue in the cause; and where the plaintiff dying, appointed a witness his executor, who revived the suit, his deposition ordered to be read on such trial. *Andrews v. Beauchamp*, 7 Sim. (ch.) 65.

4. Upon a question of the right of the deputy oyster meters of unloading, &c. all oysters brought within the port of London, and to have reasonable compensation; held, that a decree in equity upon the same right was admissible in evidence, without putting in the depositions, although referred to in the decree, but that when the decree had been put in, either party was entitled to read the depo-



sitions; held, also, that after the decree had been put in and part read, it was too late to object to its admissibility. *Layburn v. Crisp*, 8 C. & P. (n. p.) 397.

5. Where the copy of the provisional assignment, under 1 Geo. 4, c. 119, s. 7, was produced from the Insolvent Court, and offered in evidence under 7 Geo. 4, c. 57, s. 76; held admissible, and that it was not necessary to go on to show that the proceedings under the former Act were complete, and the prisoner discharged. *Doe v. Hardy*, 2 Nev. & P. (q. n.) 402.

6. Where on an issue as to a right of way, admitted to have been used by the public for thirty years, the defendants put in a document forty years old, drawn up at a parish meeting, called to resist the repairs then attempted to be thrown on them, stating the lane to be private property, subject to a foot and bridle-way, and signed by thirteen inhabitants, twelve of whom were dead, and the other called as a witness; held admissible evidence, although slight, of reputation; it appearing also that twenty-two years before the action, an agreement had been made between the owner of the soil and a colliery company, to allow them the use of the road, paying 5s. a year, and supplying cinders for the repair, which the parish were to spread; held, that although the acts of user, taken alone, might be evidence from which to infer a dedication, yet being all referable to the agreement, it amounted only to a licence, upon compliance with the terms imposed; *semb.* although there cannot be a conditional dedication, yet, to constitute a dedication, there must be a clear intention to dedicate. *Barracough v. Johnson*, 3 Nev. & P. (q. n.) 233.

7. Upon a question of the *locus in quo*, being parcel of, and within a manor, formerly part of the Duchy of Lancaster, a document produced from the Duchy-office, purporting to be a survey, *temp. Eliz.*, by J. N., deputy to the surveyor-general, and signed by persons described as jurors of the court of Survey, who presented the boundaries, but there was no inquisition nor commission for making it, although there appeared an order by the Queen for payment for making it; held inadmissible. *Evans v. Taylor*, 3 Nev. & P. (q. n.) 174.

8. Where by the practice of the Ecclesiastical Court no book was kept, but a memorandum only indorsed or entered at the foot of the original will by the officer of the court; held, that the production of the will with such memorandum was sufficient evidence of the executor's title; held, also, that an exemplification of several letters of administration relating to the same estate on one parchment, with one *St.* stamp, was sufficient. *Doe v. Gunning*, 2 Nev. & P. (n. n.) 260.

9. In trover for goods against the sheriff; held, that an affidavit made by the sheriff's officer on a motion by the defendant under the Interpleader Act, was admissible to prove the seizure of the goods by the servant of the sheriff, having full knowledge of its contents, and using it for his own purposes. *Borickill v. Hulse*, 2 Nev. & P. (q. n.) 426.

0. Where an answer in Chancery of the de-

fendant is read, he is entitled to have the whole bill read as part of his opponent's case. *Pennell v. Meyer*, 2 M. & Bob. (n. p.) 99.

11. The depositions taken before magistrates are the best and only proper evidence of the statements made, and the rule applies to them in all proceedings connected therewith in which it is sought to adduce the statements in evidence. *Leach v. Simpson* and another, 7 Dowl. (p. c.) 513.

12. The schedule of an insolvent, showing the date of his petition and statement of his liabilities, held inadmissible to prove that a previous assignment was executed with the intention of so petitioning. *Heacock v. Harris*, 6 Nev. & M. (n. n.) 854.

13. Where an Act of Parliament constitutes a court with a seal, held that it was not necessary to prove the seal, but the court would take judicial notice of it, the seal itself being the instrument of proof. *Doe v. Edwards*, 1 Perr. & Dav. (q. n.) 408.

14. An examined copy of an entry in the Middlesex registry of deeds received as secondary evidence of the original, which could not be obtained (*per Tindal, C. J.*) *Collins v. Maule*, 8 C. & P. (n. p.) 502.

15. So entries of the admission of a party to the freedom of a city company, duly vouched by other freemen, admitted, not on the ground of hearsay, but as of an act done by the company, viz. receiving the party as of a certain description, who and what he was, to be entitled to admission. 1b.

16. An entry in the Journals of the House of Lords, reciting the limitations in a patent of peerage, admitted by the Committee of Privileges, without producing the patent itself. *Lord Dufferin's Case*, 4 Cl. & Fi. (p.) 568.

And see *Bankrupt; Boundaries; Bridges; Corporation; Election of M. P.; Gaol; Insolvent; Poor; Sessions.*

#### [B] PRIVATE WRITINGS—DEEDS.

1. Where the defendant justified breaking flood-gates, as lessee of the Bishop of W., and old leases were produced from the registry, and admitted; held, that a map of the bishop's and adjoining lands could not be received to show the course of the stream to the plaintiff's mill. *Wakeman v. West*, 7 C. & P. (n. p.) 479.

2. The only case where a map is receivable in evidence, is where at the time it was made the whole property belonged to the person from whom both parties claim. *Doe v. Lakin*, 7 C. & P. (n. p.) 481.

3. Upon a question touching the right of presentation by the bishop, held, that a case stated by a former bishop for counsel's opinion, and found among the family muniments of the latter's descendants, was admissible in evidence against the former; but where the plaintiff, in *quære impedit*,



after tracing his title, and averring the death of a party, a joint tenant with him for a term of years in the advowson, alleged that he became and was possessed thereof, as of an advowson in gross for the remainder, &c., and the bishop took issue in terms of the traverse; held, that a fine, showing the title to be in third persons, was inadmissible, the parties to the suit not both claiming under the parties to the fine; held also, that the 10 Hen. 7, (passed in Ireland), avoided grants of advowsons by Edw. 4; and where appendant to manors before the grant, had the effect of re-appending them. *Meath, Bishop v. Marquis of Winchester*, 3 Bing. N. S. (c. r.) 183; and 3 Sc. 561.

4. Where a son, on his father's behalf, entered into an executory contract, and before its completion stated that his father was going to receive money, and referred in such conversation to an advertisement in a provincial paper, announcing facts in reference to the father's supposed title to receive it; held, that in the absence of any other advertisement, an advertisement, containing a statement of all those facts, was admissible in evidence to show a fraudulent compact between the father and the son, although after the contract entered into, inducing the plaintiff to go on with the contract. *Lucas v. Godwin*, 3 Bing. N. S. (c. r.) 737; and 4 Sc. 301.

5. Where on the sale of premises to the defendant's landlord, a feoffment was delivered by the vendor, and the question being as to the premises sought to be recovered by the lessor of plaintiff being parcel of the premises so conveyed, notice had been given to produce the feoffment, which not being done, an abstract thereof was tendered, there being no proof of any copy ever having existed; held, that it was admissible without calling the attesting witness; and that it not being necessary to prove the feoffment, neither was it necessary to prove the livery of seisin. *Doe v. Wainwright*, 1 Nev. & P. (x. b.) 8; and 5 Ad. & Ell. 520.

6. Entries in a religious book treated by deceased owners as important family memorials, held admissible, although not appearing by whom made. *Hood v. Beauchamp*, 8 Sim. (ch.) 26.

7. In an action for libel of plaintiff, as surgeon of a poor-law union, for neglecting patients, held that the entries which the plaintiff was required to make by sect. 15 of the act could not be read as evidence on an issue whether the plaintiff neglected those patients. *Meyrick v. Wakley*, 8 C. & P. (n. r.) 283; and 3 Nev. & P. (q. b.) 284.

8. Where a trustee conveyed property to a party, entitled as a child of a particular marriage, by deed reciting that he was such child, held, that as an act done under a state of things which, if true, the trustee would have been compellable to do, and coming out of proper custody, the deed was admissible on a question of pedigree, although *res inter alios acta*, and was not the description of evidence to which the doctrine of *lis mota* was applicable; held, also, that where a testator bequeaths a legacy to a person designated as a "relation," it is to be presumed that he was a legitimate relation. *Slane v. Wade*, 7 Sim. (ch.) 585; and affirmed 1 Myl. & Cr. 338.

9. Where letters are put in, bearing different dates, held, that others, part of the same correspondence, sent in the interval, could not be received, unless expressly referred to in those which were put in. *Sturge v. Buchanan*, 2 M. & Rob. (n. r.) 90.

10. The Judge refused to receive a Fleet register of marriages for any purpose. *Doe v. Gatacre*, 6 C. & P. (n. r.) 578.

11. Where the entry of a deceased steward showed the balance in his own favor, held that it did not affect the admissibility of a particular entry charging himself. *Williams v. Greaves*, 8 C. & P. (n. r.) 592.

12. Where, on a former reference of the same cause, the defendant had consented to admit in evidence a will in the custody of B., a party who appeared to be his mortgagee and on the trial afterwards the plaintiff's attorney producing the will, admitted that he had received it from B., held sufficient *prima facie* evidence of proper custody to render it admissible. *Doe v. Owen*, 8 C. & P. (n. r.) 751.

13. Production of the will, and proof by a niece, a legatee, of having received a legacy under it, coupled with the copy of an entry in the register of burials, held sufficient evidence of the death. *Doe v. Penfold*, 8 C. & P. (n. r.) 536.

14. Notes on the back of the brief of counsel on a trial at law, held admissible evidence in a suit in equity. *Cattell v. Corral*, 3 Younge & C. (ex. q.) 413.

#### [C] SECONDARY—PAROL TO EXPLAIN—HAND-WRITING—REPUTATION.

1. Where the warrant to the officer to seize under a *fi. fa.* was not produced, nor any notice given to produce, and it appeared to have been given to the son of the officer, who believed he had either returned it to his father or to the sheriff's office, and the officer stated that it was usual to deliver it to the auctioneer, who transmitted it, with the auction sheet, to the Excise Office, through the district supervisor, and proof was given of search made by the auctioneer among his own papers, and at the sheriff's office, but the supervisor was not called, nor any search amongst his papers proved; held, that sufficient diligence was proved to let in secondary evidence of the warrant to connect the officer with the warrant. *Minshall v. Lloyd*, 2 Mees. & W. (ex.) 450.

2. Where a check was given to the paying clerk of a vestry, and a corresponding sum appeared to have been paid by the bankers on the same day, whose custom was to return the checks to the paying clerk, who deposited them in a room in the work-house: the clerk having gone out of office, and application made to his successor for inspection, the clerk produced several bundles in which it was likely to be found, and which were searched, but it was not found; held to be such reasonable diligence as to let in secondary evidence of its contents. *M'Gahey v. Alston*, 2 Mees. & W. (ex.) 212.



3. In *assempsi* for freight on a charter-party executed at Java, it appearing that by the law of Holland such contracts are made by a notary, and entered in his book, and a copy given to each party, which may be done at any time, signed, sealed, and attested by him; in the courts of Holland, these copies are received in evidence without further proof, but in Java the notary's book must be produced, and the signature of the notary be proved; held, that such copy could not be considered as the original binding document, nor admitted as evidence of it until proved to be an examined copy according to the law of evidence in this country. *Brown v. Thornton*, 1 Nev. & P. (x. s.) 339.

4. Where assignees of a bankrupt firm, holding debentures as a security for advances, went in and claimed under a decree for carrying into execution the trusts of a deed for the benefit of creditors holding debentures, and the Master reported that the evidence to establish the right of the claimants as to one debenture, was insufficient; pending which, the assignees filed a bill in England for the administration of the bankrupt's estate, and a bill also in Ireland for the same purpose, and for execution of the deed of trusts, in which suit proof was given of the execution and assignment of a debenture, of the search and loss of the original, and of an examined copy, upon which proof a decree declaring the right was made: the decree affirmed on appeal. *Donegal, Marquis of, v. Salt*, 8 Bli. N. S. (P.) 854.

5. Where a testatrix, by a codicil, gave specific stock, "now standing in my name," and was possessed at the time to satisfy the bequest, but not satisfy other bequests charged on the same fund; held a case in which evidence ought to be received as to the state of the testatrix's funded property, and considered in connexion with the context of the several testamentary papers, was to be construed a pecuniary and not specific legacy. *Boys v. Williams*, 2 Russ. & M. (Ch.) 689; reversing the judgment below. *S. P. Attorney-general v. Grote*, lb. 699.

6. The only exceptions to the rule that evidence of hand-writing by comparison is inadmissible, are cases of necessity; as where genuine documents are already in evidence in the cause, or are ancient, and can be proved in no other way. *Doe v. Newton*, 1 Nev. & P. (x. s.); and 5 Ad. & Ell. 351; questioning *Allesbrook v. Roach*, 1 Esp. (n. r.) 351.

7. Upon an issue whether an endorsement was the defendant's, held that the jury could not be allowed to compare other writings with that in dispute, they can only do so with documents which are otherwise in the cause. *Bromage v. Rice*, 7 C. & P. (n. r.) 548.

8. Where a will, under which the lessor of plaintiff claimed, was in the hands of a mortgagee, who was subpoenaed to produce it, but refused to do so, as being part of his title; held, that secondary evidence of the contents was inadmissible. (Per Abinger, L. C. B. denying *Mills v. Oddy*, 6 C. & P. 728, to be law.) *Doe v. Owen*, 8 C. & P. (n. r.) 110.

9. Where the original judgment had been destroyed by fire, execution allowed to issue on a verified copy. *Cheesewright v. Franks*, 6 Dowl. (P. C.) 471.

10. Where the plaintiff's agent wrote to a witness (living abroad and examined by commission), the draft of which was shown to and approved by his attorney; held, that the draft was admissible without producing the original, as evidence of an act done, but that the answer of the witness to the agent was not admissible. *Rawlins v. Desborough*, 8 C. & P. (n. r.) 321.

11. Entries in the bill of a deceased attorney, subscribed as received for charges of engrossing and attesting the execution of deeds of release, held admissible, as secondary evidence of the execution of such releases. *Sheffington v. Whitehurst*, 3 Younge & C. (ex. ex.) 24.

12. It is not absolutely necessary that the search for the original document should be made for the purpose of, and shortly before the cause: when made recently after the death of the party in whose possession it had been, although three years before the action, held sufficient to let in the secondary evidence. *Fitz v. Rabbits*, 2 M. & Rob. (n. r.) 60.

13. Where in order to let in secondary evidence of a lost deed, its execution was sought to be proved by an endorsement on a draft deed in the handwriting of one of the defendants, who was at that time a clerk in the attorney's office in which the draft was prepared; held inadmissible. *Doe v. Whitefoot*, 8 C. & P. (n. r.) 279.

14. Under a general notice to produce all letters, &c. relating to the matter in dispute; held sufficient to let in as secondary evidence, a particular letter, although not specified as to date. *Jacob v. Lee*, 2 M. & Rob. (n. r.) 33.

15. A notice to produce papers in a town cause, served the evening before at the house of the attorney, too late to communicate with his client, held too late to let in secondary evidence. *Byrne v. Harvey*, 2 M. & Rob. (n. r.) 89.

16. An inquiry of the servant at the premises, held a sufficient inquiry to let in evidence of the witness's handwriting, and that it is not necessary to show that he is kept out of the way by collusion; and belief of handwriting, although the witness had only seen the party write once, is sufficient, if the jury are satisfied with the proof, although slight. *Willman v. Worrall*, 8 C. & P. (n. r.) 380.

17. A copy of a mural inscription in a church, made at the time when, by repairing the church it was effaced, in pencil, afterwards traced over with ink; held admissible on a question of pedigree. *Slaney v. Wade*, 7 Sim. (Ch.) 595.

18. The declarations of an illegitimate child held not within the rule as to members of the family of his reputed father, and rejected in a question of pedigree, as evidence of reputation. *Doe v. Barton*, 2 M. & Rob. (n. r.) 23.

And *vid. supra*.



19. In trover for goods sent by the plaintiff to the defendant, a packer, and expressed in the receipt to have been received on account of the plaintiff for M., the party to whom they had been sold; held, that evidence of the usage of trade was admissible to explain the meaning of ambiguous terms in such receipt. *Bowman v. Horsey*, 2 M. & Rob. (N. P.) 85.

20. Where premises were purchased at a sale in different lots by plaintiff and defendant, and in their deeds the premises were described only by reference to the then tenants; held, that a handbill exhibited at the sale was admissible, not as controlling, but explaining and applying the deed, and showing what was then in the tenants' occupation. *Murley v. M'Dermott*, 3 Nev. & P. (Q. B.) 366.

21. On an issue that the acceptance was not that of the defendant, held, that letters written by him relating to the transaction, and which had been read in evidence, might be handed to the jury. *Eaton v. Jervis*, 8 C. & P. (N. P.) 273.

22. Where the attesting witness to a will swore to his attestation, and on cross-examination, depositions in the Ecclesiastical Court, relating to the same will (but not evidence in the cause,) being shown to him, he stated that he believed the signatures to be his; in order to show the will a forgery, and disprove the genuineness of the attestation, a bank inspector, having no knowledge of the witness's handwriting, except from having heard his admission in court, being called to speak to the genuineness of the attestation; held, per Denman, L. C. J., and Williams, J., that his evidence was receivable; *Patteson and Coleridge, JJ.*, that it was not. *Doe d. Mudd v. Suckermore*, 5 Ad. & Ell. (K. B.) 703; and 2 Nev. & P. 16.

23. On an indictment for forging a will, written apparently over pencil writing before rubbed out, the evidence of an engraver, in the habit of looking at minute lines on paper, held admissible as to the existence of such pencil marks, which he had examined with a microscope. *R. v. Williams*, 8 C. & P. (N. P.) 434.

24. Where a receipt was given by one of several partners, without the knowledge of the others; in an action to recover the partnership debt, held, that evidence was admissible to show that the receipt was fraudulently given by a co-plaintiff: in all cases a receipt is only *prima facie* evidence, which admits of explanation. *Farrar v. Hutchinson*, 1 Ferr. & Dav. (Q. B.) 437.

25. Where the copy of an ancient grant in the chartulary of an abbey had been received, among other documents, to establish the antiquity of a weir on a public river, and objection was made to the whole class of evidence which was afterwards held to have been properly received, and the objection as to the reception of the copy, no search having been first proved to have been made for the original, was not particularly pressed, the court would not allow it afterwards to prevail, it being one of many others unquestionable, and its rejection not sufficient to have varied the verdict. *Williams v. Wilcox*, 3 Nev. & P. (Q. B.) 606.

29. In trespass for shooting a dog, the Judge re-

ceived a copy of notice on a board, fixed in the plantations, without notice to produce the original. *Bartholomew v. Stephens*, 8 C. & P. (N. P.) 728.

27. Where, in the body of the bill it appeared as drawn for 200*l.*, but the figures in the margin expressed it to be for 245*l.*; held, that the words in the body must be taken to be the amount to be paid, and that the ambiguity being patent on the bill, evidence could not be received to explain it (*diss.* *Coltman, J.*) *Saunderson v. Piper*, 5 Bing. N. S. (C. P.) 425.

And see *Auction; Boundary; Contract; Covenant; Deeds; Devise; Landlord and Tenant; Libel.*

#### [D] DECLARATIONS—ADMISSIONS—CONFESSIONS.

1. Probate of the will of a deceased ancestor, held inadmissible as evidence of a declaration by the testator of matter of pedigree. *Doe v. Ormerod*, 1 M. & Rob. (N. P.) 466.

2. In trespass, the plaintiff's claim extending to the whole of the bed of a river between his and the defendant's close; held, that evidence of acts of ownership by the plaintiff as to adjoining parts being a continuous part of the plaintiff's estate was admissible, whatever weight the jury might give to such acts. *Jones v. Williams*, 3 Mees. & W. (X.) 327.

And see *Doe v. Kemp*, 2 Bing. N. S. 102.

3. Where letters in correspondence between plaintiff and defendant were offered; held, that the latter might read his answer to the plaintiff's last letter, dated the day previous. *Roe v. Day*, 7 C. & P. (N. P.) 705.

4. Where, on an order for changing the venue in debt on bond, the term was imposed of admitting the hand-writing of the attesting witness, and after a verdict and a new trial obtained, the plaintiff was allowed to amend the oyer, by setting out the condition, whereupon the defendant pleaded specially that the bond had been altered since the execution; held, that it did not affect the admission, whether used on the first or second trial. *Langley v. Lord Oxford*, 1 Mees. & W. (X.) 508; and 1 Tyr. & Gr. 808.

5. Where a party was arrested, and subsequently promised the attorney to pay the debt if no further proceedings were taken, and by letter he informed him that he had found a friend to assist him "in paying the debt you sued me for;" held, that it was for the jury to say if he meant to recognize a debt or the particular debt indorsed on the writ. *Rainbow v. Bishop*, 7 C. & P. (N. P.) 591.

6. In covenant upon a mortgage, upon plea *non est factum*, and issue whether the deed had been fraudulently altered by H. one of the attesting witnesses, who was dead, the other witness doubting his own signature and that of the defendant, and denying all knowledge of the transaction; held that declarations of the deceased witness as to the supposed fraudulent alteration



were inadmissible. *Stobart v. Dryden*, 1 Mees. & W. (xx.) 615; and 1 Tyr. & Gr. 899.

7. Where the notice to admit the note declared on, in setting out the document produced before the Judge mis-stated the date, the defendant, after first refusing, consented to admit it; held, that he could not afterwards object to the admission being read on account of the variance. *Field v. Hemming*, 7 C. & P. (n. r.) 619.

8. Where an Act of Parliament establishes a new rule of evidence, the court of equity adopts it; held, therefore, that the evidence of an interested witness might be read in a suit, and the entry required by 3 & 4 Will. 4, c. 42, s. 26 & 27, made. *Wheat v. Graham*, 7 Sim. (ch.) 61.

9. Where a party executed a deed (for raising money on an annuity,) reciting a will, and that the trustees had not sold, and that he was in possession by their permission; held, that such admission was evidence to show that he was not the legal owner of the estate. *Doe v. Coulthred*, 2 Nev. & P. (x. n.) 165.

10. Where in assault, a letter was written by the defendant's attorney, containing an apology; held, that parts of it extolling his client's character for respectability could not be read, nor at all, if expressed to be written "without prejudice." *Healey v. Thatcher*, 8 C. & P. (n. r.) 388.

11. Where upon the trial of an indictment for obstructing a highway, the question was, whether the road was public or private; held, that the declaration of a deceased occupier at the time of planting an alleged boundary willow, was inadmissible, either as a declaration accompanying an act, or as contrary to the party's interest, or as evidence of reputation. *Reg. v. Bliss*, 2 Nev. & P. (q. n.) 464.

12. On an indictment for murder of A. by poison, held, that the dying declarations of B., who died also of the same cause, were admissible. *R. v. Baker*, 2 M. & Rob. (n. r.) 53.

13. In ejectment on two demises, in the names of a trustee in fee and *cestui que trust* for life, and at the trial, the question being one of parcel or no parcel, the lessor of plaintiff elected to abandon the latter demise; held, that a deed executed by the *cestui que trust*, not clearly and unambiguously against her interest, although an advantage was obtained under it, was inadmissible as a declaration: and *quære* whether in an action brought by a trustee in respect of the trust property, the admission on a *cestui que trust* whose interest is not commensurate with his, can be evidence against him? *Doe v. Wainwright*, 3 Nev. & P. (q. n.) 598.

14. Where the defendant's son was alleged to have warranted a horse, as agent to the defendant, and, to prove the authority, evidence was offered of the son's declaration to a stranger, held inadmissible, as not made in the course of any bargain and sale for the horse. *Allen v. Dentstone*, 8 C. & P. (n. r.) 760.

15. In an action by assignees, upon a question of fraudulent preference, before any evidence of the bankruptcy or insolvency, declarations of the

party, showing a consciousness of his being in insolvent circumstances, held admissible, the fact of insolvency being afterwards proved *aliunde*, although *semble* the latter fact should strictly be first proved. *Thomas v. Connell*, 4 Mees. & W. (xx.) 267.

16. Where a deceased party, the grantee of an annuity, anticipating that the validity of it might be questioned, through his solicitor submitted a case to counsel, and the papers afterwards came into the possession of his son, the defendant and assignee of the annuity; held, not to be privileged communications nor letters, &c., written by the defendant to his father's former solicitor, acting as his agent and friend and not as his solicitor: the privilege of the client, as to discovery, is not co-extensive with that of his solicitor. *Greenlaw v. King*, 1 Beav. (ch.) 137.

17. Where the defendant, who had become guarantee for the due accounting of a party employed by the plaintiff as agent, upon having sent to him, by the plaintiff's attorney, a letter enclosing a copy of the account for which he was liable, and, in his reply, he promised to obtain the share of his co-surety and remit it with his own to the plaintiff, and having notice to produce at the trial, the account; held, that a duplicate copy might be proved, and the admission that the defendant said it was correct, without calling the agent. *Ward v. Suffield*, 5 Bing. N. S. (c. r.) 381.

18. Where the defendant had used the affidavit of a party, stating the seizure of goods by him as officer of the defendant, upon a motion of interpleader; held, that such affidavit was admissible in evidence against the defendant to connect the party with him, although the latter was in court at the trial and might have been himself called. *Brickell v. Hulse*, 7 Ad. & Ell. (q. n.) 454.

19. Where, in an action by assignees for goods sold, &c., the defendant offered in evidence an account stated and settled, showing a balance to the defendant, and which was dated prior to the bankruptcy; held, that it was to be presumed to have been written at the time it bore date, and properly received in evidence; if the fact were otherwise, or the paper a fraudulent contrivance, it was open for the plaintiff to show it. *Sinclair v. Baggeley*, 4 Mees. & W. (xx.) 312.

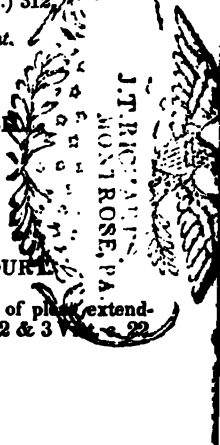
And see *Indictment; Insolvent*.

EXCHEQUER BENCH

See *Trustee*.

EXCHEQUER COURT

Power of taking inquisition of plaintiff extended to the court of Exchequer; 2 & 3 W. & A. 22 1 Beav. (ch.) Ap. xii.





## EXECUTION.

1. Where, after an order for speedy execution, the defendant paid the money, and afterwards moved for a new trial; the court refused to allow the money to be paid into court whilst the rule pending. *Morton v. Burn*, 5 Dowl. (P. C.) 421.

2. Where, in *assumpsit* for goods sold, and on an account stated, which last count was demurred to, the plaintiff obtained a verdict on the first count; the court, on his undertaking to enter a *nolle pro.*, allowed speedy execution. *Allsopp v. Smith*, 7 C. & P. (N. R.) 708.

3. The bishop can only be required to make a return of what has been levied since his coming into the office, and when the attorney has been changed, the order to change must be served with the order to return. *Phillips v. Berkeley*, 5 Dowl. (P. C.) 279.

4. The plaintiff having obtained judgment for 33*l.*, and issued a *fi. fa.* for 24*l.*, including 1*l.*, the cost of the writ; held, that a tender of the debt was insufficient, and the plaintiff entitled to issue execution. *Bayley v. Potts*, 3 Nev. & P. (Q. B.) 365.

5. Writs of, new forms of, pursuant to 1 & 2 Vict. c. 110. 5 Bing. N. S. (C. R.) 366.

6. A *venditioni exponas* is not a process distinct from the *fi. fa.*, but a part of it, being a direction to execute it in a particular manner, and is therefore within the rule of Mich. Term, 3 Will. 4, s. 13, which a Judge in vacation, has power to order the sheriff to return, and an attachment may issue for disobedience. *Hughes v. Rees*, 4 Mees. & W. (EX.) 468; and 7 Dowl. (P. C.) 56.

7. Where a verdict had been obtained against the defendant, as a nominal defendant, on behalf of a mining company of which he was a director; held, that as the act enabled a party who had so recovered judgment to levy the amount on the reserved fund, or any other property of the company, he was not personally liable to execution. *Harrison v. Timmins*, 4 Mees. & W. (EX.) 510; and 7 Dowl. (P. C.) 28.

8. Where, after a final decree in the Stannary Court of Cornwall, the defendant removed out of the jurisdiction, held that the court could not issue execution on the equity side under 6 & 7 Will. 4, c. 106. *Harvey v. Gilbard*, 7 Dowl. (P. C.) 525.

And see *Judgment*; *Lex. Facias*; *Sheriff*; *Prisoner*.

## EXECUTOR.

[A] DUTIES AND LIABILITIES OF—WHEN A TRUSTEE.

[B] PRIVILEGES.

[C] ACTIONS AND SUITS, BY AND AGAINST—COSTS.

[A] DUTIES AND LIABILITIES OF—WHEN A TRUSTEE.

1. An executor is entitled to avail himself of a judgment confessed, and plea of *puis darr. cont.*, although given pending an action against him, referred. *Alder v. Park*, 5 Dowl. (P. C.) 16.

2. Where executors and trustees allowed a considerable portion of the assets to lie more than a year unproductive in the hands of bankers, who failed; held to be chargeable with the loss. *Moyle v. Moyle*, 2 Russ. & M. (CH.) 710.

3. Upon the bequest of residuary estate to one of two executors for his own use and benefit, "trusting to his honor that he would act in strict conformity with her wishes," and testatrix on the same day executed a testamentary paper containing a list of legacies; held, that the executor was to be deemed only a trustee, and that after payment of the debts and legacies, the residue belonged to the next of kin. *Wood v. Cox*, 1 K. (CH.) 317.

4. Where a legacy was given after the death of testator's wife to W., and if he should die in her life-time to such person as he should appoint, and in default thereof to his executors, &c. absolutely; W. died without making any appointment, but appointed an executor: held, that the latter took no beneficial interest in the legacy. *Stocks v. Dodsley*, 1 K. (CH.) 325.

5. Where the defendant, who eventually took out letters of administration to his mother, being abroad at the time of her death, expressed himself, in a letter to the person ordering the funeral, satisfied with what had been done; held to have been properly left to the jury to say if he had not ratified the orders, and was liable for the amount. *Lucy v. Walrond*, 3 Bing. N. S. (C. R.) 841.

6. Upon a rule calling upon executors to account for legacy duty, the court directed it to form part of the rule, that if any duty should be found payable, the executors should pay the costs



of the crown, to be taxed in the usual manner. *Robinson, in the goods of, 5 Dowl. (s. s.) 609.*

7. Where the executor, after payment of debts and legacies, invested the residue in the funds, for the benefit of certain legatees; held, upon plea *plene administravit*, in an action on a bond, of which they had no notice until 15 years after the testator's death, that having the control over part of the testator's estate still in their hands, the plea could not be sustained. *Smith v. Day, 2 Mees. & W. (xx.) 684.*

8. An act done by an executor is valid, provided the will is ultimately proved, although the executor doing the act die without proving it. *Brazier v. Hudson, 8 Sim. (ch.) 67.*

9. Where the executors of a deceased trustee admitted assets, after payment of debts, sufficient to satisfy a breach of trust; held, that they were liable, although ignorant of such breach of trust, and no claim made, and they had long since satisfied the legacies, and distributed the surplus amongst the residuary legatees. *Knatchbull v. Fernhead, 3 Myl. & Cr. (ch.) 122.*

10. The pendency of a suit for administration of the estate by a legatee, held no answer to an application under the 42 Geo. 3, c. 52, by the Commissioners of Stamps, for an account of duties become payable, if any. *Sammon, in re, 3 Mees. & W. (xx.) 381.*

11. Bequest of an annuity to the executor for his trouble, until a final settlement of his affairs should take place, and he proved and acted, but a suit was subsequently instituted for administering the estate; held, that until shown that the trouble of the executorship had ceased, the annuity was payable. *Baker v. Martin, 8 Sim. (ch.) 25.*

12. Where, upon administration granted to A. and B., A. being a *feme covert*, the fund was invested in the names of B. and the husband of A. at a banker's to be paid out upon their joint checks; and after the death of the husband of A., B. drew out the fund and absconded; held, that the husband of the administratrix having, by such deposit, put it out of her control, and on his death enabled B. to appropriate the money without the control of his co-administratrix, his estate was liable to make the fund good. *Clough v. Bond, 3 Myl. & Cr. (ch.) 490; affirming B. C. 8 Sim. 594.*

And see *Adair v. Shaw, 1 Sch. & Lefr. 293.*

13. Where the testatrix, having property in several counties, appointed persons resident in each, executors, and having paid all the debts and specific legacies, apportioned the funds and arranged to pay the legatees respectively in those counties; one having made default, held that the other was responsible, the parties entitled, and in no fault, not being to be injured by such arrangement between themselves, and the funds not being handed over in the ordinary course of administration. *Moses v. Levi, 3 Younge & C. (xx. xq. 359.*

14. Where a party is equitably interested at the time of filing his bill, it is no objection that

at the time of filing he has not taken out administration. *lb.*

15. An executor ordered to pay a fund into court, held not to be prejudiced thereby as to his lien thereon for his costs. *Blenkinsop v. Foster, 3 Younge & C. (xx. xq.) 207.*

16. The mere ordering the funeral and appropriating a reasonable sum for that purpose, does not make the party an executor *de son tort*; where the defendant had received a debt due to the deceased and applied it to the purpose of the funeral, held that it was a question for the jury to say if the sum were more than was reasonable for that purpose; as, if he had received more, he must be taken to have paid it out of the assets. *Camden v. Fletcher, 4 Mees. & W. (xx.) 378.*

17. Where testator directed his widow to carry on his business until the youngest child should attain 21, and for that purpose gave her "the entire use, disposal, and management of the capital, stock, and effects in the trade, and authorized his executors to augment or diminish the capital from time to time as they might deem proper;" the executors renounced, and the widow took out administration: held, that the specified property was only liable to the debts incurred by the widow in carrying on the trade. *Cutbush v. Cutbush, 1 Beav. (ch.) 184.*

18. Upon a limitation of funds in a settlement, "to the executors, &c. of the settlor, and to and for his and their own use and benefit;" held, that the executors did not take beneficially, but only in their representative character. *Hames v. Hames, 2 Keene (ch.) 646.*

19. An executor in trust, who has not proved, is not liable for a *devastavit*, and therefore is a competent witness to increase the estate. *Hall v. Laver, 3 Younge & C. (xx. xq.) 191.*

20. Where the executor of the survivor of several trustees declined to prove the will, held within the 1 Will. 4, c. 60, and upon the usual reference new trustees appointed. *Hagger, ex parte, 1 Beav. (ch.) 98.*

21. Where the estate of the testator consisted principally in book debts, which were very numerous, the executors allowed to appoint an agent with a salary. *Hopkinson v. Roe, 1 Beav. (ch.) 180.*

22. But extra brokerage for transferring stock from the name of the testator into that of the executor not allowed; the sum allowed by the court is one guinea. *lb.*

#### [B] PRIVILEGES.

1. Where a balance was found to be due to the estate from two executors, one of whom was a creditor, held, that he was entitled to retain his debt out of the assets jointly due from himself and co-executor. *Kent v. Pickering, 2 Keene, (ch.) 1.*

2. Where a party employed successively the plaintiff and others as solicitors in a suit in Chancery, and eventually and after her death, upon



revivor, the then attorney obtained a decree, and an order for the Master to settle the costs of all parties, which when settled were to be paid as directed, viz. the costs of the plaintiffs to their then solicitor, and of the defendants to their several solicitors; the plaintiff, one of the original solicitors, having received a part, and a judgment of assets *quando*, which, on proceeding to enforce, the executor induced him to stay, undertaking to pay the residue of his bill out of the first assets; upon a further sum being awarded out of Chancery in the suit in respect of the same costs; held, (per *Park* and *Alderson*, BB., *contra* Lord *Abinger*, L. C. B.) that such sum was assets within the meaning of the undertaking. *Smedley v. Philpot*, 3 Mees. & W. (ex.) 573.

3. Where a party at the time of his becoming bankrupt, was indebted to his sister, who by her will gave a sum to trustees in trust, to pay the interest to him for life, free from debts, and without power of anticipation, and after his death to such persons as he should appoint, and for default thereof, to his executors and administrators, for his and their use and benefit; the bankrupt died without ever having obtained his certificate or made any appointment; and held, that the executors of the testatrix could not set off the debt against the legacy, but that the assignee was entitled to sue for it, and the executors to prove, and deduct the dividend payable on the proof from the amount they were liable to pay. *Cherry v. Boulton*, 2 Keene (ch.) 319.

4. Where the testator deposited with the party whom he made his executor, a policy, as security for a debt, and for a further advance, which the office refused to pay, unless a receipt was given by the holder "as executor," and which he did; held, that upon the plea *plene adm.*, except, &c. that the executors were only chargeable for the surplus as assets after payment of the debt. *Glaholm v. Rowntree*, 6 Ad. & Ell. (x. s.) 710.

5. Where executors, before a suit for administration commenced, paid several creditors in part, held that the latter were not entitled to further payment until all the others had been paid proportionably. *Wilson v. Paul*, 8 Sim. (ch.) 63, 8 S. P.; *Mitchelson v. Piper*, *ib.*, 64; held, also, in the latter case, that the executors were not to be allowed payments made after the decree, but the utmost they were entitled to was to stand in the place of creditors as to such payments.

6. The case of *Wood v. Cox*, 1 Keene, 317, reversed on appeal, 2 Myl. & Cr. (ch.) 684.

7. The case of *Turner v. Hitchon*, (1 Keene, 804) affirmed on appeal, 2 Myl. & Cr. (ch.) 710.

And see *Bankrupt; Receiver*.

2. Where the attorney of the creditor, at the time of demand, alleged that he did so upon the party's individual liability, on account of having paid the interest from time to time on the debt; held, not to amount to a waiver of the right to sue the party in the representative character, nor to justify the payment of legacies before debts; held also, that a taking possession by the executor of a chattel in which a life interest was given, did not amount to an assent to the bequest to the party in remainder. *Richards v. Browne*, 3 Bing. N. S. (c. p.) 493; and 4 Sc. 262.

3. Where the executor pleaded to the action, and not *plene adm.*; held, that judgment against him was evidence of a *deceit*, and a return of *nulla bona testatoris* to a *sci. fa.* quashed, and a new writ ordered. *Palmer v. Walter*, 1 Mees. & W. (ex.) 689; 1 Tyr. & Gr. 1014; and 5 Dowl. (p. c.) 172.

4. Proof of furniture bought within 12 months, and seen in the intestate's house shortly before his death; held, a *prima facie* case of evidence of assets. *Britton v. Jones*, 3 Bing. N. S. (c. p.) 676; and 4 Sc. 393.

5. Upon the usual decree against an executor to account, the Master cannot go into disputed partnership transactions between the executor and his testator, but the plaintiff may have relief by supplemental bill, without interrogating the executor in the original suit; and where one of two executors was partner with the testator, the bill for an account of the partnership transaction may be sustained against both, although collusion is neither charged nor proved. *Cropper v. Knapman*, 2 Younge (ex. eq.) 338.

6. Where the plaintiff in a suit for an account of an intestate's estate had, through the conduct of the administratrix, been obliged to employ an accountant, the court ordered the defendant to pay the expense before the hearing for further directions. *Toner v. Thompson*, 7 Sim. (ch.) 145.

7. Where a legatee filed a bill against the representative of an executor, and a suit was subsequently instituted by creditors of the executor, the court allowed a petition to abandon his suit, and for liberty to prove for his legacy and costs of his suit, and of the petition on the creditor's suit. *Turner v. Wardle*, 7 Sim. (ch.) 80.

8. On a *sci. fa.* to revive a judgment against an executor; held, that a plea of writ of error depending on the judgment, was bad. *Snook v. Matlock*, 5 Add. & Ell. (x. s.) 239.

9. On a bill filed for an account of an intestate's estate against an executor *de son tort*, payments made to the party who took out administration, pending the suit, disallowed. *Layfield v. Layfield*, 7 Sim. (ch.) 172.

10. Where an executor separated from the testator's property a sum bequeathed to him on trust, to which he for some time applied the interest, and afterwards applied the fund to his own use; held, that he was liable as a trustee, and that the suit against him was not to be deemed a suit for a legacy, nor the right affected by the late Statute of Limitation, 3 & 4 Will. 4, c. 27, s. 40. *Phillips v. Munnings*, 2 Myl. & Cr. (ch.) 309.

# [C] ACTIONS AND SUITS BY AND AGAINST—COSTS.

1. Executors deriving title from the will, and not from the probate; held, that all might join in a *sci. fa.* to receive a judgment, although only one had taken out probate. *Scott v. Briant*, 6 Nev. & M. (x. s.) 331.



11. Where in an action by an executor, the defendant craved *oyer* of the letters testamentary, with the will annexed, held, that the will must also be set out. *Daly v. Mahon*, 4 Bing. N. S. (c. r.) 235; and 6 Dowl. (r. c.) 395.

12. In *assumpsit* against an executor, for goods sold to him as executor, and for work, &c., performed for him at his request, held to be necessarily intended for debts due from him in his own right, and misjoined with counts for money paid to his use as executor, and on an account stated and a promise by him as executor: and judgment arrested. *Corner v. Shaw*, 3 Mees. & W. (ex.) 350.

And *vid. supra*.

13. Upon a bill filed by a residuary legatee against the personal representative, for an account and payment of the residue, and a creditor, on a bond above 20 years' date and no interest thereon ever paid, subsequently filed a creditor's bill against the representative, who, by his answer, admitted the debt; the plaintiff, in the former suit, obtained the common decree, and then moved and obtained an order that all proceedings in the second suit might be stayed; the Lord Chancellor, on appeal, discharged that order, and made the common decree in the second suit, and directed the report to be made in both causes. *Budgen v. Sage*, 3 Myl. & Cr. (ch.) 683.

14. Where, in a suit by a legatee, the executor denied assets, but stated facts showing that he was personally liable for the payment of the plaintiff's legacy, the court granted an order for immediate payment, without directing the accounts to be taken. *Rogers v. Soutten*, 2 Keene (ch.); and 1 Coop. (ch. c.) 96.

15. Where, after the bill had been dismissed, as against the testator, with costs, his executor revived the suit, intending, as he alleged, to appeal, but which he did not prosecute; held, that he was liable to the costs. *Horlock v. Priestley*, 8 Sim. (ch.) 621.

16. Where, the executor resident abroad, administration was granted to M., his attorney, with the will annexed, for the benefit of the executor; held, that upon the death of the executor the grant to M. was at an end, and administration *de bonis non*, subsequently granted to the plaintiff, was good; but that he could not recover upon a count stating the promise to have been made to the executor. *Sewercrop v. Day*, 3 Nev. & P. (q. b.) 670.

17. In debt, on a promissory note, payable 12 months after date, by the defendant (executrix) to the plaintiff, plea, that W. deceased, intestate, was at the time of his death indebted to the plaintiff, who had applied to the defendant for payment, and that in consideration of the debt being unpaid, and for no other whatever, the defendant, at the request of the plaintiff, made and delivered the note, and that there were no executors, nor had any administration been granted to the estate of W.; replication, *de injuria*: held, that such plea was bad, as not negating assets, and in the event of the defendant afterwards taking administration, the note would have

the effect of postponing the payment of the debt for 12 months, and judgment *non obst. vered*; but held also, that the defendant, being the widow of the deceased, a hair-dresser, continuing to live in the house, and opening the shop, the entrance to the house, but there was no evidence of any sale of goods by her, or of doing more than giving the note, and of having the goods valued, preparatory to taking out administration, were not acts sufficient to constitute her executrix *de son tort*. *Serle v. Waterworth*, 4 Mees. & W. (ex.) 9; and 6 Dowl. (r. c.) 684; but judgment reversed on error, 4 Mees. & W. 795.

18. Where in a suit for administering an estate, certain legatees (charged on lands, and who had been paid), were made defendants, and filed disclaimers; held, that the plaintiff was not chargeable with their costs. *West v. Cole*, 3 Younge & C. (ex. ex.) 583.

19. In a suit against the legal personal representative, praying the usual accounts, and by the decree he was ordered to pay a sum into court; held, that upon his death, the mere order to revive was not sufficient, but that there must be a specific direction to the new defendants to do the specific acts their testator was directed to do. *Harries v. Johnson*, 4 Younge & C. (ex. ex.) 583.

And see *Assumpsit; Bills; Bonds; Limitations, Stat. of.*

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## EXECUTORY DEVISE.

See *Legacy*.

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## EXONERATION.

See *Debts*.

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## FACTOR.

Where a factor had goods consigned to him, and the bills of lading indorsed, and received the dock warrants and wharfinger's certificates in his own name, which he pledged for advances on his own account, held, that the 6 Geo. 4, c. 91, did not extend to documents created by the factor himself, but only to pledges by him of documents entrusted to him by the owner; and it would make no difference, that the pledgee knew that the goods were not the property of the factor. *Close v. Holmes*, 2 M. & Rob. (n. r.) 22.

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## FAIR.

Where by the charter granting a fair, the terms of the grant were *cum omnibus liberis consuetudinibus, &c., ad feriam pertinentibus*; held, that the judge improperly directed the jury, that



that if the charter were one simply of grant, those words might signify tolls; *semb. aliter*, if the charter were one of confirmation, and supported by immemorial usage. *Egremont, Earl of v. Saul*, 6 Ad. & Ell. (q. n.) 924.

### FALSE JUDGMENT.

The 19 Geo. 3, c. 70, *semb.*, applies only to courts of record; a return by the sheriff to a writ of false judgment, "that the plaintiff in error had not given security to prosecute his suit with effect," held bad. *Crookes v. Longden*, 7 Dowl. (r. c.) 413.

And see *County Court*.

### FINES AND RECOVERIES.

1. The commissioners for taking the acknowledgments of married women have a lien on the instruments in their possession for fees due in respect of the discharge of their duty. *Grove, ex parte*, 3 Bing. N. S. (c. r.) 304; 3 Sc. 671; and 5 Dowl. (r. c.) 355.

2. Where the object of the recovery was to bar the issue of a daughter entitled to a part of a lunatic's estate in remainder, after the lunatic's death without issue, in order to enable her and her husband to dispose of it, the court, as protector under the Fines and Recoveries Act, refused to concur in barring the entail. *Newman, in re*, 2 Myl. & Cr. (ch.) 112.

3. The court allowed the attorney for taking the acknowledgment, being also one of the commissioners, to verify the certificate. *Scholefield, in re*, 5 Dowl. (r. c.) 363.

4. The affidavit of execution of the deed by married women in foreign parts, although not signed by the parties, allowed, upon proof that it was not usual for affidavits there to be signed by the deponent. *Birch, ex parte*, 4 Bing. N. S. (c. r.) 394.

5. Where copyhold had been devised to the separate use of the wife, and the husband was living abroad separate from her, the court allowed a conveyance by her, under 3 & 4 Will. 4, c. 74, ss. 77, 91, without his concurrence. *Shirley, ex parte*, 5 Bing. N. S. (c. r.) 226; and 7 Dowl. (r. c.) 268.

6. Affidavit of acknowledgment of a *feme covert* taken by a judge at Illinois, before a notary public, held sufficient. *Mann, ex parte*, 5 Bing. N. S. (c. r.) 226.

7. Where the actual proclamations were omitted to be indorsed on a fine which had been levied at the Court of Great Session in 1830, it appearing to have been the practice of the court to proclaim all fines, whether required or not; the amendment, by indorsing them, allowed. *Evans, dem., Davies and Wife, def.*, 5 Bing. N. S. (c. r.) 229; and 7 Dowl. (r. c.) 259.

8. Where the tenant having been appointed, and acted as receiver during 10 years, in which he also claimed title as devisee, against the heir general of the testator, and upon the final decree in his favor, had received the accruing rents, and openly taken possession, and immediately, in compliance with the directions of the will, assumed the name of the testator, and shortly after levied a fine in that name; held, that it was a sufficient claim of the freehold and levy of the fine in the name by which then known to make the fine available, and a bar to the claim of a subsequent defendant. *Davies v. Lowndes*, 5 Bing. N. S. (c. r.) 161; and 6 Sc. 738.

9. Where an entry appeared at the foot of the fine, that the proclamations had been made, although by misprision of the clerk of the Court of Great Sessions, only an entry of the second had been entered on the roll; the court allowed an entry of the first and third to be indorsed, it appearing that they had in fact been made. *Lloyd dem., Nicholas def.*, 4 Bing. N. S. (c. r.) 633; and 6 Sc. 355.

10. Acknowledgment of a married woman, taken at Hamburg, allowed to be filed, although the affidavit verifying the due taking thereof, in the German language, was sworn before the proper officer, but not signed by the deponent, it not being the practice of the foreign law to do so. *Birch, in re*, 6 Sc. (c. r.) 185.

11. Where the acknowledgment is taken abroad, the affidavit verifying the certificate need not state the place where taken. *Shufflebottom, in re*, 6 Sc. (c. r.) 898.

12. The proclamations allowed to be indorsed by the clerk of peace into whose custody the proceedings had come, and which had been omitted to be done by the late deputy prothonotary of the Court of Great Sessions, although after ejectment brought. *Evans dem., Davies def.*, 6 Sc. (c. r.) 372; and 7 Dowl. (r. c.) 259.

13. Under 3 & 4 Will. 4, c. 74, the Chancellor is not protector of the settlement in the place of a lunatic, who is at the time a tenant in tail in possession; and *semb.*, if the estate of the lunatic were such as constituted the Chancellor protector, and the lunatic were seised of the remainder in fee, subject only to an intervening estate tail, the Chancellor would not concur in barring it. *Wood, in re*, 3 Milne & Cr. (ch.) 266.

And see *Attorney; Copyhold; Lunatic; Recovery*.

### FIXTURES.

See *Trover*.

### FOREIGN ATTACHMENT.

1. Where the plaintiffs, as assignees, had instituted a suit in the Mayor's court for the very same debt, and judgment been given against them, held, that they could not file a bill for the same



matter, there being no allegation of want of jurisdiction, irregularity, nor incompetency in the court below to do justice, and plea of verdict and judgment there allowed. *Behrens v. Pauls*, 1 K. (CH.) 456.

2. Plea in *assumpsit* for money had, a recovery by foreign attachment by a creditor of the plaintiff, and that such creditor had execution thereof; replication, no execution executed, pursuant to the custom, and issue thereon: held, 1st, that an allegation that the plaintiff had no notice of the proceedings in the foreign attachment was no answer to the plea, the custom being found not to require that any notice should be given to the defendant in the attachment; 2dly, that the custom alleged in the plea, that after execution had and executed, the garnishee should be discharged, and it being expressly found that no writs of execution were issued on the defendant or garnishee, the plaintiff was entitled to judgment on that issue; that the defendant, by taking issue on that replication, was not precluded from proving, and the jury from finding, according to the fact; and that the attorney of the garnishee was not incompetent to prove custom. *Magrath v. Hardy*, 4 Bing. N. S. (C. R.) 782; 6 Sc. 627; and 6 Dowl. (P. C.) 749.

And see *Certiorari*.

### FOREIGN COURTS.

1. In a suit in a foreign court for the distribution of personal estate of a party domiciled out of the country, held, that it is bound to adopt, in the interpretation of testamentary instruments, the rules of construction which would prevail in the country where the party was domiciled, but that they are not bound to adopt the foreign rules of evidence, every court being governed by its own rules of procedure. *Yates v. Thompson*, 3 Cl. & Fi. (P.) 545.

2. Where a party domiciled in England, but possessed of real estate in Scotland, died intestate, being indebted on bonds which were paid by the heir out of the proceeds of the real estate in Scotland; held, that the right which the heir in Scotland paying movable debts has there against the personal estate, may be made available in England, where the personal estate is primarily liable for the payment of all debts. *Winchelsea, Earl of, v. Garatty*, 2 Keene (CH.) 293.

### FOREIGN JUDGMENT.

Plea of judgment recovered for the same cause of action in the Vice-Admiralty Court of Sierra Leone, not a court of record, and the judgment being only evidence of the cause of action, and not shown to be binding and conclusive on the defendant, held not a bar to a count on the original ground of action. *Smith v. Nicholls*, 5 Bing. N. S. (C. R.) 208; and 7 Dowl. (P. C.) 283.

### FOREIGN LAWS.

Although a general stoppage of payments by a foreign trader necessarily amounts to a refusal at the time of such stoppage, yet where the suspension arose from the stoppage of the house of agency in this country, the Judicial Committee held that it established only the *ouverture de la faillite* from the time of actual stoppage abroad; a mere refusal, not followed by a cessation of payment, held not to establish such *ouverture de la faillite* within the Art. 441 of the Code de Commerce of France. *D'Epinay v. Saunders*, 1 Moore, (P. C.) 103.

And see *Pleading*, (C. L.)

### FOREIGN STATES.

1. Where this country introduced its own municipal law into a conquered or ceded country, not in all its branches, but only *sub modo*; held, that it did not draw with it the law incapacitating aliens from holding and transmitting real estate; and *semb.*, the Mortmain Act does not extend to East India British possessions. *Lyons, Mayor, &c., v. East India Co.*, 1 Moore (EX. CO.) 288.

2. Devise by a party, born in France, but holding military rank in the English service in India, and resident at the court of a native prince there, of real and personal estate, in trust, for setting apart sums for liberating prisoners confined for debt, and for the endowment of a college at and in the dominions of the prince wherein the testator was residing; upon a reference in a suit at Calcutta for carrying the will into effect, to inquire whether the bequest as to the relief of prisoners, could be carried into effect, as to which it was reported in the negative; and 2dly, whether the governor-general in council had the power of giving effect to the bequest for the college at L., as to which it was reported, that the governor was willing to receive the funds, but did not state whether he had the means of giving effect to it; whereupon the court decreed payment of the funds to the governor, or to such person as he should direct; upon appeal, the latter part of the decree reversed, the report of the Master being informal, and the objection, if taken at the time, fatal. *Ib.* 175.

3. A foreign prince becoming a suitor voluntarily in a court of law in this country, becomes subject, as to all matters connected with that suit, to the jurisdiction of the court of equity; and a discovery being necessary to the plaintiff's defence at law, demurrer, for that as against a sovereign the suit was not maintainable, overruled. *Rothschild v. Queen of Portugal*, 3 Younge & C. (EX. EQ.) 594.

And see *Costs*, [B]; *Habeas Corpus*.

### FORFEITURE.

1. Where a lease was to become voidable in case the tenant should become bankrupt or insol.



vent, and after his discharge under the Insolvent Act, the landlord received rent subsequently accruing, held to amount to a waiver of the forfeiture, and that the non-payment of the rent specified to be due in the schedule, did not amount to a continuing insolvency, as to create a new cause of forfeiture. *Doe v. Rees*, 4 Bing. N. S. (c. r.) 384.

2. In ejectment for forfeiture for breach of covenants for insuring, and also to repair; held, that the plaintiff was bound to show that the forfeiture had been committed, and that the refusal of the defendant to produce the policy was not of itself evidence that he had not insured, but merely let in secondary evidence. *Doe d. Bridger v. Whitehead*, 3 Nev. & P. (q. n.) 557.

And see *Bankrupt; Devise; Ejectment*.

### FORMEDON.

Where a writ of *petit cape* issued after a general imparlance and view demanded by the tenant, and no default committed by him, held irregular; and *semble*, if such demand of view were irregular, the objection could be taken otherwise than by demurrer or counterplea. *Tolson v. Watson*, 3 Bing. N. S. (c. r.) 770. And the demand of view allowed to be withdrawn on payment of costs. lb. 783.

### FRAUD.

1. Where the solicitor employed both by mortgagor and mortgagee, obtained the execution of the deed in such an irregular and informal manner as, if he had been an innocent person, ought to have excited his suspicion, and to have put him upon making inquiries; held to amount to constructive notice to his client of the fraud by which it was obtained, and a re-assignment decreed; and affirmed, upon appeal, but without costs. *Kennedy v. Green*, 3 Myl. & K. (ch.) 699.

2. The court, acting on the principle of transactions between attorney and client, granted an injunction against enforcing an agreement obtained by a medical man from an aged patient, for the payment of a large sum on his death, in consideration of past services and future attendance; and *semble*, such an instrument is void in law, as holding out temptations to do the very act which by the agreement it was the duty of the party accepting it to do. *Dent v. Bennett*, 7 Sim. (ch.) 539.

3. Where an attorney being employed to recover possession of estates, an agreement was entered into between him and his client, that he should have possession delivered upon giving an indemnity against costs, and that the contract should be complete upon payment of a certain sum within a stated period after the delivery of possession; held, that such contract was void and contrary to public policy; an account of the dealings between

the attorney and client having been decreed, held, that the former was bound to prove the consideration for which securities were given. *Jones v. Thomas*, 2 Younge & C. (ex. ex.) 498.

And see *Heir; Injunction; Insolvent; Mortgage; Joint Stock Company; Vendor and Pur.; Will*.

### FRAUDS, STATUTE OF.

1. Where the plaintiff's traveler took the defendant's order for hops, the terms of which the latter entered in his own sample book, containing his own name, and which the traveler signed on behalf of the plaintiff; held a sufficient memorandum of the contract within the statute. *Johnson v. Dodgson*, 2 Mees. & W. (ex.) 653.

2. In assumpsit for not completing an agreement to assign a lease of premises, held, first, that the day stated in the contract for completing the purchase of an interest in land, could not be varied by parol, as being a contravention of the Statute of Frauds; but, secondly, that the failure to procure a licence to assign, or to register previous assignments before the day stipulated for such completion of the contract, being imperfections capable of being removed, were not breaches of the agreement. *Stowell v. Robinson*, 3 Bing. N. S. (c. r.) 923.

3. Where the defendant had taken the stock of a party, and undertaken to satisfy the creditors, the plaintiff agreeing to withdraw his execution which he had issued; held to be an original and not a collateral undertaking for the debt of another within the statute. *Bird v. Gammon*, 3 Bing. N. S. (c. r.) 883.

4. Where an agreement for a lease contained a stipulation for a mode of valuation; held that it was to be taken to be and continue entire, and that such stipulation could not be waived by parol. *Harvey v. Grahham*, 5 Ad. & Ell. (x. n.) 73.

5. Where a joint order for distinct articles was given, and part received, but objections were made to the other being according to order; held, that if the articles were furnished according to that contract, and such as ought to have been delivered pursuant to it, the defendant was responsible upon the joint contract for both, by the acceptance of one, and that such part acceptance was sufficient to satisfy the Statute of Frauds. *Elliott v. Thomas*, 3 Mees. & W. (ex.) 170.

6. The defence, no contract in writing, need not be specially pleaded where the contract is executory, and relating to an interest in land. *Buttermere v. Hayes*, 7 Dowl. (p. c.) 489.

7. A contract by parol to purchase, at 2s. per sack, potatoes, then growing (June), to have them at digging-time (October), and to find diggers; held, not a contract for an interest in land within the statute. *Sainsbury v. Matthews*, 4 Mees. & W. (ex.) 343.

And see *Stamp; Will*.



## FRIENDLY SOCIETY.

1. An order of Justices requiring the officer of a friendly society to pay money to a member, must expressly find that such party is a member entitled to the money, and that the party on whom the order is made is at the time an officer of the society; and held, that the order being directed to him, describing him as "steward, &c.," nor was the recital of the complaint on oath, stating him such officer, sufficient; nor was such recital by the claimant, stating himself a member and entitled, and the money due sufficient to dispense with such finding, nor the direction to pay the amount "so due and owing as aforesaid;" and a distress founded upon an order so deficient being bad, the Justices held liable in trespass. *Day v. King*, 5 Ad. & Ell. (K. B.) 359.

2. Where the original rules had been enrolled, but the society had for 30 years acted on new rules, which had not been enrolled, held, that it ceased to be within the protection of 33 Geo. 3, c. 54, s. 2, and a *mandamus* to justices to hear the complaint of a member refused. *R. v. Lord Godolphin*, 3 Nev. & P. (Q. B.) 488.

And see *Bankrupt*.

## GAME.

The information for trespassing in pursuit of game, under 1 & 2 Will. 4, c. 92, s. 30, may be laid by a party having no interest in the land. *Middleton v. Gale*, 3 Nev. & P. (Q. B.) 372.

And see *Indictment*.

## GAMING.

See *Action*; *Assumpsit*; *Bankrupt*; *Bill*; *Discovery*; *Wager*.

## GAOL.

On an indictment against the keeper of Newgate for refusing to receive parties committed by Middlesex justices on misdemeanors, held that the Court of Aldermen had no power under 4 Geo. 4, c. 64, s. 13, to make an order, limiting the appropriation of that gaol to felons, excluding parties so committed for misdemeanors; and that returns made by previous keepers, and returns made by the Court of Aldermen under that statute, were admissible to show how that prison had been used; but held, that a refusal to receive a party committed by order or warrant, departing from the usual form, was not a wilful and contemptuous disobedience, within the words of the indictment: where it was the course of business of the office of the city solicitor to indorse notices and orders when served, the Judge (although there were no corroborating circumstances) received the indorsements as evidence of service, the

solicitor, the clerk and the keeper being all dead. *R. v. Cope*, 7 C. & P. (N. P.) 720.

## GIFT.

See *Bankrupt*; *Bond*.

## GRANT.

1. Where the crown in a lease of lot and cope granted also to the same lessee the office of barmaster or steward of the barmote court, a judicial officer, regulating amongst other things the measure to be rendered by the miners to the lessee; held, that the grant of the office being to a party who was incapable of holding it, on the ground of his peculiar interest, was void. *Arkwright v. Cantrell*, 2 Nev. & P. (Q. B.) 582; and 7 Ad. & Ell. 565.

2. Where, in consideration of a party permitting the defendant to hold the office of steward of a manor, at the will of the grantor, the defendant promised, out of the fees, to pay an annuity to a party, the former steward, so long as he should hold the office, and the lord afterwards appointed the defendant for life; held, that it was not competent to him to contend that he did not hold at the will of the lord, and avoid the payment of the annuity. *Mattock v. Kinglake*, 1 Ferr. & Dav. (Q. B.) 46.

And see *Assumpsit*; *Crown Grant*; *Fair*; *Mines*.

## GUARANTEE.

1. Where the plaintiff acted as attorney for a party, plaintiff in a Chancery suit, which was agreed to be put an end to, the defendant (being the defendant in the Chancery suit) undertaking to pay the costs of the plaintiff's attorney; held, that it being originally the debt of another, and for which the original debtor was still liable, the promise not being in writing, the action was not maintainable. *Tomlinson v. Gell*, 1 Nev. & P. (K. B.) 588.

2. In *assumpsit*, on a guarantee in the terms "I hereby undertake to secure you the payment of any sums of money you have or may hereafter advance to D. and C., on their account with you;" held, 1st, that it not appearing from the terms of the instrument that the future advances were the consideration for guaranteeing the past advances, the actual consideration was left too uncertain to render the guarantee sufficient within the Statute of Frauds; 2dly, that under the general issue, the defendant might show that the consideration alleged in the declaration was not the actual one, without pleading it specially; and, lastly, that the creditor having proved against the estate of the principal to a larger amount than that covered by the guarantee, the defendant had a right to deduct the dividends from the amount



claimed under the guarantee. *Raikes v. Todd*, 1 Perr. & Dav. (q. n.) 133.

And see *Action; Contract; Frauds, Statute of; Set-off; Surety*.

### GUARDIAN.

1. Where the father by his will appointed guardians to his children, the court, on *habeas corpus*, made an order for them to be taken from the custody of the grandmother, and delivered to the guardians, notwithstanding a bill filed in equity against the guardians for an account, and for placing the children under the protection of that court. *R. v. Isley*, 5 Ad. & Ell. (x. n.) 441.

And *infra*.

2. Where a female appointed guardian marries, it is of course to appoint a new one. *Anon.* 8 Sim. (ch.) 346.

### HABEAS CORPUS.

1. Where a *habeas corpus* had been recognized and executed according to the process of a foreign state, where the defendant was, but not obeyed, the court refused a rule for an attachment absolute in the first instance against the party, who had returned within the jurisdiction; nor could the court issue its warrant for the disobedience, under the 56 Geo. 3, c. 100, s. 2, where it appeared that the child sought to be restored to the applicant was detained in France. *Wyatt, ex parte*, 5 Dowl. (p. c.) 339.

2. Where the commitment of a bankrupt by commissioners was right, and upon notice of his being ready and willing to make full answer, the commissioners were ready to appoint a sitting for that purpose upon his paying the costs of such sitting, the court refused a *habeas corpus* for the purpose of discharging him, although on affidavit of his inability to pay. *Stockwin, in re*, 5 Ad. & Ell. (x. n.) 266.

3. A rule *nisi* granted for a *habeas corpus* to bring up a prisoner committed on a charge of embezzlement, as a witness before an election committee of the House of Commons, *sed quare*. *In re Pilgrim*, 5 Ad. & Ell. (x. n.) 485.

4. An affidavit is absolutely necessary, either from the party who claims the writ, or from some other person, to satisfy the court that there is such coercion as renders him unable to make it. *Canadian Prisoners' Case*, 5 Mees. & W. (ex.) 33, and 7 Dowl. (p. c.) 208.

5. Where the return showed in substance that the party was in custody of the gaoler of L., where he had been brought from a colony, C., after being indicted for treason, and a pardon granted, on terms of his being transported to the colony of V. D., for life, to which condition he had consented, and that in order to carry the condition into effect, he had been brought to L., and delivered into the custody of the gaoler there,

until he could be taken to V. D., there being no means of transporting him at once from C. to V. D., the court refused to discharge him; if the condition were not lawful, or no assent given, the party being still liable to be tried for the treason here, and detained in custody until he could be dealt with according to law. *Canadian Prisoners' Case*, 5 Mees. & W. (ex.) 32.

6. Where the party was in custody under an order of the Lords of the Admiralty; held, that the court had no power to change the custody, to charge him in execution, which can only be when in civil custody, and the writ refused. *Jones v. Danvers*, 7 Dowl. (p. c.) 394; and 5 Mees. & W. (ex.) 234.

And see *Bankrupt; De Contumace capiendo; Costs*.

### HAWKERS.

Where a timber merchant, residing at A. purchased logs of mahogany at B. which he sent to C., and then sold them by auction; held to be a hawker within the Act, and requiring a license. *R. v. Pease*, 5 M. & Ry. (x. n.) 507.

### HEIR.

1. Where at the time of executing a deed of grant of a perpetual rent-charge of 500*l.*, the grantor was entitled for the joint lives of himself and his father, to a rent-charge of that amount, charged on an estate of which the father was tenant for life, remainder to himself in fee; held, that as he had the power of securing such rent-charge by assignment of his life estate, and of his reversion in fee expectant, it was not to be considered as a sale of an interest in reversion; held also, that in determining the adequacy of value, the market value, and not the estimate of an actuary, ought to be regarded. *Wardle v. Carter*, 7 Sim. (ch.) 490.

2. The 1 Will. 4, c. 60, as to infant heirs being trustees on agreements of purchase, held not to apply to the cases of exchanges of land, nor of an exchange of lands, where money also formed part of the consideration, by way of equality of exchange. *Turney v. Edgell*, 1 K. (ch.) 502.

3. An heir of entail being also heir of the line, is bound by the law of Scotland to collate or bring into account the value of the real estate to which he has succeeded, before being entitled to claim the share of the personality of the deceased. *Anstruther v. Anstruther*, 4 Cl. & Fi. (p.) 33; affirming the decree below; and supporting the case of *Little Gilmour*; 13 Dec. 1809, Fac. Coll.

And see *Condition; Injunction; Practice (ex.); Pleading (ex.); Writ of Right*.

### HIGHWAY.

1. Churchwardens and overseers, although en-



titled under the Highway Acts to the custody of the books, &c., of the waywarden, yet, unless furnished and paid for by them, have no property in them, so as to maintain trover against a party detaining them. *Addison v. Round*, 6 Nev. & M. (x. s.) 422; and 4 Ad. & Ell. 799.

2. Where an Enclosure Act directed that allotments to be made in respect of certain messuages should be deemed parcel of the townships in which such messuages were situated, and the commissioners were directed to set out roads, and to declare in what parish or township such roads were situate, and by whom to be repaired; one of the roads directed by them passed between allotments which were declared to be in different townships, but the road, which was an ancient one, had previous to the inclosure been in one township, and the award omitted to declare in what townships the allotments were situate, or by whom the road was to be repaired; held, that the Act did not, by changing the parochial locality as to such allotments, affect that of the road, which, in the absence of any declaration by the commissioners, was to be still deemed in the original township; held also, that to subject the inhabitants of the district to repair, an old road continued, as well as roads newly set out and made, must be first declared by Justices in Sessions to be fully completed and repaired; held also, (per Denman, L. C. J.) that although the herbage of a road becomes vested in the owners of the adjoining allotments, under 41 Geo. 3, c. 109, s. 11, no presumption arises that the soil belongs to them. *R. v. Hatfield*, 4 Ad. & Ell. (x. s.) 156.

3. On an indictment against a parish for non-repair of a highway within it, alleging the liability of the parish at large, plea, alleging that a township had always been accustomed, and of right ought to repair, traversing the liability of the parish at large to repair, and issue on the custom, found for the defendants; held, first, that the custom being in favor of the defendants, judgment for the crown could not be entered *non obst. vered.*; and, secondly, that the plea was bad, for not averring in direct terms that the parish would have been liable but for the custom, and judgment arrested. *R. v. Eastington*, 1 Nev. & P. (x. s.) 193.

4. Where the local Act recited the benefit intended by making the main line and branch roads, held, that it was an entire undertaking, and that the trustees must complete both before they could burthen the public with the repair of any part; such acts are a species of bargain, and performance by the trustees of all they have engaged to do, is a condition precedent to the liability of the public. *R. v. Cumberworth*, 1 Nev. & P. (x. s.) 197; and 4 Ad. & Ell. 731.

And see *S. C. 3 B. & Ad. 108*; and *R. v. Edge Lane*, 6 Nev. & M. 81.

5. Where the road stopped up was, as to part, wholly situate in one parish, and as to another part, running between two parishes, partly in one and partly in another parish; held, that the order stopping up so much as lay in one parish, was invalid; and that one order cannot be made for stopping up separate and distinct roads, but there

must be a separate order for each. *R. v. Milverton*, 1 Nev. & P. (x. s.) 179.

And see *Davison v. Gill*, 1 East, 64; and *R. v. Kent Justices*, 10 B. & Cr. 477.

6. The period of six months given for removing an order for stopping up a public footway, confirmed by an order of sessions, is to be calculated from the latter order; held also, that two separate orders are requisite, for diverting and stopping up. *R. v. Middlesex Justices*, 1 Nev. & P. (x. s.) 92.

7. Where the only ground for removing an indictment for obstruction of a highway, by building thereon; as a question of fact only, and no suggestion of specific difficulty in law suggested, a *certiorari* was refused. *R. v. Jowl*, 1 Nev. & P. (x. s.) 28; and 5 Dowl. (p. c.) 435.

8. Where on an indictment against the inhabitants of a township for non-repair, the defendants relied on an agreement, in 1591, between the owners of the soil of that and another township, to repair the roads in the former township, with a clause that a competent lawyer should prepare and make all necessary assurance, and the same had been repaired, up to a short time before the indictment, by the inhabitants of such township; held, that a judge was not bound on such evidence to direct the jury to presume such conveyances, in the absence of any vestige that they ever existed. *R. v. Scarsbrick*, 1 Nev. & P. (x. s.) 582.

9. The court will not discharge a parish from an indictment for non-repair of a highway, removed by *certiorari*, merely on the certificate of its being in repair, until by a winter's wear it appears to have been substantially done. *R. v. Witney*, 5 Dowl. (p. c.) 723.

10. Where a presentment under 13 Geo. 3, c. 78, s. 24, had been removed into K. B., and before judgment that Act was repealed by 5 & 6 Will. 4, c. 50, held, that the Court could not give judgment thereon. *R. v. Mawgan in Menage*, 3 Nev. & P. (q. s.) 502.

11. The 5 & 6 Will. 4, consolidation of Highway Acts, amended by 2 & 3 Vict. c. 45.

And see *Evidence*.

## ILLEGITIMATE.

See *Escheat*.

## INCUMBRANCE.

1. Where of two incumbrances of an equitable interest, the latter gave notice to the trustees, which the former neglected to do; held, that the notice gave the second incumbrance a prior right. *Foster v. Cockerell*, 9 Bli. N. S. (r.) 332; affirming the judgment below.

And see *Ryal v. Rowles*, MS. Ib. n.



2. Where lands were conveyed by C. as a security for annuities to J., with a proviso for re-purchase, upon giving 12 months' notice; the grantor afterwards agreed to sell the lands to B., subject to the incumbrances, and the purchaser entered into possession and paid the annuities, and subsequently C. granted the same to J., in trust to sell and pay off the charges, and agreed to give J. a charge upon the premises and purchase-money, to secure the payment of the annuities and arrears and interest thereon; and an account having been stated, he assigned the balance due from B. under the contract, and subject to incumbrances, to be applied in payment of the amount so found due; the solicitors of B. afterwards went to the residence of J. for the purpose of tendering the consideration money for the annuities and arrears, &c. with deeds of transfer of the annuities for the execution of J., and he being absent, a written notice to the same effect was left; held, (reversing the judgment below) that it did not operate as an equivalent to payment, nor determine the annuities; and an inquiry directed as to whether J. had any and what lien or claim to any portion of the purchase-money payable by B. to C. *Birch v. Joy*, 10 Bli. N. S. (r.) 201.

3. Where A., one of several executors, alone acted and took an assignment from his son of his interest in the residue, without any notice to the co-executors, and after the death of A., and a suit instituted for the administration of the estate, the son assigned the same interest, for valuable consideration, to the petitioner, who gave notice thereof to the executors; held, that the knowledge of the assignment by A., who was interested, without communicating that knowledge to his co-executors, was not sufficient notice of the prior incumbrance to give him priority over the subsequent assignee. *Timson v. Ranisbottom*, 2 Keene (ch.) 35.

4. Where by a Railway Act, the costs and expenses of investing money in lands to the like uses, were directed to be paid by the company; held, that the meaning of the Act was to give such costs in cases where the money was to be applied in discharge of incumbrances. *Trafford, ex parte*, 2 Younge & C. (ex. eq.) 522; and see *ex parte Northwick*, 1 Younge & C. 166.

5. Where a mortgagee took under the exercise of a general power of appointment, held, that taking it as if it had been limited by the deed creating the power, it was not affected by the lien, of a judgment duly docketed and registered, and of which the mortgagee had notice. *Skeeles v. Shirley*, 8 Sim. (ch.) 153; and affirmed on appeal, 3 Myl. & Cr. 112.

6. Upon a petition, by an incumbrancer, to have the debt liquidated out of the dividends of the fund, held, in a contested case, that the only relief he was in strictness entitled to was to restrain the transfer of the fund and payment of the dividends, and to file a bill for any ulterior relief. *Cook v. Collingridge*, 1 Coop. (ch.) 255.

And see *Interest*; *Minor*; *Merger*; *Mortgage*.

## INDICTMENT.

### [A] OFFENCES AGAINST THE PUBLIC PEACE—PUBLIC JUSTICE—SERVICE.

- (a) *Coining.*
- (b) *Conspiracy.*
- (c) *Forgery.*
- (d) *False Pretences.*
- (e) *Nuisances.*
- (f) *Perjury.*
- (g) *Bigamy.*
- (h) *Post-office.*
- (i) *Unnatural offences.*
- (k) *Relating to Stamps.*
- (l) *Election of Members of Parliament.*

### [B] OFFENCES AGAINST THE PERSON.

- (a) *Murder—concealment.*
- (b) *Manslaughter.*
- (c) *Rape.*
- (d) *Maliciously cutting, &c.—shooting.*
- (e) *Robbery.*
- (f) *Threatening letters.*

### [C] OFFENCES AGAINST PROPERTY.

- (a) *Larceny, what.*
- (b) *Arson.*
- (c) *Burglary—housebreaking.*
- (d) *Embezzlement.*
- (e) *Poaching.*
- (f) *Malicious injuries.*
- (g) *Misdemeanors.*
- (h) *Sheep stealing.*
- (i) *Forcible Entry.*

### [D] INDICTMENT.

- (a) *Sufficiency of—venue—Central Court.*
- (b) *Plea—autrefois acquit.*
- (c) *Trial—jury—examination of witnesses—reply—postponement of.*
- (d) *Evidence—confessions—depositions.*
- (e) *Judgment—restitution.*

### [A] OFFENCES AGAINST THE PUBLIC PEACE—PUBLIC JUSTICE—SERVICE.

#### (a) *Coining.*

1. Where two parties committed distinct utterings, when separate, and it was not shown that they were near enough to give any assistance, or to be acting in concert; held, that the separate utterings could not be received as evidence of joint utterings; a general privity, or community of purpose, is not sufficient. *R. v. Manners*, 7 C. & P. (N. r.) 801.

2. On an indictment for selling plate, with the King's mark forged, knowing, &c.; held, that judgment of transportation, under 11 Geo. 4 & 1 Will. 4, c. 66, could only be passed. *R. v. Harris*, 1 Ry. & M. (c. c.) 396.



3. On an indictment upon 2 Will. 4, c. 34, s. 10, for having moulds in his possession, the jury must believe that the moulds had at the time of the prisoner's possession, the entire of the obverse or reverse part of the coin impressed, and not merely a part. *R. v. Foster*, 7 C. & P. (n. r.) 494.

4. But upon a count for making a mould, which was intended to make and impress the figure and apparent resemblance of the obverse side of a shilling; held, that it need not be proved that he had completed the entire impression. *Id.*

5. The giving a counterfeit piece of money in charity, nothing being received in exchange, held not an uttering within the statute, as no intention to defraud any one appeared. *R. v. Page*, 8 C. & P. (n. r.) 122.

6. Where husband and wife were engaged together in uttering counterfeit money, held that she was entitled to acquittal; and *semb.*, there is no distinction, as to coercion, between felonies and misdemeanors committed by her in his presence. *R. v. Price & Ux.* 8 C. & P. (n. r.) 19.

#### (b) Conspiracy.

On an indictment for a conspiracy to resist the payment of church-rates, held, that a witness might be asked, on cross-examination, as to any appeals having been made against the rates, but not as to what the trustees had done in reference thereto, their proceedings being required by the Local Act to be entered, and allowed to be read in evidence in all cases; 2dly, that acts of distinct individuals may be first proved, and then it may be shown that those acts prove a conspiracy between them; 3dly, that a witness cannot be asked, for the purpose of trying his credit, whether he has not himself, in certain publications, used slanderous expressions of the defendants; 4thly, that a warrant of distress having been put in, the broker may be asked if he did not distrain under it without producing the notice of distress; 5thly, that there is no distinction between civil and criminal cases, as to cross-examining, with the judge's leave, a party's own witness, when unwilling; 6thly, that a witness may be asked the circumstances on which he founds a particular belief; 7thly, that he may be asked if he received bills similar to those produced; held, also, that upon a charge of conspiracy, the jury must be satisfied that the acts were done with common concert and design between the parties, but for that purpose it is not necessary to show they came together to concert them; and it is sufficient, if by their acts they pursue the same object by the same means, though each may perform separate parts of an act. *R. v. Murphy*, 8 C. & P. (n. r.) 297.

#### (c) Forgery.

1. Forging a magistrate's order, upon a gaoler

to discharge a prisoner, held indictable, as forgery at common law. *R. v. Harris*, 1 Ry. & M. (c. c.) 393.

2. Altering a regimental receipt for the subsistence money, held to be properly charged as a forgery of a receipt for money, although the instrument, in its effect, might be used and operate as an order for payment. *R. v. Hope*, 1 Ry. & M. (c. c.) 414.

3. An order to pay a sum as an advance of wages on an intended voyage, as per agreement, and containing a memorandum subjoined, that on receiving such check he agreed to sail, and be on board within sixteen hours from the date; held to be properly charged as a forged order for payment of money. *R. v. Bamfield*, 1 Ry. & M. (c. c.) 416.

4. Where the prisoner gave his employer a bill, subscribed with a receipt for the amount of goods, and the jury found that it was uttered for the purpose of deceiving into a belief that money given had been applied to the purpose for which it had been obtained, being a mere pretence and fraud; held, that he was properly convicted of uttering the forged receipt, with intent to defraud. *R. v. Martin*, 1 Ry. & M. (c. c.) 483; and 7 C. & P. (n. r.) 549.

5. Where the prisoner obtained the prosecutor's acceptance to a bill in blank, as for a smaller sum marked in pencil in the margin, and he afterwards inserted a larger one; held to amount to a forgery. *R. v. Hart*, 1 Ry. & M. (c. c.) 485; and 7 C. & P. 652.

6. Where in an indictment for forging an order of relief and pass route to a discharged prisoner, the instrument set out varied from the form in the Act, and was in many parts ungrammatical; held, that it could not be supported. *R. v. Donnelly*, 1 Ry. & M. (c. c.) 438.

7. A foreign bill of exchange, for — pounds sterling, held properly so described, although it contained no word of payment, and that the term *lires* meant pounds. *R. v. Szudburakie*, 1 Ry. & M. (c. c.) 429.

8. Where the prisoner having received from the prosecutor a bill, dated at three months, and afterwards alleging that he could not get one for so large an amount discounted, prevailed on the prosecutor to accept one for a smaller sum, and pretending to destroy the former one, afterwards altered it to a date of twelve months; held to be a forgery, with intent to defraud the prosecutor. *R. v. Atkinson*, 7 C. & P. (n. r.) 669.

9. Where the prisoner represented that a relative had died and left him money, which was in the hands of C., and that he wanted mourning, and afterwards produced a letter as from C., in the terms, "Please to let W. T. (the prisoner) have such things as he wants. I have got the amount of 27l. for C. in my hands these many years;" held, that it was a forged request, within 11 Geo. 4, & 1 W. 4, c. 66, s. 10; although *semb.* the case might have been considered as false pretences. *R. v. Thomas*, 7 C. & P. (n. r.) 851.



10. Where the indictment charged the uttering a forged bill of exchange; held not supported by proof of the acceptance only being forged, which is a distinct offence. *R. v. Horwell*, 1 Ry. & M. (c. c.) 405.

11. Under 2 & 3 Will. 4, c. 123, it is sufficient to allege that the prisoners forged a promissory note for £——, without stating the date. But where the forgery is on a joint stock bank, *quære*, if the intent must be laid to defraud the parties returned under 7 Geo. 4, c. 46, to the Stamp office, and such return be produced. *R. v. Burgess*, 7 C. & P. (N. P.) 490. *S. P. R. v. James*, lb. 553.

12. Whether the prisoner by the forgery intended to defraud bankers with whom he had deposited guarantees to a large amount, held to be a question for a jury. *R. v. James*, 7 C. & P. (N. P.) 557.

And *vid. infr.*

13. On an indictment for forging an instrument in the terms, "twenty-one days after date pay (without acceptance) to the order of —," held that it was properly described as a bill of exchange. *R. v. Kinnear*, 2 M. & Rob. (N. P.) 117.

14. Where the prisoner wrote the acceptance of a party on a bill, with whom he had formerly been in partnership, and subsequently been given accommodation acceptances, held, that if he signed the name with a *bona fide* belief that he had authority so to do, it would not be a forgery; and such authority need not be expressed, but may be implied from acts; held also, that payment of the bill into a provincial bank, and drawing checks on the credit of it, would be a sufficient uttering: the 7 Geo. 4, c. 46, does not make it necessary that all the partners should reside in England. *Reg. v. Beard*, 8 C. & P. (N. P.) 143.

15. Where the prisoner obtained goods on a note, signed by a customer of the prosecutor, in the terms: "Please let bearer, W. G., have a shovel and grafting tool for me," signed; held to be a forged request for the delivery of goods within the 11 Geo. 4 & 1 Will. 4, c. 66, s. 11. *R. v. James*, 8 C. & P. (N. P.) 292.

16. Where from previous dealings a party has used the name of another on bills, under a *bona fide* belief that he had authority to do so, and without intention to defraud, the jury ought to acquit him. *R. v. Parish*, 8 C. & P. (N. P.) 94.

And see *R. v. Forbes*, 7 C. & P. 224.

17. On an indictment for uttering a forged copy of an entry in a marriage registry, held that the instrument need not be set out, but that it was sufficient to state it as if it had been an indictment for stealing the instrument, although it might not be the subject of larceny; and that the court would take judicial notice that the parish of Seighford, in the county of Stafford, was a parish in England. *R. v. Sharpe*, 8 C. & P. (N. P.) 436.

18. If the jury find that the prisoner uttered a bill as true, meaning it to be taken as such, and that at the time he knew it to be forged, held that they ought to find, as a necessary consequence,

an intent to defraud. *R. v. Hill*, 8 C. & P. (N. P.) 274.

19. Where the prisoner, acting for his father, an overseer, received a receipt for a county-rate from the high constable, for the sum of 3*l.* 5*s.* 9*d.*, which, on payment, the constable subscribed "received the above rate," and the prisoner afterwards inserted a figure 1 before the 5*s.*, held to be a forgery of the receipt, and that the instrument might be described in the same way as if the subject of larceny. *R. v. Vaughan*, 8 C. & P. (N. P.) 277.

20. Where the prisoner, a servant, having received the amount of a tradesman's bill from her mistress, brought back the bill with the word *paid*, and the name of the tradesman subscribed, held to be forgery of an acquittance, with intent to defraud. *Reg. v. Houseman*, 8 C. & P. (N. P.) 180.

21. The forging an instrument in the form of a promissory note for 100*l.*, or such other sum not exceeding that sum as the payee might incur, by reason of becoming surety to the sheriff for his officer, held, to be a forging an undertaking for the payment of money, within 1 Will. 4, c. 66, s. 3. *R. v. Reed*, 8 C. & P. (N. P.) 623.

22. A forged letter of credit, in the name of a party having funds in the hands of the party to whom it was addressed, held a warrant for the payment of money within 1 Will. 4, c. 66, s. 3. *R. v. Raake*, 8 C. & P. (N. P.) 625.

23. The writing an acceptance of an existing person without authority, or of a non-existing firm or person, with intent to defraud, is forgery. *R. v. Rogers*, 8 C. & P. (N. P.) 629.

24. Where the prisoner deposited a forged acceptance with bankers, which he hoped would be a security for what he owed, to which the manager replied that it would depend on the result of inquiries as to the acceptor; held a sufficient uttering; and where a party utters what he knows to be a forged instrument, it is a consequence that he intends to defraud the party to whom he utters it: held, also, that the writing an acceptance on a blank stamp, which is afterwards filled up by another, would not amount to a forgery of the acceptance of a bill. *R. v. Cooke*, 8 C. & P. (N. P.) 582.

25. And, *scmb.* where the prisoner was himself a partner in the bank, the count laying the intent to defraud A. and others could not be supported. *lb.*

26. So, where the witness for the prosecution had sworn that he had received a forged bill from the prisoner, and on cross-examination added that he took a blank stamp to the prosecutor, and that he returned it with his name upon it, the judge would not allow him to be cross-examined by the prosecutor, nor to show the latter statement to be untrue, and that the witness had made different statements to other persons. *R. v. Farr*, 8 C. & P. (N. P.) 767.

27. Where the same attorney acted for the prisoner, (the mortgagor), and also for the mortgagee, and received from the prisoner, as part of his title deeds, a forged will; held not a privileged com-



munication, and that the attorney was bound to produce the will on the trial of an indictment for the forgery; held also, that the 1 Will. 4, c. 66, s. 3, applied to the forging the will of a non-existing person, as well as of false making of the will of a living person. *R. v. Avery*, 8 C. & P. (N. P.) 596; denying the case of *R. v. Smith*, 1 Phillpotts Ev. c. 6.

28. An instrument in the form of a promissory note for payment of 100*l.*, or any other sum not exceeding the sum which the party might become liable to as surety for a sheriff's officer; held an undertaking for the payment of money within 1 Will. 4, c. 66, s. 3. *R. v. Reed*, 8 C. & P. (N. P.) 623.

#### (d) *False Pretences.*

1. Where the prisoner, on a purchase of goods, drew a check on bankers with whom he represented he had an account, and one count of the indictment alleged that he pretended it to be a "good and genuine order, of the value of £—," and by means of which he obtained the goods, he having no account or funds at the time with the bankers; held, that he was properly convicted upon that count. *R. v. Parker*, 7 C. & P. (N. P.) 825; and confirmed by the Twelve Judges.

2. Where the prisoner went into a shop, wearing the academic dress, and stating that he belonged to M. College, and obtained goods; held a false pretence, and would have been so, although no words had been used. *R. v. Barnard*, 7 C. & P. (N. P.) 784.

3. Where the prisoner was charged with obtaining money, by falsely pretending that if the prosecutor would give him a sovereign, he would tell him where a horse and mare, which had been stolen then were; held insufficient, the pretence being that he knew where they were. *R. v. Douglas*, 1 Ry. & M. (c. c.) 462.

4. Where the indictment alleged that the prisoner had an iron weight of 25*lbs.* and no more, and pretended to sell the prosecutor 16*cwt.* of of coals, worth 20*s.*, and that the said weight was 56*lbs.*, with intent to defraud the prosecutor of 10*s.*; held, that there was no allegation connecting the sale of the coals with the false weight, and that the statements were merely false; and the conviction on such indictment was wrong. *R. v. Reed*, 7 C. & P. (N. P.) 848.

5. Where the prisoner, having accepted a bill drawn by the prosecutor, had stated that he could raise all the amount for taking it up except 300*l.*, which the prosecutor consented to advance, but the prisoner applied it to his own use, and suffered the bill to be dishonored; held, that the Act embraced every mode of obtaining money by false pretences, by loan as well as by transfer; and that if the jury were satisfied that he was stating a deliberate falsehood to obtain the money, and that he knew at the time he had not the funds to take it up, and meant all the time to apply the 300*l.* to his own use, the offence was complete. *R. v. Crossley*, 2 M. & Rob. (N. P.) 17.

6. An indictment for obtaining money under false pretences, held insufficient, where it omitted to allege that the money obtained was the property of the party intended to be defrauded. *Reg. v. Norton*, 8 C. & P. (N. P.) 196.

7. Where the indictment for obtaining goods by false pretences, omitted to state the person from whom obtained, held bad, and not cured by 7 Geo. 4, c. 64, s. 21. *R. v. Martin*, 3 Nev. & P. (Q. S.) 472.

#### (e) *Nuisances.*

1. Upon an indictment for a nuisance in a public harbor, by erecting piles, and thereby obstructing and rendering it insecure, the verdict finding that, by the defendant's works, the harbor was, in some extreme cases, rendered less secure; held, that the court could not necessarily infer that the works must be a nuisance for which the defendants were criminally responsible. *R. v. Tindall*, 1 Nev. & P. (N. S.) 719.

#### (f) *Perjury.*

1. In perjury, assigned on an affidavit to set aside a judgment, alleged to have been entered up "in or as" of Trin. Term; held bad, and an amendment under 9 Geo. 4, c. 15, refused; but the allegation of the warrant of attorney having been directed to —, "then and still being attorneys of K. B.;" held to be sufficiently admitted by the party executing it. *R. v. Cooke*, 7 C. & P. (N. P.) 559.

2. Upon an assignment of perjury in an answer in Chancery, by the defendant, it being material whether an annuity payable to the defendant or B. his trustee, had been paid; held, that the clerk of B. might be asked, "at the time he received money from B. to pay in at his bankers, what did he say about the money?" held, that the answer was receivable as a declaration made by an agent, acting at the time within the scope of his authority. *R. v. Hall*, 8 C. & P. (N. P.) 358.

3. Where the indictment for perjury, on a charge of felony, merely stated that the defendant went before justices, and deposed (setting out the deposition of the party having done so and so, amounting to felony), and assigning perjury thereon, but there was no allegation that any charge of felony had been made, or any judicial proceeding pending before the justices, held bad. *Reg. v. Pearson*, 8 C. & P. (N. P.) 119.

4. On an indictment for perjury, on an information under the Beer Act, before two justices, held that it was necessary to aver that the justices were acting in and for the division or place within which the house was situate, but that it need not allege them to have been acting in petty session, nor *semble*, that there was a written information. *R. v. Rawlins*, 8 C. & P. (N. P.) 439.

5. Where the witness gave contradictory evidence in his deposition before the magistrate, and on the trial at the sessions, on which latter the



perjury was assigned; held, that it would not be sufficiently shown to be false by the mere fact of his having sworn the contrary at another time; but the jury must consider whether there was such confirmatory evidence of the facts stated in the deposition as proved that given at the sessions to be false. *R. v. Wheatland*, 8 C. & P. (n. r.) 238.

And see *R. v. Harris*, 5 B. & A. 926.

6. On an indictment for perjury, in a charge, before justices, of beastiality, and that the party had the flap of his trowsers unbuttoned, the two witnesses to disprove being the party and his brother, who swore that his brother was not absent from him on the alleged occasion more than three minutes, and that the trowsers he then wore had no flap: held, that the corroborative evidence was sufficient to go to the jury, and the averment of the materiality of the state of the dress was sufficient: held, also, that the indictment sufficiently stated it as a judicial proceeding pending before the magistrate. *R. v. Gardiner*, 8 C. & P. (n. r.) 737.

7. The court refused to allow the chairman of the quarter sessions, as a Judge of a court of record, to be examined as to a party's statement in order to support a charge of perjury. *R. v. Gazard*, 8 C. & P. (n. r.) 595.

8. In a criminal case the court will not allow the formal proofs to be admitted unless made at the trial by the prisoner or his counsel. *R. v. Thornhill*, 8 C. & P. (n. r.) 575.

And see *Insolvent*.

#### (g) *Bigamy.*

Where the offence was committed in a different county from that in which the bill was found and tried; held, that the indictment ought to have stated the latter facts. *R. v. Fraser*, 1 Ry. & M. (c. c.) 407.

#### (h) *Post-office.*

Laws relating to offences against the Post-office consolidated, and new provisions relating thereto, by 1 Vict. c. 36.

And see *Highway*.

#### (i) *Unnatural offences.*

1. The 7 Will. 4 & 1 Vict. c. 85, allowing the jury who acquit of a felony to convict of assault, where the crime charged shall include an assault against the person, held not to apply to charges of beastiality, but the prisoner might be detained, and indicted for the attempt to commit the crime. *R. v. Eaton*, 8 C. & P. (n. r.) 417.

2. On a charge by a wife of an unnatural offence by her husband, unless by violent resistance the inference of consent is excluded, being other-

wise an accomplice, she must be confirmed, or the jury are bound to acquit. *R. v. Jellyman*, 8 C. & P. (n. r.) 604.

3. An indictment for assaulting, and indecently exposing the person, with intent to incite a party to commit an unnatural crime; held not to be "a wilful and indecent exposure" within the 7 Geo. 4, c. 64, s. 24, enabling the court to give costs to the prosecutor. *Reg. v. —*, 3 Nev. & P. (q. n.) 627.

#### (k) *Relating to stamps.*

Where a stamp distributor, on renewing a post-horse licence, altered the former as to the date of the year, held, that it was a question for the jury if fraudulently done, although by the words of the statute, 2 & 3 Will. 4, c. 120, fraud was not made an ingredient in the felony, yet, that to make it such, there must have been a guilty intention. *Reg. v. Allday*, 8 C. & P. (n. r.) 136.

#### (l) *Election of Members of Parliament.*

Where the defendant, indicted on 2 Will. 4, c. 45, s. 58, (Reform Act) for a false statement at the poll, that he had the same qualification for which his name was originally inserted on the register, and it appeared that he had ceased to occupy that tenement, but did at the time of the poll occupy another of the same value; held, that he had ceased thereby to have the right to vote, but that the term, "same qualification," being equivocal, the jury, in order to convict the party, must be satisfied that he was stating what he knew to be false. *R. v. Dodsworth*, 2 M. & Rob. (n. r.) 72.

And see *Election of Members of Parliament*.

#### [B] OFFENCES AGAINST THE PERSON.

##### (a) *Murder—concealment.*

1. Where the wound was stated by the surgeon to have been partly cut and partly torn, and done by an instrument not sharp; held sufficient to support the indictment, which alleged it to have been "with a certain sharp instrument," the degree of sharpness being immaterial. *R. v. Grounsell*, 7 C. & P. (n. r.) 788.

2. Where the indictment for murder by strangling averred that the prisoner did bring the child forth of her body alive; held that the jury must be satisfied that the child was entirely born before the act committed by the prisoner: *semb.* if so, although still attached by the umbilical cord, the prisoner might be convicted of murder. *R. v. Crutehley*, 7 C. & P. (n. r.) 814.

3. And that it was actually and entirely born in a living state, proof of having breathed is not decisive that it was born alive. *R. v. Ellis*, 7 C. & P. (n. r.) 850.



4. The mother may be found guilty of concealing the birth, although she may have before communicated the fact of pregnancy. *R. v. Douglas*, 1 Ry. & M. (c. c.) 480; and 7 C. & P. 644.

5. Costs of prosecution in cases of concealment of birth. By 1 Vict. c. 44.

6. Where the prisoner undertook the care of an aged and imbecile person, and by keeping her in a confined and unhealthy place, and neglect to provide proper food, &c. occasioned her death; held, that if the jury were satisfied, from the gross and wilful neglect, the prisoner contemplated the death of the party, he would be guilty of murder; and if guilty of such neglect, although he did not contemplate death, he would be guilty of manslaughter. *R. v. Marriott*, 8 C. & P. (n. r.) 425.

7. Where the father of a party with whom the prisoner had been detected in the commission of an unnatural offence, two days after, meeting the prisoner, whom he had been seeking, stabbed him; held not to amount to a sufficient provocation to reduce the offence to manslaughter. *Reg. v. Fisher*, 8 C. & P. (n. r.) 182.

8. To reduce the offence to that of manslaughter, by showing previous provocation, the jury must be satisfied that the act was done in consequence of such provocation, and not of previous malice. *Reg. v. Kirkham*, 8 C. & P. (n. r.) 15.

9. Where two agree to commit suicide, and the means used only take effect on one, held that the survivor may be convicted of murder. *R. v. Alison*, 8 C. & P. (n. r.) 418.

10. Where the prisoner was only in the act of proceeding with the child towards the place of intended concealment, but stopped before the act was complete, held insufficient to constitute the offence under 9 Geo. 4, c. 31, s. 14. *R. v. Snell*, 2 M. & Rob. (n. r.) 44.

11. Indictment for child murder, alleging the offence as upon an infant male child of tender age, to wit, of six weeks, and not baptised; held insufficient, for not stating a name, or that it was to the jurors unknown; and affirmed afterwards by the 15 Judges. *R. v. Biss*, 8 C. & P. (n. r.) 773.

12. On a charge of murder, the evidence showing the body to be of a different party; held, that until proof of the actual death of the party alleged to have been killed, the prisoner could not be called on to give any account. *R. v. Hopkins*, 8 C. & P. (n. r.) 591.

13. Where an indictment against the prisoner for the murder of her husband described her as "the wife of," &c., the Judge directed the description to be amended, by describing her as "widow." *R. v. Orchard*, 8 C. & P. (n. r.) 565.

14. Where parties were charged as accessories to murder, the principal being insane; held, that they could not be convicted on that count, but if, aware of the malignant purpose of such insane party, they entertain it, and share in that purpose with him, and are present aiding and abetting, and assisting him in the commission of acts fatal to life, they are guilty as principals for what is

done by his hand. *R. v. Tyler and others*, 8 C. & P. (n. r.) 616.

15. To constitute the offence of concealment, under 9 Geo. 4, c. 31, s. 14, it is essential that some act have been done by the prisoner towards disposal of the body; as, where it slept from the mother whilst on the privy, held not enough, although the prisoner denied the birth. *R. v. Turner*, 8 C. & P. (n. r.) 755.

#### (b) *Manslaughter.*

1. Where the prisoner had been acquitted on a charge of aiding and abetting murder; held to be no bar to an indictment charging her as an accessory before the fact. *R. v. Birchenough*, 1 Ry. & M. (c. c.) 477.

2. Where the death was occasioned by the prisoner, a boy, having pulled out the trapstick of a cart, in a frolic; held guilty of manslaughter. *R. v. Sullivan*, 7 C. & P. (n. r.) 641.

3. If the driver, by racing with another carriage, loses the control of his own horses, and a party is killed by the upsetting of his own carriage, it is manslaughter in the driver. *R. v. Timmins*, 7 C. & P. (n. r.) 499.

4. On a charge of manslaughter against the captain and mate, by ill treatment of a sailor on board, who was proved to have been in a diseased state, but which they alleged to be skulking; held, that the question was whether the indications of disease were such as to have excited the attention of reasonable and humane men, and the party having come from an hospital, that it was their duty to have inquired of the surgeon whether the party was in a state to perform his duties. *Reg. v. Leggett*, 8 C. & P. (n. r.) 190.

5. An iron-founder having furnished cannon, one of which being imperfect and returned, he had filled the flaw with lead and returned it, and upon being fired, it burst and killed a man; held to be manslaughter. *R. v. Carr*, 8 C. & P. (n. r.) 163.

6. A medical man, though duly qualified to practice, yet if by gross unskillfulness he occasions death, will be guilty of manslaughter. *R. v. Spilling*, 2 M. & Rob. (n. r.) 107.

7. Where a party enters into a contest, being armed with a deadly weapon, with intent to use it, it will be murder in case of death ensuing; but if used in the heat of provocation, without such previous intent, it will only amount to manslaughter; if used in the necessary defence of his own life, it would be justifiable homicide. *Reg. v. Smith*, 8 C. & P. (n. r.) 161.

8. The master of an apprentice held bound to provide medical attendance during sickness, and held liable where the death was occasioned by the want of such assistance: in the case of a servant, the master is not bound by law to provide such. *Reg. v. Smith*, 8 C. & P. (n. r.) 153.

9. Where the evidence of the death having been



occasioned by the act of the prisoner arose from his own statements, and there was no proof of its being accidental; held, that the jury could not legally infer it. *R. v. Morrison*, 8 C. & P. (n. r.) 22.

10. So, where the death is shown to have been occasioned by the hand of the prisoner, it lies on him to show by evidence, or inference from circumstances, that the offence does not amount to murder. *R. v. Greenacre*, 8 C. & P. (n. r.) 35.

#### (c) Rape.

1. The old presumption that a party under 14 years of age is incapable of committing a rape is not affected by the 9 Geo. 4, c. 31, s. 16, 17. *R. v. Groombridge*, 7 C. & P. (n. r.) 582.

2. Where the female consented, believing the prisoner to be her husband, held that the offence did not amount to rape, but that he might under 1 Vict. c. 85, s. 11, be convicted of assault, and sentenced to imprisonment and hard labor. *R. v. Saunders*, 8 C. & P. (n. r.) 265; *S. P. R. v. Williams*, 1b. 266.

3. Although it is not necessary that the hymen should be ruptured where penetration is proved, yet the jury may hesitate to conclude the latter, where the rupture is not proved. *R. v. M'Rue*, 8 C. & P. (n. r.) 641.

4. Upon an indictment for a rape on a child under 10 years; held, that the offence did not include an assault under 1 Vict. c. 83, but that the prisoner could only be found guilty of the whole charge, or be acquitted. *R. v. Banks*, 8 C. & P. (n. r.) 574.

5. So, where the party was between the ages of 10 and 12, and the offence a misdemeanor only; held, that the consent would put the charge of assault out of the question; and although every attempt to commit a misdemeanor is a misdemeanor, yet the attempt must be by an illegal act. *R. v. Meredith*, 8 C. & P. (n. r.) 569.

6. Where the prisoner charged with an assault, with an attempt to commit a rape, was himself under 14; held, that he could not be convicted, nor was evidence admissible to show that he was capable of committing the offence of rape. *R. Philips*, 8 C. & P. (n. r.) 736.

#### (d) Maliciously cutting, &c.—shooting.

1. Where the prisoner had previously declared that if any man struck him he would make him repent it, and armed himself with a sword-stick, with the blade open, and the prosecutor coming in, and perceiving the prisoner creating a disturbance, struck him with his fist, upon which the prisoner stabbed him; held, that it was for the jury to say if he used the words as an idle threat, or with the deliberate purpose of doing so, as such intention would constitute the *malus animus* which the law terms "malice;" and although drunkenness would form no excuse, it might be

taken into consideration upon the question of provocation in cases where the act may be attributed to passion excited by such provocation. *R. v. Thomas*, 7 C. & P. (n. r.) 817.

2. Where the prosecutor, having on a hat with a hard rim, was struck several times on the head by the prisoner with an air gun, and received a contused wound, which was said to have been caused by the rim of the hat; held, and confirmed by the judges, that it was a wounding within the statute. *R. v. Sheard*, 7 C. & P. (n. r.) 846.

3. Where the prisoner, being taken by warrant before a justice on a charge of assault, was ordered to find bail, and on his refusal, whilst his commitment was making out, he escaped, and the prosecutor was ordered verbally by the justice to pursue and apprehend him, and, in the attempt to do so, was cut by the prisoner; held, (per Gaslee, J.) that the original warrant continued in force, and that the apprehension was lawful; and the conviction held right. *R. v. Williams*, 1 Ry. & M. (c. c.) 387.

4. But where the prisoner, after apprehension under the Vagrant Act, had escaped, and was several hours afterwards attempted to be retaken, without warrant by the constable, in the resisting which he wounded the officer; held, that the conviction for stabbing with intent to resist lawful apprehension, could not be supported. *R. v. Gardener*, 1 Ry. & M. (c. c.) 390.

5. Where the party in pursuit of the prisoner to apprehend him was distant a quarter of a mile from the officer who had the warrant, and was stabbed with a knife which the prisoner had in his hand at the time; held, that as the arrest was illegal, if death had ensued in resisting, it would have been manslaughter only: but if the prisoner had taken out the knife on seeing the prosecutor come up, it might have been evidence of previous malice. *R. v. Patience*, 7 C. & P. (n. r.) 775.

6. A count charging the wounding with intent to resist lawful apprehension by a metropolitan police-officer, to wit, for committing damage and injury to certain plants and roots in a garden, &c., held good. *R. v. Fraser*, 1 Ry. & M. (c. c.) 419.

7. Where the wound inflicted in attempting to cut the throat amounted only to a slight scratch, and wounds inflicted on the hands, although deep cuts, were inflicted by the prosecutor's attempt to defend himself; held not to be within the statute. *R. v. Beckett*, 1 M. & Rob. (n. r.) 536.

8. Where the wounding was by biting the hand, held not a wounding within the stat., which requires that an instrument be used. *R. v. Stevens*, 1 Ry. & M. (c. c.) 409.

9. So, the throwing vitriol over the prosecutor's face with intent to disfigure, held not a wounding within the statute. *R. v. Murrow*, 1 Ry. & M. (c. c.) 456.

10. Where the indictment alleged the act to have been done "feloniously, wilfully, and maliciously," and not "unlawfully," the word used in the statute, held insufficient. *R. v. Ryan*, 7 C. & P. (n. r.) 854.



11. Where the prisoner shot at H., mistaking him for L., with intent to kill the latter, and the indictment contained counts with intent to kill H. and others, laying the intent to kill L., held that, being one act of shooting, the joinder was proper, but the jury negating the intent to injure H., an acquittal directed; in such case, the grand jury being discharged, the judge refused to detain the prisoner until articles of the peace could be prepared. *R. v. Holt*, 7 C. & P. (n. r.) 518.

12. Although by 7 Will. 4 & 1 Vict. c. 85, ss. 2, 4, the wounding with intent to murder, and to maim, or do bodily harm, be subject to different judgments, it is no objection that counts laying the wounding with different intents be joined in the same indictment. *Reg. v. Strange*, 8 C. & P. (n. r.) 172.

13. A blow with an iron hammer, whereby the jaw of the prosecutor was broken, and the skin broken internally, held, a wounding within the statute. *Reg. v. Smith*, 8 C. & P. (n. r.) 173.

14. Where the prisoner, whilst taking away ashes, was detained on being charged with taking away part of a kettle, and in the scuffle wounded the prosecutor; held, that if the jury were satisfied that the prisoner had stolen the article, the prosecutor had a right to detain him, and the wounding would be felony. *R. v. Price*, 8 C. & P. (n. r.) 282.

15. Under 7 Will. 4 & 1 Vict. c. 85, where the wounding was under such circumstances as, if death had ensued, the offence would only have amounted to manslaughter; held, that if the jury were satisfied of the malice and intent, the prisoner might be convicted of felony. By the term malice, is not intended malice aforethought. *R. v. Griffiths*, 8 C. & P. (n. r.) 248.

16. Where a policeman ordered a street musician, who had collected at night a number of disorderly persons around him, to move on, and on his refusal laid his hand on his shoulder to remove him, and the party drew a razor and wounded the officer; held, that upon a provocation so slight, if death had ensued it would have been murder; *aliter*, if the party had been struck a blow or knocked down. *Reg. v. Hagan*, 8 C. & P. (n. r.) 167.

17. Shooting into a room where the prosecutor was supposed to be, but in fact was not, held not to be a shooting *at*, within the statute. *R. v. Lovel*, 2 M. & Rob. (n. r.) 39.

18. But where he shot at A., and struck B., held to amount to the offence of shooting at B. *R. v. Jarvis*, 2 M. & Rob. (n. r.) 40.

19. To constitute a wound, there must be a separation of the entire skin, and not a mere abrasion of the outward cuticle. *R. v. M'Loughlin*, 8 C. & P. (n. r.) 635.

20. Where the indictment contained the usual counts, and one for a common assault, the verdict of guilty allowed to be entered on the count on felony, for the intent to do grievous bodily harm; and held, by the 15 judges, on the objec-

tion for misjoinder, that the conviction was good. *R. v. Jones*, 8 C. & P. (n. r.) 776.

### (c) Robbery.

1. Where two persons were robbed whilst in the same carriage, and there were separate indictments, held, that on the trial of the first, the prosecutor in the second might be asked as to his loss of a watch found on one of the prisoners, but not as to the violence used towards him. *R. v. Rooney*, 7 C. & P. (n. r.) 517.

2. Laws relating to offences against the person amended by 1 Vict. c. 85; to robbing and stealing from the person, c. 87.

3. On an indictment for robbery, the jury having found the prisoner "guilty of an assault, but without any intention to commit any felony;" held, that the prisoner might be convicted of the assault, and punished, under the 7 Will. 4, & 1 Vict. c. 85, s. 11. *R. v. Ellis*, 8 C. & P. (n. r.) 654.

4. So, where the indictment charged an assault, and wilful administering deleterious drugs. *R. v. Sutton*, 8 C. & P. (n. r.) 660.

### (f) Threatening Letter.

1. It is for the jury to say whether the terms of the letter amount to threats within the statute. *R. v. Tyler*, 1 Ry. & M. (c. c.) 428.

2. Upon an indictment for threatening to accuse of an infamous crime, and intimidating the party; held, that the jury may take into their consideration, in reference to the expressions used before obtaining the money, what was said afterwards by the prisoner relating thereto, when in custody. *Reg. v. Kain*, 8 C. & P. (n. r.) 187.

3. On an indictment under 7 & 8 Geo. 4, c. 29, for threatening to accuse; held, that the words were not confined to an accusing by course of law, but to be taken to mean, threatening to charge before any third person. *R. v. Robinson*, 2 M. & Rob. (n. r.) 14.

4. Where the threat was to accuse "of having taken indecent liberties," held not within 7 Will. 4, & 1 Vict. c. 87, s. 4, which is to be construed as a threat to accuse of having committed the complete crime; but the prosecutor having parted with his money under the combined fear of personal violence as well as of character, held not the less a robbery, because the bodily fear was produced by two adequate causes. *R. v. Norton*, 8 C. & P. (n. r.) 671.

### [C] OFFENCES AGAINST PROPERTY.

#### (a) Larceny, what.

1. Removal by miners of ore from the heaps of other miners to their own, in order to increase



their own wages, without being taken away from the owners, held not to amount to larceny. *R. v. Webb*, 1 Ry. & M. (c. c.) 431.

2. Where the prisoner, occasionally employed as a clerk, received a check to be handed over to a creditor, but appropriated it to his own use, held to amount to larceny of the check. *R. v. Metcalf*, 1 Ry. & M. (c. c.) 433.

3. Where the prisoner had received the horse from the prosecutor to agist, and been paid for one week, held that the subsequent sale of it did not amount to larceny. *R. v. Smith*, 1 Ry. & M. (c. c.) 473.

4. Where the articles stolen were not such as pass from hand to hand, as ends of unfinished woollen cloths, the lapse of two months held only a circumstance for the jury. *R. v. Partridge*, 7 C. & P. (n. r.) 551.

5. Where the prisoner hired a horse and gig of the prosecutor, which he immediately offered for sale; held, that there having been no actual conversion of the property, the prisoner could not be convicted of larceny. *R. v. Brooks*, 8 C. & P. (n. r.) 225.

6. Where the prisoner having ordered goods and change for a crown to be sent, and he met the prosecutor's servant with the goods, and received them from him with the change, giving him a crown which turned out to be counterfeit; held, that if the jury found that it was a preconcerted scheme to get possession of the goods without paying, and that the servant had only a limited authority to deliver on payment, the offence amounted to larceny. *R. v. Small*, 8 C. & P. (n. r.) 46.

7. Where the prosecutor went to sleep at a house with the prisoner, and laid his watch on the table, whence it was stolen; held to be a stealing in the dwelling-house, and not from the person. *R. v. Hamilton*, 8 C. & P. (n. r.) 49.

8. Where in a case of ring-dropping, the prosecutor parted with his money in the purchase of the prisoner's share, held not to be a case of larceny. *Reg. v. Wilson*, 8 C. & P. (n. r.) 111.

9. Where the workmen of a mine proprietor by his orders stopped up an air-way affecting an adjoining mine; held, that if they acted in the belief that he had the right, although they might be all guilty as trespassers, yet they could not be guilty of felony within 7 & 8 Geo. 4, c. 30, s. 6: *aliter*, if they knew that the act was maliciously directed by their employer. *Reg. v. James*, 8 C. & P. (n. r.) 131.

10. Opening a letter, and detaining it, merely from curiosity or political motive, held to be a trespass only, and not a felony. *R. v. Godfrey*, 8 C. & P. (n. r.) 563.

#### (b) *Arson*.

1. Since the 7 & 8 Geo. 4, c. 30, s. 17, the indictment for setting fire to, &c. with intent to injure the owner is sufficient, although the jury found the intent to be to injure another, and a

count would be good although no intent laid. *R. v. Newill*, 1 Ry. & M. (c. c.) 458.

2. A covering of wood and straw set on upright posts and cross timbers, in a farm-yard, held to be an outhouse within the 7 & 8 Geo. 4, c. 30, s. 2, and that placing fire among the straw, producing smoke and burnt ashes in the straw, was a setting on fire, although there was no appearance of fire itself. *R. v. Stallion*, 1 Ry. & M. (c. c.) 398.

#### (c) *Burglary—housebreaking*.

1. A separate building, in which a gardener lived upon his master's premises, held well described as the dwelling-house of the servant. *R. v. Rees*, 7 C. & P. (n. r.) 568.

2. An erection in a field for a cart shed, boarded up, with a lock and key, and gorse thrown over the top, held a building within 7 & 8 Geo. 4, c. 29, s. 44. *R. v. Worrall*, 7 C. & P. (n. r.) 516.

3. Laws relating to burglary and stealing in a dwelling-house, amended by 1 Vict. c. 86.

4. Laws relating to piracy amended by 1 Vict. c. 88; to burning or destroying ships, by c. 89.

5. Upon an indictment under 7 Will. 4 & 1 Vict. c. 86, s. 2, it must allege both the burglary and striking, and the proof must correspond therewith; where the party struck was misnamed, held, that the prisoner could only be guilty of burglary. *R. v. Parfit*, 8 C. & P. (n. r.) 283.

6. On an indictment for stealing lead affixed to a building, &c.; held, that the prisoner could not be found guilty of a simple larceny, the jury finding that he took the lead when severed and lying at a considerable distance from the building. *R. v. Gooch*, 8 C. & P. (n. r.) 294.

7. The breaking out of a house may be burglarious, although the being within the house may have been originally lawful, as in the case of guests at an inn, or of lodgers; the lifting a hatch by such parties, if with the intention of getting out with goods feloniously taken, is a burglarious breaking out of the house. *R. v. Wheeldon*, 8 C. & P. (n. r.) 747.

#### (d) *Embezzlement*.

1. Where it was the duty of the prisoner, a banker's clerk, to keep the money received in a box, and make entries of his receipts; and upon his being called on to produce his money, he threw himself upon their mercy, and said he was 900*l.* short; held upon an indictment for embezzling monies to a large amount, to wit, 500*l.* that he was properly convicted, although no evidence was offered of the persons of whom received nor the sort of money abstracted; and the judgment affirmed by the judges. *R. v. Grove*, 7 C. & P. (n. r.) 633, and 1 Ry. & M. (c. c.) 447.

2. The omission of a clerk to enter money received in his books, held insufficient, where there



had been no denial by him of the receipt. *R. v. Jones*, 7 C. & P. (N. P.) 833.

3. It is essential that there should be a denial of the receipt, or a false account have been given. *Id.* 834.

4. On an indictment against the clerk of a savings bank, held that he was properly described as clerk to the trustees, although he was appointed by the managers. *R. v. Jenson*, 1 Ry. & M. (C. C.) 434.

5. So where the secretary of a society received monies from a member to be paid over to the trustees, although usually received by a steward, and he fraudulently withheld it; held, that it might be stated as the property of the trustees, and he be deemed their clerk and servant. *R. v. Hall*, 1 Ry. & M. (C. C.) 474.

6. A collector of the poor-rates, church and rector's rates, appointed in vestry under a local act, and described as servant to the committee of management; held sufficient, and the conviction proper under 7 & 8 Geo. 4, c. 29, s. 47. *R. v. Callahan*, 8 C. & P. (N. P.) 154.

And see *R. v. Jenson*, *Mood*. (C. C.) 434.

7. It is not sufficient to prove generally a deficiency in account, but some specific sum must be proved to have been embezzled. *R. v. Lloyd Jones*, 8 C. & P. (N. P.) 288.

8. Where the prisoner, being a salesman as well as drover, had been entrusted to take cattle to the salesman of the prosecutor at Smithfield, but had authority to sell them on the road if he could, and he drove them to the market, and sold them there, and applied the money to his own use; held, that being the agent, and not the servant, he could neither be convicted of larceny or embezzlement. *R. v. Goodbody*, 8 C. & P. (N. P.) 665.

9. Where A., a coach-proprietor, horsed the coach from H. to W., driving it himself, and liable to his co-proprietors for the receipts, employed the prisoner to drive occasionally for him, giving him all the fees, and it was his duty to account for all the sums received, to his employer; held, that the abstracting and not accounting for part was embezzlement, and that he was properly described as the servant of A., and the monies embezzled as the property of A. *R. v. White*, 8 C. & P. (N. P.) 742.

10. Where the party charged with embezzling was clerk to a society, binding themselves by oaths of an unlawful nature, under 37 Geo. 3, c. 123, and 57 Geo. 3, c. 19; held, that the indictment laying the property in persons so unlawfully combined could not be supported. *R. v. Hunt*, 8 C. & P. (N. P.) 642.

#### (e) Poaching.

1. Where gamekeepers find poachers in a wood, the circumstances are sufficient notice, and no notice need be given that they are going to apprehend; but if the parties are not on the ground, or within the manor of the gamekeepers'

employer, they would not be justified in the apprehending. *R. v. Davis*, 7 C. & P. (N. P.) 785.

2. Large stones brought to the spot and used in assailing gamekeepers, held to be "offensive weapons" within the statute. *R. v. Grice*, 7 C. & P. (N. P.) 803.

3. The indictment, *semble*, ought to allege the being armed at the time of entering the land, as well as "being then and there by night armed as aforesaid." *R. v. Wilks*, 7 C. & P. (N. P.) 811.

4. Where two were charged in the same indictment with the principal felon as receivers, in one count jointly, and in another with receiving separate parts; held good. *R. v. Hartall*, 7 C. & P. (N. P.) 475.

5. Where the only weapon found on the prisoner was a common walking-stick, held, that if there were circumstances showing an intention to use it for purposes of offence, it might be an offensive weapon within the statute; *aliter*, if the jury find that it was in his possession in the ordinary way, and upon unexpected attack or collision only, used it offensively. *R. v. Fry*, 2 M. & Rob. (N. P.) 42.

6. An indictment under 9 Geo. 4, c. 63, s. 9, held sufficient, although not charging whether the land entered on was enclosed or not; held, also, that where some of the party were in the lands stated, and others in the adjoining land co-operating in the same purpose, all were guilty of the offence. *R. v. Andrews*, 2 M. & Rob. (N. P.) 37.

7. Where one of several went by himself to poach in a distinct field, held not an entry by the others into that field, to support the indictment; nor where they remained out in the road, and sent in their dogs into an adjoining field to drive the game into nets set by them. *R. v. Neckless and others*, 8 C. & P. (N. P.) 757.

8. So, a constructive arming is not sufficient within the statute to make the arming by one an arming of all, and satisfy the averment that all were armed. *R. v. Davis and another*, 8 C. & P. (N. P.) 759.

And see *Conviction*.

#### (f) Malicious injuries.

Where goods, although complete as to the manufacturing and texture, were still in process of dyeing, held to be still within the protection of 7 & 8 Geo. 4, c. 30, s. 3, against wilful damage of goods in process of manufacture. *R. v. Woodhead*, 1 M. & Rob. (N. P.) 549.

#### (g) Misdemeanors.

An attempt to commit a misdemeanor, whether the offence be one at common law or created by statute, held a misdemeanor. *R. v. Roderick*, 7 C. & P. (N. P.) 795.



(h) *Sheep-stealing.*

Where the prisoner had cut the throat of the sheep, but was disturbed, and the animal died two days after the wound, the jury, finding that he inflicted the wound with intent to steal the carcass, held that the conviction was right. *R. v. Sutton*, 8 C. & P. (n. r.) 291.

(i) *Forcible entry.*

A Judge of assize may refuse to award restitution after a true bill found by the grand jury for a forcible entry and detainer, and the court has not jurisdiction to interfere. *R. v. Harland*, 1 Perr. & Dav. (q. n.) 93.

## [D] INDICTMENT.

(a) *Sufficiency of—venue—Central Court.*

1. Indictment for stealing pipes fixed to the dwelling-houses of A. and B., it appearing that the house was let in separate parts to A. & B., held not sustainable. *R. v. Finch*, 1 Ry. & M. (a. c.) 418.

2. Wherever it is clear that there is only one offence, the joinder of counts, one as an accessory to the principal felony, and another for receiving, as a substantive felony, under 7 & 8 Geo. 4, c. 29, s. 54; held, that the objection ought not to prevail; but it is a matter wholly in the discretion of the Judge, and not open to demurrer, nor a ground for quashing the indictment. *R. v. Austin*, 7 C. & P. (n. r.) 798.

3. Where the prosecutor's wife, employed to sell her husband's goods, received a note, which was stolen from her before her return home; held, that it was properly described as the husband's property. *R. v. Roberts*, 7 C. & P. (n. r.) 485.

4. Since 1 Will. 4, c. 66, s. 24, a party held to be triable for forgery in any county in which he is in custody, although the offence arose elsewhere. *R. v. James*, 7 C. & P. (n. r.) 555.

5. Where the prisoner stole lead from a building in Berks, and was found in possession of it in Middlesex; held, that the taking not being a larceny but a statutable felony, of which the subsequent possession was not a larceny, he could not be tried as for an offence within the jurisdiction of the Central Criminal Court. *R. v. Millar*, 7 C. & P. (n. r.) 655.

6. Where the indictment for an offence, a misdemeanor, triable at the Central Criminal Court, was removed by *certiorari*; held, that it could only be tried at the assizes for the county in which the offence was committed. *R. v. Connop*, 3 Ad. & El. (n. s.) 949.

7. Where the prisoner was apprehended with the stolen horses in S., and accompanied the offi-

cer with the horses into K., where he escaped; held, that he could not be convicted of stealing in K. *R. v. Symmonds*, 1 Ry. & M. (c. c.) 401.

8. Where the larceny of tea was committed at a place inland, but where great ships might go; held, that the prisoner was triable within the jurisdiction of the Central Criminal Court. *R. v. Allen*, 1 Ry. & M. (c. c.) 494; and 7 C. & P. 664.

9. Where after a true bill for perjury found at the Central Criminal Court, the defendant was arrested in a civil suit and committed to the custody of the sheriff of Middlesex; held, that the court had no power under 4 & 5 Will. 4, c. 36, s. 16, to cause him to be brought by *habeas corpus* to be removed to the gaol of Newgate, (in another county,) to be tried for the misdemeanor. *R. v. Morgan*, 7 C. & P. (n. r.) 642.

10. Practice of Central Criminal Court assimilated with other courts of criminal jurisdiction, with respect to offenders liable to the punishment of death, by 1 Vict. c. 77.

11. Where the name of the child, only 12 days old, was alleged to be unknown, it appearing not to have been baptized, and the only evidence of a name was of the mother saying she should have the child named M. A.; held, that no name of reputation was thereby acquired, and the conviction proper. *R. v. Smith*, 1 Ry. & M. (c. c.) 402.

12. Where a statute only regulates the punishment, no averment *contra formam statuti* is necessary. *R. v. Berry*, 1 M. & Rob. (s. r.) 463.

13. Any one of several defendants is entitled to remove an indictment by *certiorari*, and the circumstance that by his so doing the recognizances of the others are discharged, although it may be a ground for exercising a discretion as to issuing the writ, is no ground for a *procedendo*. *R. v. Boxall*, 1 Nev. & P. (x. s.) 513.

14. The court refused to add to a rule for *certiorari* to remove proceedings before the coroner, who had issued his warrant against a party, that he might be admitted to bail before a magistrate, where he had not surrendered. *R. v. Wren*, 5 Dowl. (r. c.) 222.

15. Where a prisoner was acquitted of felony, and a new bill found for the misdemeanor; held, that he was entitled to traverse. *R. v. Williams*, 1 M. & Rob. (n. r.) 503.

16. And where the prosecutor was unable to attend, from the consequences of violence used towards him; held, that it is for the Judge to decide in each instance whether it is a case requiring the detention of the prisoner, or admit him to bail. *R. v. Osborn*, 7 C. & P. (n. r.) 799.

17. Where an indictment for an offence committed in the reign of the late king, concluded, "against the peace of the now queen," &c., held fatal on demurrer, the 7 Geo. 4, c. 64, s. 20, being confined to the cases of objections taken after judgment; and leave to quash and prefer a new indictment refused. *R. v. Smith*, 2 M. & Rob. (n. r.) 109.

18. Where a servant sent out to collect monies



was robbed before he returned home, held, that the money was improperly laid to be the property of the master. *R. v. Pendick*, 8 C. & P. (n. r.) 237.

19. The indictment for stealing in a shop, on 7 & 8 Geo. 4, c. 29, s. 15, must expressly aver a stealing therein; and merely averring that the goods were in the shop, and that the prisoner stole them, held insufficient. *R. v. Smith*, 2 M. & Rob. (n. r.) 115.

20. The West India Dock Act, making it sufficient to describe and refer to goods stolen as the goods of the company, held sufficient to allege the goods taken as the property of the company, without going to allege them to have been taken from the company. *Reg. v. Stokes*, 8 C. & P. (n. r.) 151.

21. Where an indictment contained counts charging a party as accessory, both *before* and *after* the fact committed by other prisoners; held, not improperly joined, and that the prosecutor could not be put to elect. *R. v. Blackson*, 8 C. & P. (n. r.) 43.

22. Where a party is indicted as an accessory after the fact, with the principal in a case of murder, held, that if the latter is found guilty of manslaughter only, the former may be found guilty as accessory to the lesser offence: the question for the jury in such cases is, whether the prisoner, knowing the offence to have been committed, was assisting in concealing the offence, or in any way aiding the offender to escape justice. *R. v. Greenacre*, 8 C. & P. (n. r.) 35.

23. It is sufficient to make a party liable as an accessory after the fact, if he employ another to receive and assist in the escape of the principal. *R. v. Jarvis*, 2 M. & Rob. (n. r.) 40.

24. Where an indictment for conspiracy had been removed by *certiorari*, and only one defendant had entered into the proper recognizances, the Court refused to interfere to compel him to submit to terms as to the time of trial. *R. v. Hunt*, 2 Nev. & P. (x. s.) 121; 6 Dowl. (r. c.) 5.

25. The proper mode of describing a peer in an indictment is by his Christian name, and degree in the peerage, describing him as "lord," and not "baron," held insufficient. *R. v. Pitts*, 8 C. & P. (n. r.) 771.

26. Where an illegitimate child, six weeks old, and baptised by the name of E., after which for a few days only it was called by the name of baptism, and its mother's name; held, sufficient evidence to go to a jury, whether it had acquired by reputation its mother's name, and to warrant their finding it properly so described in the indictment. *R. v. Evans*, 8 C. & P. (n. r.) 765.

27. An indictment alleging a previous conviction, but not concluding *contra formam*, held insufficient. *R. v. Blea*, 5 C. & P. (n. r.) 735.

28. Where the indictment, on 1 Vict. c. 85, s. 2, described the means by which the bodily injury was occasioned, and the nature and situation of the injury; held sufficient. *R. v. Cruise and Wife*, 8 C. & P. (n. r.) 541.

29. Where the inquisition stated a beating with a poker on the head by A. on one day, and a kick in the belly by B. on another day, of which the deceased respectively languished until, &c., and then died of the said blows on the head, together with the bruises and contusions on the belly, and that so the said A. and B. the said deceased did kill, &c., held bad. *R. v. Devett and Fox*, 8 C. & P. (n. r.) 639.

And see *Baron and Feme; Lunatic*.

#### (b) *Plea Autrefois acquit.*

1. A party who had been tried and acquitted as a principal in murder; held not entitled to plead such acquittal in bar of an indictment as an accessory before the fact to the same felony. *R. v. Plant*, 7 C. & P. (n. r.) 575.

2. Plea to an indictment against A. for receiving, &c., that A. and others were tried on an indictment for the same offence at, &c. where A. and three others were acquitted, held good. *R. v. Dann*, 1 Ry. & M. (o. c.) 424.

3. Where the bill was found partly on the affirmation and partly on the oaths of jurors, charged, &c.; held that the plea ought to state who were sworn and who affirmed. *Ib.*

4. Where the prisoners pleaded *autrefois acquit*, and that the felonies in the second indictment were the same; held that the prisoners' counsel were to begin; the four prisoners having been charged for rape in separate counts, each as principal, and the others as aiders and abettors, and acquitted, and at the same assizes three of them indicted in the same way, to which they pleaded *autrefois acquit*, the Judge (*deb.*) admitted the commitment in evidence for the prisoners, but held that pending the same assizes, the first indictment and minutes of the verdict were receivable without the record being made up; the jury having found that the felonies were the same, and acquitted the prisoners, the Judges, on reference, held that the verdict was final. *R. v. Parry*, 7 C. & P. (n. r.) 836.

#### (c) *Trial—jury—examination of witnesses—reply—postponement of.*

1. Wherever there is counsel for the prisoner, the case should be opened by the counsel for the prosecution. *R. v. Gascoine*, 7 C. & P. (n. r.) 772.

2. And although there be none, if the circumstances of the case are peculiar. *R. v. Bowler*, *Ib.* 773.

3. And declarations of the prisoner, not being confessions, should be stated. *R. v. Hartel*, *Ib.* 774; *R. v. Orrell*, *Ib.* 775; *R. v. Davis*, *Ib.* 786.

4. In opening the case for the prosecution, counsel held entitled to state to the jury declarations by the prisoner, as well as facts. *R. v. Orrell*, 1 M. & Rob. (n. r.) 467.



5. In strictness the counsel may reply, although the evidence called on the part of the prisoner is only to character, although the court would recommend the right to be exercised only under special circumstances. *R. v. Stannard*, 7 C. & P. (n. r.) 673.

6. And the right to reply will be on the whole case, and not only on the evidence to character. *R. v. Whiting*, 7 C. & P. (n. r.) 771.

7. Where two presentments by commissioners of sewers were removed by *certiorari*, and first entered by the defendant, and the prosecutors afterwards entered them, the Judge refused to alter the order of entry, and directed them to be tried as entered. *R. v. Leigh*, 7 C. & P. (n. r.) 813.

8. Although the jury may use their general knowledge on the subject of any question, yet where it relates to a particular trade, the knowledge as to which one of them can speak, he must be sworn as a witness. *R. v. Rosser*, 7 C. & P. (n. r.) 648.

9. The 6 Geo. 4. c. 50 (Jury Act), held not to affect the right of the crown not to be put to be called on for cause of peremptory challenge until the panel is exhausted; held also that a prisoner having challenged peremptorily 20 jurors could not be allowed to withdraw one and challenge another remaining juror instead. *R. v. Parry*, 7 C. & P. (n. r.) 837.

10. Where a witness on the bill is tendered, but not examined by the counsel for the prosecution, held that he might be cross-examined after being examined for the prisoner. *R. v. Harris*, 7 C. & P. (n. r.) 581.

11. Where a material witness, a friend of the prisoner, and whose name had been forged, did not attend upon his recognizance at the trial, and he was proved to have been attempting to compromise, the Judge ordered the prisoner to be remanded until the next assizes, until he should have entered into sureties for his appearance, and to give seven days' notice of bail. *R. v. Parish*, 7 C. & P. (n. r.) 782.

12. On several indictments against the same party for felony, the witness must be re-sworn, and may then have read over the evidence in the former case from the Judge's notes, and avouch its truth. *R. v. Foster*, 7 C. & P. (n. r.) 495.

13. A witness for the crown cannot be asked upon cross-examination, whether he did not, before the justices, state so and so, until after his deposition is read, and which is to be taken as part of the evidence of the cross-examining party; and if not read, the court may direct it to be done, and entitle the counsel for the prosecution to a reply; if the witness admits such statement to have been made, the prisoner's counsel may comment on the omission or its effect upon the other parts of his testimony; if he denies it, the prisoner's counsel may call witnesses to prove that he did; but in either case the deposition is the prisoner's evidence, and entitling the prosecutor to the reply. *Mem.* 1 Ry. & M. (c. c.) 496; and 7 C. & P. 676.

14. Where evidence is called only to character,

the prosecutor is strictly entitled to reply, although it may be for his discretion whether he will do so or not. In cases of Crown prosecutions, the prosecutor is entitled in strictness to reply, whether the prisoner calls witnesses or not. *Id.*

15. Where the indictment has not been taken before the grand jury, a material witness having absconded, the course is, that if it can be traced to any acts or contrivance of the prisoner or his friends, to require heavy recognizances for his future appearance, but if no collusion appears, to discharge the prisoner on his own recognizance alone; *sensu* magistrates should commit accomplices, although it may be intended to call them as witnesses. *R. v. Beardmore*, 7 C. & P. (n. r.) 497.

16. The rule of the Central Criminal Court said to be, not to try a case of perjury whilst the cause out of which it arises is undetermined, unless the court in which the latter is pending direct the charge to be first disposed of. *R. v. Ashburn*, 8 C. & P. (n. r.) 50.

17. The court refused to compel a prosecutor to try a traverse entered by the defendant, where ten days' notice had not been given. *Reg. v. Featherstonhaugh*, 8 C. & P. (n. r.) 109.

18. On cross indictments for assaults, tried as traverses at the assizes, the transaction being the same, the Judge directed the jury to be sworn in each case, and the counsel for the traverse first entered to open his case and call witnesses, and afterwards the counsel for the other to do the like, without either replying. *R. v. Waklyn & Vaughan*, 8 C. & P. (n. r.) 290.

19. Where the grand jury threw out a bill for murder on the ground of the prisoner being insane, held wrong, as preventing the detention of the party during the pleasure of the Crown. *Reg. v. Hodges*, 8 C. & P. (n. r.) 195.

20. On an indictment for riot, the having taken an active part in a measure occasioning much local excitement, held a good ground of challenging jurors. *R. v. Swain*, 2 M. & Rob. (n. r.) 112.

21. The duty of counsel in a prosecution is, to assist in the furtherance of justice, not considering himself as acting for any side or party. *R. v. Thursfield*, 8 C. & P. (n. r.) 269.

22. Counsel can only cross-examine from depositions, by making them evidence and giving the right of reply; but Judges are not bound by the resolutions advised upon the passing of the Prisoners' Counsel Bill, and may in their discretion question the witness as to the discrepancies: where cross-examinations of witness are not returned in the depositions by the magistrates, counsel may cross-examine as to such. *R. v. Edwards*, 8 C. & P. (n. r.) 26.

23. After counsel have cited and commented on a case to the Judge, he cannot do so afterwards in his address to the jury, who are bound to take the law from the Judge. *R. v. Parish*, 8 C. & P. (n. r.) 96.

24. After the prisoner's counsel has addressed



the jury, he cannot be also heard. *Reg. v. Boucher*, 8 C. & P. (N. P.) 141.

25. And his counsel cannot state the prisoner's story, nor anything which he is not in a condition to prove. *Reg. v. Beard*, 8 C. & P. (N. P.) 142.

26. A prisoner, since the statute, is not entitled to the privilege of two statements, one by himself and another by his counsel. *R. v. Burrows*, 2 M. & Rob. (N. P.) 124.

27. The court will not direct the name of a witness to be struck off the back of the indictment, being the brother of the prisoner, as, if showing any unfair bias, he might be cross-examined by the counsel for the prosecution. *R. v. Chapman*, 8 C. & P. (N. P.) 558.

28. Where the bill for perjury had been found at the preceding assizes, and entered at the ensuing assizes as a traverse by the defendant, without notice of trial given; held, that notwithstanding the defendant had been on bail more than 20 days, he could not force the prosecutor to try. *R. v. Minshall*, 8 C. & P. (N. P.) 576.

29. On an indictment, under 1 Vict., c. 75, s. 2, against husband and wife, for violently beating a child, with intent to murder; held, that the jury must be satisfied of an actual intent, and it is not sufficient that if death had ensued, the offence would have been murder: and where a party is charged as aiding and abetting, the jury must find that the latter was aware of the intent of principal to commit the offence of murder: held also, that the jury convicting only of the assault, the wife was not protected from the presumption of having acted under coercion. *R. v. Cruse and Wife*, 8 C. & P. (N. P.) 541.

30. Where the prisoner's counsel attempts to elicit on cross-examination evidence as to character, evidence of a previous conviction may be given in the first instance. *R. v. Gadburn*, 8 C. & P. (N. P.) 676.

31. Where at the trial of an indictment found at a previous sessions, a jury, after the opening of counsel, recollected that he sat as a grand juror when the bill was found, and it was proposed that he should leave the box, which was resisted, and the trial proceeding, the defendant was found guilty; the court refused a new trial, as on a mis-trial. *R. v. Sullivan*, 1 Perr. & Dav. (Q. B.) 96.

32. A witness cannot be asked as to what he did or did not state before the magistrate; the deposition must be first put in, and read over to him. *Reg. v. Taylor*, 8 C. & P. (N. P.) 726.

33. The application for a prosecutor to elect, is to the discretion of the Judge; where several houses had been burnt, and the setting each on fire was alleged in distinct counts, being one transaction, the Judge refused the application. *Reg. v. Trueman*, 8 C. & P. (N. P.) 727.

34. On an indictment containing 10 counts, a return of "true bill on both counts," held to be cured by pleading to the whole, and the court refused to ask the grand jurors to explain their finding. *R. v. Cooke*, 8 C. & P. (N. P.) 584.

And see *R. v. Carlile*, 1b. n.

(d) *Evidence—confession—depositions.*

1. There is a difference of opinion amongst the Judges, as to receiving evidence of confessions where an inducement has been held out by persons having authority, and where by persons having none. *R. v. Spencer*, 7 C. & P. (N. P.) 776.

2. Where the confession, was obtained from the prisoner, a girl, 15 years old, through the promises and threats of relatives and servants of the prosecutor, held improperly received, and the conviction bad. *R. v. Simpson*, 1 Ry. & M. (C. C.) 411.

3. So, where obtained by the promises and threats of the prosecutor's wife, held inadmissible. *R. v. Upchurch*, 1 Ry. & M. (C. C.) 465.

4. And where the prisoner, under 14 years of age, was solemnly questioned and pressed by a party not connected, nor a constable, held, that the statements were strictly admissible, but the mode of obtaining them strongly disapproved. *R. v. Wild*, 1 Ry. & M. (C. C.) 452.

5. Where the constable had said to the prisoner, "You had better not add a lie to the crime of theft," and then desired him to go with another constable and show where he had put the things, a confession afterwards made to such constable rejected. *R. v. Shepherd*, 7 C. & P. (N. P.) 579.

6. Where the prosecutor said to the prisoner, "If you will not tell us what you know about it, we of course can do nothing;" held to amount to a promise, that if he would tell, the prosecutor would do something for him, and to render the confession inadmissible. *R. v. Partridge*, 7 C. & P. (N. P.) 552.

7. Where the prisoner's statement had been made in answer to questions put by the magistrate, and been read over to him and acknowledged in substance correct, held sufficiently proved by a witness, who deposed to the signatures of the magistrate and the prisoner, without calling the magistrate or his clerk. *R. v. Rees*, 7 C. & P. (N. P.) 568; *S. P. R. v. Reading*, ib. 649.

8. Where the prosecutor, before the magistrate, on a charge of forgery, said, he considered the prisoner as only the tool of another, and the magistrate told the prisoner to be sure to tell the truth, held, that the statement then made was receivable. *R. v. Court*, 7 C. & P. (N. P.) 486.

9. Where parts of the prisoner's statement were in answer to questions put by the magistrate, held unobjectionable; held also, that what was said to him by his wife, when in custody, was admissible. *R. v. Bartlett*, 7 C. & P. (N. P.) 832.

10. The object of 7 Geo. 4, c. 64, s. 2, (Prisoners' Counsel) being to enable prisoners to know what they have to answer on their trial, the magistrates, although not bound to take down more than is material to prove the charge, yet are



bound to take down the whole of the prisoner's statement. *R. v. Grady*, 7 C. & P. (N. P.) 650. *S. F. R. v. Coveney*, ib. 667.

11. And since the Act, it is proper to take down the witnesses statements fully upon the matter in question. *R. v. Thomas*, 7 C. & P. (N. P.) 817.

12. On an issue out of Chancery, between A. and B., held, that depositions in a suit between B. and C. were inadmissible. *Atkins v. Humphreys*, 1 M. & Rob. (N. P.) 523.

13. But held, (per Littledale, J.) that where the defence is either fraud, circumvention or forgery, the declarations of the testator contained in an admitted codicil, are admissible. *Ellis v. Hardy*, 1 M. & Rob. (N. P.) 525.

14. Dying declaration in favor of the prisoner, held admissible. *R. v. Scaife*, 1 M. & Rob. (N. P.) 551.

15. Where no person was present at the time to contradict the prosecutor's statement, the prisoner allowed to make his statement before his counsel addressed the jury. *R. v. Malings*, 8 C. & P. (N. P.) 242.

16. But *Gurney B.*, *hesitant*, under circumstances, allowed that course, and that it ought not to be drawn into precedent. *R. v. Walking*, 8 C. & P. (N. P.) 243.

17. Where before the prisoner's examination was taken, he was told not to say anything to prejudice himself, as it would be used for or against him; held, (per Coleridge, J.) that the examination was inadmissible. *Reg. v. Drew*, 8 C. & P. (N. P.) 140.

18. Where a party charged with murder made a statement before the coroner, which purported to have been taken on oath, held not receivable against him, and that parol evidence was inadmissible to show that it was not made on oath. *R. v. Wheeley*, 8 C. & P. (N. P.) 250.

19. The depositions of witnesses taken before magistrates need not be signed by them separately, to make the deposition of a particular witness admissible. *Reg. v. Osborne*, 8 C. & P. (N. P.) 114.

20. Where a witness had been examined before a magistrate, had gone to sea, and could not be produced; held, that his deposition could not be read, except by consent. *Reg. v. Hagan*, 8 C. & P. (N. P.) 168.

21. Where the coroner has returned depositions, the Judges have, under their general authority, power over them to order copies to be furnished to the prisoner. *R. v. Greenacre*, 8 C. & P. (N. P.) 32.

22. The evidence of an accomplice held equally to require corroboration, notwithstanding his having been summarily convicted of the offence, and such corroboration must be of some fact which affects the identity of the accused. *Reg. v. Farlar*, 8 C. & P. (N. P.) 107.

23. The confirmation must be as to some matter which goes to connect the prisoner with the transaction. *R. v. Dyke*, 8 C. & P. (N. P.) 261.

24. Where the evidence of an accomplice fell far short of his depositions, he being unable to read, the Judge, at the instance of the prosecutor, refused to allow them to be read over to him by the officer of the court, with a view of founding questions thereon. *R. v. Beardmore*, 8 C. & P. (N. P.) 260.

25. Where one of two prisoners charged with sheep-stealing had been convicted at the sessions, held, that his wife might be examined on the trial of the other. *R. v. Williams*, 8 C. & P. (N. P.) 284.

26. A servant finding bank-notes in her master's house, making no inquiry, and converting them to her own use, held guilty of felony; held, also, that constables are not justified in putting questions to parties in their custody, without cautioning them that their answers may be given in evidence. *Reg. v. Kerr*, 8 C. & P. (N. P.) 176.

27. Where the magistrate's clerk, in taking down the statements of several parties charged, left the names of each other mentioned by them in blank, the Judge refused to have it supplied by supplementary evidence. *R. v. Morse and others*, 8 C. & P. (N. P.) 605.

28. An examination taken after the commitment, and not in the prisoner's presence, ought not to be returned as one of the depositions. *R. v. Arnold*, 8 C. & P. (N. P.) 621.

29. Where a prisoner is defended by counsel, who address the jury, the party is not entitled also to make a statement. *R. v. Rider*, 8 C. & P. (N. P.) 539.

30. The examination of a party, taken in the prisoner's absence, ought not to be returned as one of the depositions: if the prisoner is desirous of making a statement, it is the duty of the magistrate, after a caution that it will be used against him, in order to get rid of any previous impression, to receive it and have it taken down. *R. v. Arnold*, 8 C. & P. (N. P.) 621.

31. Where the prisoner made a statement induced by a person without authority, but in the presence of her mistress, and who expressed no dissent, held not receivable: to exclude such confessions the inducement must be made or sanctioned by a party having some authority. *R. v. Taylor*, 8 C. & P. (N. P.) 733.

32. The statement made before the magistrate at the first hearing, although not taken down, and on the final one the prisoner had declined saying anything, held receivable in evidence, and not to be excluded by reason of the magistrate's neglect in not returning what had been said. *R. v. Wilkinson*, 8 C. & P. (N. P.) 663.

33. Where the statement is returned with the deposition, the prisoner is not entitled to a copy thereof under 6 & 7 Will. 4, c. 114, but only of the deposition of witnesses. *R. v. Aylett*, 8 C. & P. (N. P.) 669.

34. Where the principal thief had been admitted evidence for the Crown against the receiver, the latter was allowed to see the depositions which had been returned against the former. *R. v. Walford*, 8 C. & P. (N. P.) 767.



35. Where the statement of an accomplice in sheep-stealing was corroborated by the fact of great quantities of mutton being found in the prisoner's father's house where he lived, and as stated by the accomplice; held, a sufficient corroboration. *R. v. Birkett*, 8 C. & P. (N. P.) 732.

36. Where the prisoners went to the ground with parties about to fight a duel, although neither acted as a second, and were present when the shot was fired, and returned with the principals; held, that if the jury were satisfied that the prisoners were there for the purpose of giving countenance and assistance, they were liable as principals in the second degree. *R. v. Young*, 8 C. & P. (N. P.) 644.

(e) *Judgment—restitution.*

1. Where the prisoner, on an indictment for murder, was convicted of manslaughter, held, that sentence of transportation under 9 Geo. 4, c. 31, s. 9, might be passed, although not concluding *contra formam*, the punishment only, and not the nature of the offence being altered. *R. v. Chaburn*, 1 Ry. & M. (c. c.) 403; S. P. *R. v. Rushworth*, ib. 404.

2. On an indictment for separate utterings, an entire judgment of two years' imprisonment under 2 Will. 4, c. 34, s. 7, held bad; it should have been of consecutive judgments of one year's imprisonment on each count. *R. v. Robinson*, 1 Ry. & M. (c. c.) 413.

3. The court will not pass sentence on a conviction for an assault where an action is pending for the same assault. *R. v. Mahon*, 1 Nev. & P. (N. S.) 575.

4. So the court refused a criminal information for an assault, where the defendant had been held to bail on a warrant, although it was offered that the latter proceeding should be abandoned. *R. v. Anon*, *gent.*, &c. lb. 576, n.

5. Punishment of pillory abolished by 7 Will. 4 and 1 Vict. c. 23.

6. Punishment of death abolished in cases of forgery, by 1 Vict. c. 84, and in other cases by c. 91.

7. Laws relating to offences punishable by transportation for life, c. 90.

8. The court directed the governor of the gaol to attest the power of attorney, to enable a prisoner to obtain funds out of a savings bank, to enable him to conduct his defence or for paying a *bona fide* debt. *R. v. Coxon*, 7 C. & P. (N. P.) 651.

9. And where from the lapse of time it might be presumed that the prisoner obtained a portion of it from other sources, the Judge ordered 5*l.* to be given up for his defence. *R. v. Rooney*, 7 C. & P. (N. P.) 516.

10. Where the prisoner was found in possession of a horse which had been clearly purchased with the proceeds of a bill which he was found guilty

of stealing, the court ordered the horse to be delivered to the prosecutor. *R. v. Powell*, 7 C. & P. (N. P.) 640.

11. Where a jury of matrons impanelled to try whether a prisoner is quick with child, require the assistance of a medical person, he must be examined as a witness in court; and held (per *Gurney*, B.) that "quick with child" means having conceived. *R. v. Wycherley*, 8 C. & P. (N. P.) 263.

12. Where the nuisance had been abated, and the prosecutor consented, the Judge allowed an acquittal to be entered for one defendant who was absent abroad from ill health. *R. v. M'Michael*, 8 C. & P. (N. P.) 755.

13. Where a party, having pleaded guilty, is brought up for judgment, the affidavits in aggravation are to be first read, and counsel for the Crown to be heard before that for the defendant: *contra*, where the verdict is taken by consent and without evidence: and the rule is not varied where several defendants, and some plead guilty and others are convicted on a verdict. *Reg. v. Dignam*, 7 Ad. & Ell. (Q. B.) 593.

And see *R. v. Sutton*, *ib. notis.*

14. Where parties were convicted of an offence which subjected them to capital punishment, and the judgment pronounced was of transportation, upon which a writ of error was brought; held, that the Judge being *functus officio*, it could not be remitted back nor could the Court of Error give the proper judgment. *R. v. Bourne*, 7 Ad. & Ell. (Q. B.) 58.

15. The rule that if the Crown will not join in error the party is entitled to be discharged, applies to cases of felony as well as of misdemeanor. *R. v. Howes*, 7 Ad. & Ell. (Q. B.) 60 n.

And see *Award*; *Certiorari*.

INFANT.

1. In deciding the question, whether goods supplied are necessities, held, that evidence to show that, at the time of sale, the defendant's father had furnished him with goods of the same kind suitable to his condition, was admissible. *Burkhardt v. Angerstein*, 1 M. & Rob. (N. P.) 465.

2. Where an infant was made a co-plaintiff, held that, on his coming of age, his name might be struck out of the bill. *Acres v. Little*, 7 Sim. (CH.) 138.

3. Where the infant was not entitled to a legacy given for her sole and separate use until 21, and married before 21; held that, having no power to alienate until that age, her interest did not pass by the act of marriage to her husband, but that she was entitled to have it transferred to her separate use. *Johnson v. Johnson*, 1 K. (CH.) 569.

4. Where the suit was instituted, as next friend, by a person in low circumstances and of immoral character, and under circumstances showing that



it was not instituted for the infant's benefit, but from motives of spite, the bill ordered to be taken off the file, with costs, by the *prochein amy*. *Walker v. Elze*, 2 Sim. (ch.) 234.

5. The court, in deciding which of several suits on behalf of infants shall be prosecuted, will prefer that which is so framed as to be capable of being beneficially and effectually prosecuted, to one in point of form more extensive in the relief sought; and where the trustees occasion and persist in unnecessary litigation, they will be personally liable to the costs. *Campbell v. Cambell*, 2 Myl. & Cr. (ch.) 25.

6. The Court will only allow infant wards to reside out of the jurisdiction when absolutely necessary to their health, and where such an order is made, it ought to comprise a scheme for their education and a provision for informing the Court from time to time of their condition and progress, and an undertaking to bring them within the jurisdiction when required. *Campbell v. Mackay*, 2 Myl. & Cr. (ch.) 31.

7. Where ill-health required the removal, the Court made an order for the Master to approve of a plan for the infant's maintenance and education out of the jurisdiction, but the allowance limited to one year. *Wyndham v. Lord Ennismore*, 1 K. (ch.) 467.

8. An infant allowed, under circumstances, to be placed at the University in Dublin, upon security for bringing him within the jurisdiction when required. *Lethem v. Hall*, 7 Sim. (ch.) 141.

9. Where, after an order to bring in an infant defendant, the messenger returned that there was every reason to believe that she was secreted by the mother, the court ordered the senior six clerk to be appointed guardian to answer and defend the bill. *Steed v. Calley*, 7 Sim. (ch.) 148.

10. An order to permit an infant ward to go abroad for a fixed time to visit his father, the party by whom he was to be accompanied giving security for bringing him back within the jurisdiction within the time limited. *Biggs v. Terry*, 1 Myl. & Cr. (ch.) 675.

11. Where the next friend became insolvent, and had been indemnified, the court refused to compel security for costs. *Murrell v. Clapham*, 8 Sim. (ch.) 74.

12. Where legacies were given to sons attaining twenty-four, or dying under that age, leaving issue, and to daughters attaining that age or marrying, and no limitation over in the event of none acquiring a vested interest, the court refused to make an order for maintenance without the consent of the testator's next of kin. *Cannings v. Flower*, 7 Sim. (ch.) 523.

13. Where the father, convicted of felony, was on board the hulks; on a *habeas corpus*, held, that the mother was entitled to the custody of her infant. *Bailey, ex parte*, 6 Dowl. (p. c.) 311.

14. An infant, although he has a sufficient income to pay ready money, is not incapable of contracting for articles, necessary or suitable to

his station, on credit. *Burghart v. Hall*, 4 Mees. & W. (ex.) 727.

15. In an action for goods, alleged to be necessary, to an infant, that being the simple question for the jury; held, that inquiry as to the defendant's circumstances is not a condition precedent to the right of recovery. *Brayshaw v. Eaton*, 5 Bing. N. S. (c. p.) 231.

16. And where the mother was present at the time of the defendant ordering the goods, held that inquiry as to her sanctioning the purchase was unnecessary. *Dalton v. Gib*, 5 Bing. N. S. (c. p.) 199.

17. Where the parents were in very indigent circumstances, an increased allowance for maintenance of infant legatees ordered. *Allen v. Coster*, 1 Beav. (ch.) 202.

18. An infant's share, a residue of small amount, ordered to be paid to his father as an outfit and passage to India. *Clay v. Pennington*, 8 Sim. (ch.) 359.

19. The fund to which an infant was entitled being £1,000, the mother, by petition, appointed guardian, and the interest directed to be paid to her. *Allsop, in re*, 1 Coop. (ch. c.) 44.

20. Where some of the plaintiffs were infants, the Master of the Rolls having, upon the facts disclosed in the affidavits, directed a reference whether the suit was for their benefit, and whether the next friend should be charged, the Lord Chancellor refused to interfere with the order. *Robinson v. Stone*, 1 Coop. (ch. c.) 369.

21. Custody of, regulated by 2 & 3 Vict. c. 54.

And see *Bankrupt; Cognovit; Judicial Committee; Marriage; Mortgage; Pleading*.

## INFORMATION.

1. Criminal information refused for words spoken to a magistrate, alleging that he wilfully absented himself from an election, calling him a liar, and threatening to repeat the charge whenever he met him, no intention appearing to provoke a breach of the peace. *Chapman, ex parte*, 4 Ad. & Ell. (k. s.) 773.

2. Upon an information under 6 Geo. 4, c. 10E, s. 45, for assisting and being concerned in the unshipping tobacco into Ireland the duties not having been paid, the defendant being proved only to have hired the vessel in England, but to have taken no part in the offence subsequently committed; held, that he was guilty of no offence described in the Act, for which he was triable in England. *Attorney-General v. Keniseck*, 2 Mees. & W. (ex.) 715.

3. Where on an information and bill, the same person was relator and plaintiff, suing in his own right, and he had failed to give security for costs when required by the Attorney-general; held, that it was not a ground for the court to stop the suit. *Attorney-General v. Knight*, 3 Myl. & Cr. (ch.) 154.



4. Where the affidavit in support of an application for a criminal information for slander of a magistrate, was itself filled with slanderous matter and intemperate language, the rule refused, without costs. *R. v. Byrne*, 2 Nev. & P. (x. s.) 152; and 6 Dowl. (r. c.) 37: held, also, that it was sufficient if the county appeared where the deponent was sworn, although not stated in the *jurat*.

5. Where the affidavit in support of a motion for an information for a libel, only stated that the defendant did print and publish a newspaper, called, &c. a copy of which is annexed; held not sufficient proof of publication to ground the motion, nor can the prosecutor avail himself of admissions in the affidavits in answer. *Rex v. Baldwin*, 3 Nev. & P (q. s.) 342.

6. On an application for a criminal information for a libel, affecting several members of a family, at the instance of one, whose conduct had been such as would not have entitled him to the rule; held, that the others, against whom no imputation rested, were not thereby precluded from the protection of the court. *R. v. Gregory*, 1 Perr. & D. (q. s.) 110.

7. Where a criminal information for sending a challenge was applied for by a party who had himself sent one to a party to the same transaction; held not to be entitled, although the latter took place in a foreign country, and no breach of the peace contemplated here. *R. v. Larrien*, 7 Ad. & Eil. (q. s.) 277.

8. An attorney giving a relator an indemnity for costs for using his name, or using it without authority, although afterwards assented to, the court will order the information to be taken off the file, with costs to be paid by the relator and attorney. *Attorney-general v. Skinner's Company*, 1 Coop. (ch. c.) 7.

9. Where several being named as relators, some were desirous of withdrawing their names, held that an order to amend, by striking out their names, was irregular; but that such amendment not consisting in a new engrossment, it was not a ground for taking it off the file, but the court would restore the record to the original state; in order to warrant such an application on the part of relators, it is not enough to show merely that the defendants will not be prejudiced by the alteration, but that justice will not be done, or that the suit cannot be so conveniently prosecuted unless it be made. *Attorney-general v. Cooper*, 3 Myl. & Cr. (ch.) 258.

10. Upon a reference to the Attorney-general, his certificate that, upon certain terms, all proceedings should be stayed, adopted by the court; relators are at every moment subject to his authority, and he is bound to exercise a discretion as to the prosecution of the suit. *Attorney-general v. Fishmongers' Company*, 1 Coop. (ch. c.) 85.

And see *Charity*.

## INHABITANT.

See *Charter*.

## INJUNCTION.

1. Where suits were instituted for the same matter in the Courts in England and Ireland, and in the former a decree obtained against the plaintiff, the court restrained the party from proceeding with the suit in Ireland. *Booth v. Leycester*, 1 K. (ch.) 579.

2. The Act 53 Geo. 3, c. 121, enabling the Commissioners of Woods and Forests to grant building leases in streets, &c., according to certain plans and leases granted; setting out the lines and boundaries, but not otherwise referring to or including the plans; held that the parliamentary plans, showing open spaces in certain streets, did not prevent the erection of a statue thereon, either on the ground of contract, or of public nuisance or obstruction, and an injunction dissolved. *Squire v. Campbell*, 1 Myl. & Cr. (ch.) 459.

3. A resolution signed by a majority of the communicants of a dissenting chapel, in whom the management was vested, communicated to the minister, with a request to him to resign, held, tantamount to a dismissal, and an ejectment refused to be stayed by injunction. *Attorney-General v. Aked*, 7 Sim. (ch.) 321.

4. Where the officer omitted to bring the defendant to the bar within the time required by 16 Reg., in consequence of his being in ill health, the court granted a motion, with costs, for an injunction to stay proceedings in an action brought against the officer for the irregular detention. *Chalie v. Pickering*, 1 K. (ch.) 749.

5. Where a case is made out, the court will direct a reference as to compensation. *Ib.*

6. Where a joint-stock company is incorporated by Parliament to carry into effect certain purposes in a certain way, the court will not restrain them from attempting to obtain the aid of Parliament to material alterations, or the mode of effecting those purposes and extending them, or of varying its constitution; and an injunction refused, except as against all acts not authorized by the existing powers and constitution of the company. *Ware v. Grand Junction Canal Company*, 2 Russ. & M. (ch.) 470.

7. Upon a bill for discovery in aid of an action, and injunction to restrain it, the court refused to dissolve the injunction before the coming in of the answer, upon presumptive but contradictory evidence of the defendant's death; the answer being read as an affidavit of a fact, the court allowed affidavits to contradict the fact to be read. *Janson v. Solarte*, 2 Younge, (x. r.) 127.

8. Where A. and B. carried on business under the firm of A. L. & Co., and upon the death of A., B. continued the business under the firm of B. & Co., successors to A. and L.; held, that the surviving partner had a right to carry on the business under the original or modified form, and an injunction granted to restrain the executor of A. from commencing the same business under the firm of L. *Lewis v. Langdon*, 7 Sim. (ch.) 461.

9. Where a tramroad had, with the licence of a former tenant in possession, been completed



and used; held, that the defendants, if not entitled to use it as a right of way, being trespassers and subject at law, it was not a case for injunction. *Deere v. Guest*, 1 Myl. & Cr. (ch.) 516.

10. And where a notice of motion for a special injunction had been refused below, and renewed in the court above upon the appeal against the order below, allowing a demurrer; upon the appeal being dismissed, held, that the defendants were entitled to the costs of the motion as well as the appeal. *Ib.*

11. The court refused an order to extend the common injunction to stay trial where the affidavit was not made by the plaintiff himself, nor any sufficient reason given why it had not. *Spalding v. Ikey*, 7 Sim. (ch.) 377.

12. Where parties had been imprisoned on an attachment afterwards set aside as irregular, the court, on terms of payment of costs, and referring the amount of compensation to the Master, stayed actions commenced for the imprisonment. *Phillips v. Worth*, 2 Russ. & M. (ch.) 638.

13. An order nisi to dissolve an injunction after publication, held irregular. *Barnett v. Mole*, 1 K. (ch.) 645.

14. The court granted an injunction to restrain a party from using on his omnibuses the same words and devices, being a colorable imitation of those used by the plaintiffs, and held that the not having complied with the requisites of the stage-coach licensing Acts, which were merely fiscal, did not preclude the right to sue. *Knott v. Morgan*, 2 Keene, (ch.) 213.

15. Where the lessee of tin-plate works at C. had long used a mark as designating the manufactory, and on the expiration of the lease removed the manufactory to another place, where he continued to use the former mark, and the original works, after being some time unoccupied, were taken by the plaintiff, who obtained an injunction, against the former lessee continuing to use the mark, the Lord Chancellor, on appeal, dissolved the injunction, with liberty to bring an action; where the court exercises a jurisdiction over legal rights, it will not at once interfere by injunction, and prevent the defendant from disputing the plaintiff's legal title. *Motley v. Downman*, 3 Myl. & Cr. (ch.) 1.

16. Where a testator to whom a party was indebted, in one sum on a note, and another on a bond, in his will bequeathed to a son part of the entire debt, and afterwards by codicil revoked the bequest, and by indorsement on the bond, declared that he thereby acquitted the obligor of the sum, and stated that in consequence he had revoked by codicil of the same date the bequest to the same amount; held, that being a volunteer, and the release without consideration, he was not entitled to come into equity for relief. *Tuffnell v. Constable*, 8 Sim. (ch.) 69.

17. Where private individuals suffer an injury quite distinct from that done to the public in general, they are entitled to relief, and may maintain a bill for an injunction, which may have the effect of compelling the party to take active measures from allowing the injury to continue.

*Spencer v. London and Birmingham Railway Company*, 8 Sim. (ch.) 193.

18. Where the undertakers of a navigation and tram-road therefrom, had fifteen years allowed to complete it in, but they were bound to get possession of the land within five years; and it appeared that they had made some deviation from the Parliamentary line, although in no way injurious to the plaintiff, at a distant part, but there was nothing to show that they had finally abandoned that line, the court refused an injunction from taking the lands of the plaintiff within that line before the five years expired. Where an Act is strictly carried into execution, as regards a party's lands, he cannot restrain them from proceeding on the ground merely of a variation made with the consent of others, and not injurious to himself. *Lee v. Milner*, 2 Younge & C. (ex. ex.) 611.

19. Where on the eve of trial of an ejectment, an *ex parte* injunction was obtained, which was afterwards dissolved, and an order made for the parties to give judgment in the ejectment, the Lord Chancellor, on appeal, being of opinion that there was no omission of facts which might have improperly led the court to have granted the injunction, held, that there was no authority to support such order; held also, that the plaintiff being in contempt for disobedience of the order, was not precluded from moving to discharge the order, which was the root from which the attachment had proceeded. *Brown v. Newall*, 2 Myl. & Cr. (ch.) 558.

20. Where in an injunction suit to stay proceedings at law, the subject of claim is ordered to be paid into court by instalments, and afterwards to be suspended until the hearing, the effect of such order is to reverse both legal and equitable jurisdiction over it at the hearing, and if the court then finds the defendant to be entitled, it will at once order it to be paid to him, without driving him to establish his legal right by further proceedings at law. *Small v. Atwood*, 3 Younge & C. (ex. ex.) 105.

21. An injunction to stay a trial immediately coming on, merely on the ground of the greater rapidity occasioned by the new rules at law, refused, although there was not sufficient time for obtaining it according to the practice of the court as to granting injunctions. *Bailey v. Weston*, 7 Sim. (ch.) 666.

22. Where upon a motion upon a bill for a special injunction, notice was required to be served, and before the day named the answer was put in; held, that on the motion being renewed, the affidavits filed in support of the bill might be read. *Atkinson v. Kemble*, 7 Sim. (ch.) 638.

23. Amending the bill without a special application, held to be a waiver of notice of motion for an injunction. *Martin v. Fast*, 8 Sim. (ch.) 199.

24. The common injunction having been obtained on a report of the answer being insufficient, and an order to amend without prejudice to the injunction, and for the defendant to answer the amendments and exceptions, and subsequently



an order to extend the injunction to stay trial; held, that such latter order was regular. *Simce v. Duff*, 8 Sim. (ch.) 270.

25. On motion to restrain the defendant, a tenant, from removing buildings erected during the tenancy, which he by his answer alleged not to be affixed to the freehold, the court refused to allow the plaintiff to read affidavits filed after the answer, tending to show that they were affixed. *Shirreff v. Barnard*, 8 Sim. (ch.) 161.

26. A party sustaining special damage from a nuisance, may sustain a bill to restrain it without making the Attorney-general a party. *Sampson v. Smith*, 8 Sim. (ch.) 272.

27. In an injunction suit, the court will not enlarge the time for obtaining the Master's report, except under special circumstances, as the indisposition of the Master. *Davenport v. Whitmore*, 8 Sim (ch.) 251.

28. Where a bottomry bond was alleged to have been executed in fraud or under circumstances which a court of equity would not give effect to; held, that it had jurisdiction to restrain a party from proceeding in a suit in the Admiralty Court upon it, and that it was quite sufficient if the court, upon the pleadings and evidence, finds a case which makes the transaction a proper subject of investigation in a court of equity. *Glasscott v. Lang*, 3 Myl. & Cr. (ch.) 460; and 8 Sim. (ch.) 358.

29. Injunction to restrain the setting up of outstanding terms on the trial of an ejectment, refused, although, by the answer, the legal title was admitted, but a question of equity raised which would bind the plaintiff if the cause came to a hearing. *Ringer v. Blake*, 3 Younge & C. (ex. eq.) 591.

30. Where a creditor, suing an executor, obtained judgment *de bonis test, et si non de bonis propriis*, but under circumstances the court was of opinion that an injunction against further proceeding ought to be continued, the executor ordered to pay the costs up to the time of notice of the injunction, and the balance appearing to be in the defendant's hands to be paid into court. *Bookless v. Crummack*, 1 Coop. (ch. c.) 125; and where the cases as to false pleas by executors are collected.

31. Where, to a bill of injunction to restrain an action on a bill until answer or further order, the defendant put in his answer, admitting the possession of documents, the court refused to dissolve the injunction until the plaintiff had time to inspect them. *Walker v. Corke*, 3 Younge & C. (ex. eq.) 276.

32. Where, pending proceedings at law to try the right to a watercourse, the defendants were proceeding to take the law into their own hands, held, that the plaintiff was entitled to file a bill for an injunction; but where the application for dissolving it, on the ground of the bill showing a legal title acquired by lapse of time, had been refused, the court said that it ought to make provision for having the question between the parties tried at law. *Dewhurst v. Wrigley*, 1 Coop. (ch. c.) 319; collecting and reviewing the cases.

33. Where the plaintiffs, in an action for obstructing a watercourse, claimed the right by reason of their possession of a mill, and the enjoyment was alleged to have been had under an agreement made 28 years before, which was given in evidence by the defendants; held, that it should still be left to the jury to say whether they would presume a grant to have been executed, and a new trial granted. S. C. lb. n. 320.

34. Where the plaintiff accepted a bill for the accommodation of D. and W., which was by them deposited, with others, with D. & Co., as a collateral security for the payment of a bill indorsed by the defendant, and also for the purpose of securing clearances made by D. & Co. to a stated extent, and they subsequently assented to hold the securities for the benefit of the defendant, after their own claims satisfied: on the bankruptcy of D. and W. the holders sued the plaintiff and obtained a *cognovit*, and upon the defendant having paid the amount, the plaintiff's bill and *cognovit* were delivered over to him: held, that the plaintiff not being entitled to the possession of the bill, nor the defendant's possession of it fraudulent or against good faith, the plaintiff could not sustain a bill for having it delivered up to him to be cancelled, nor to restrain the defendant from enforcing the *cognovit*. *Jones v. Lane*, 3 Younge, (ex. eq.) 281.

35. If a party obtain wrongful possession of a bill, although under circumstances which would give a complete defence at law, equity will, nevertheless, interfere, if, from lapse of time or death of witnesses, such defence is likely to fail; but if the objection, being apparent on the face of the instrument, must always be open to the defendant whenever the action is brought against him, he is not entitled to relief in equity. lb.

36. Where the plaintiff, a shareholder in a joint stock company, being sued at law, in the name of the officer, for calls, filed a bill against the defendants as directors, and also against the public officer of the company, praying a discovery and the refunding of sums already paid, to which bill the latter appeared, but the other defendants did not, and an injunction was obtained for want of appearance, and an order for extending to stay trial; held, on appeal, that the latter order was irregular, the common injunction never having been against the plaintiff in the action, although only nominally such; it also appearing on the affidavits and the whole case, that the allegation in the plaintiff's affidavit that the discovery sought by his bill was material to his defence to the action could not be true, held, that such order ought not to have been made, and that the delay between the commencement of the action and the filing of the bill not being sufficiently accounted for, the court would not be justified in extending the injunction on the very eve of the trial. *Thorpe v. Hughes*, 3 Myl. & Cr. (ch.) 742.

37. Where the plaintiff had himself been guilty of false representation as to his own preparation and mode of procuring it, the court refused to interfere to protect him against the sale of a spurious article by the defendant under the same name, until the legal title was established at law. *Pidding v. How*, 8 Sim. (ch.) 477.



38. Where a railway company had agreed to take premises at a valuation by arbitrators, but began to pull down before the award made, an injunction granted on an *ex parte* motion, although the defendants had appeared. *Petley v. Eastern Counties Railway Company*, 8 Sim. (ch.) 463.

39. Where the owner of lands intended to be taken by a railway company had, by his conduct and with full knowledge of his equity, permitted the company to carry on the works, as upon the supposition that they were entitled to enter upon and take the lands of the plaintiff for their purposes; held, that he was not entitled to an interlocutory injunction to restrain them from so entering. *Greenhalgh v. Manchester and Birmingham Railway Company*, 3 Myl. & Cr. (ch.) 784.

40. On an injunction against commissioners, under a local paving Act, to restrain them from proceeding to summon a jury and assess the value of premises intended to be taken, it being suggested that they had not funds sufficient for the payment of the purchase; held, that the Act having vested in them the power of purchase, both the funds and the powers being undefined in point of time, and not temporary only, it was not inconsistent with the rights under the Act and the convenient course for all parties, that the jury should go on to assess the sum at which the commissioners might purchase; the Lord Chancellor, on appeal, dissolved the injunction granted by the Vice-Chancellor, as to proceeding before the jury, and also the motion for extending it to the taking possession of the premises. *Salmon v. Randall*, 3 Myl. & Cr. (ch.) 439.

41. Where, in an injunction suit to restrain the defendant from using certain marks, which he had ceased to do from the time of an injunction obtained against another party, with whom the defendant had no connection, and the suit was persisted in at a great expense, for the sake of the account, which was abandoned at the hearing on account of its minuteness, the court, exercising its discretion as to costs, in repressing useless litigation, decreed a perpetual injunction, but without the costs of the cause. *Millington v. Fox*, 3 Myl. & Cr. (ch.) 338.

42. Where, pending a suit to establish a will of real estate, in which the heir concurred, and also with the trustee on the management thereof, but had brought actions of ejectment and detinue for recovering the estates and title deeds, a reference to the Master directed, to inquire as to what proceedings ought to be taken, and under circumstances an injunction granted against one defendant at the instance of another co-defendant: the will having eventually turned out to be invalid, the trustee acting *bona fide* and in concurrence with the heir, held entitled to be indemnified out of the estate. *Edgecumbe v. Carpenter*, 1 Beav. (ch.) 171.

43. Where, on a covenant with two for payment of an annuity to a third party, on its falling in arrears one of the trustees declining to enforce it, the other brought an action in the name of both, and thereupon the covenantor filed a bill against all the parties, alleging fraud, and for an

injunction, which he obtained against the trustees separately, the court refused to dissolve it against the party who had answered until the other had filed his answer. *Nanney v. Vaughan*, 8 Sim. (ch.) 439.

44. A plaintiff in an injunction cause to be allowed to amend the bill without prejudice to the injunction. 2 Reg. Gen. May 1839, 1 Beav. (ch.) Ap. x.

45. And where after injunction to stay proceedings dissolved, the plaintiff shall amend his bill, to be entitled to move for injunction upon affidavit of the truth of the amendment, unless defendant shall plead, &c. within eight days after appearance. 3 Reg. Gen. 1b.

46. On a special injunction against four co-partners, to restrain them from doing an act jointly, one of whom had not answered, the plaintiff held entitled to read affidavits in opposition to a motion by the three to dissolve the joint injunction. *Naylor v. Wellington*, 8 Sim. (ch.) 396.

47. After the common injunction obtained to stay execution, and a subsequent notice of motion to stay trial, but before the motion made the answer was filed and excepted to; held that an order as of course to refer the answer *instanter* for insufficiency, was regular. *Brooks v. Haigh*, 9 Sim. (ch.) 558.

48. Upon an action by a *cestui que trust* in the name of his trustee, and injunction obtained, a special motion to dissolve it held regular. *Sharples v. Ferring*, 8 Sim. (ch.) 600.

49. An order *nisi* to dissolve the common injunction, obtained after exceptions to the answer filed, held irregular. *Howes v. Howes*, 1 Beav. (ch.) 197.

And see *Bank of England; Bridge; Ejectment; Fraud; Interpleader; Landlord and Tenant; Lunatic; Mandamus; Marriage Settlement; Receiver*.

## INNKEEPER.

1. Where goods were left in an inn, to be taken up by a carrier, and lost, held that, however the innkeeper might be liable for negligence, trover could not be maintained. *Williams v. Geese*, 3 Bing. N. S. (c. r.) 849; and 7 C. & P. (x. r.) 777.

2. An innkeeper cannot detain the person of his guest, or take off his clothes to secure the payment of his bill. *Sunbolf v. Alford*, 3 Mee. & W. (xx.) 248.

## INQUIRY, WRIT OF.

In a proper case, the court will direct the sheriff to summon a jury from the special jury list. *Price v. Williams*, 5 Dowl. (r. c.) 160.



## INQUISITION.

1. Where the inquisition alleged the offence on a day not arrived, by mistakingly using the words "year aforesaid," it was quashed. *R. v. Mitchell*, 7 C. & P. (N. P.) 800.

2. On a coroner's inquisition, several jurors being of the same name, it is not necessary to distinguish them by their trades or places of abode. Where it alleged that parties were feloniously present, then and there aiding, &c.; held insufficient, as the word "feloniously" only applied to the word "present," and not to the latter words; but want of time and place to the concluding averment, "and so the jurors, &c.," held not material. *R. v. Nicholas*, 7 C. & P. (N. P.) 538.

3. Where a local drainage Act authorized the trustees to purchase "lands, tenements, or hereditaments," for the purposes of the Act, and compensation to be awarded by a jury to be impanelled 40 days after notice to the party interested; held, that where the party expressly waived such notice, he could not object to the inquisition for not setting it out, nor that the Act did not extend to the purchase of copyhold lands, he having concealed the nature of the tenure: and the jury having found a certain sum for the value and compensation, and gone on to direct a hedge to be erected on the party's land, at the expense of the trustees; held, that such latter direction did not avoid the inquisition, it not appearing that any less compensation had been awarded on that account. *R. v. South Holland Drainage Trustees*, 1 Ferr. & D. (Q. B.) 79.

And see *Indictment*.

## INSOLVENT.

1. In *assumpsit* by drawer against acceptor, and plea—discharge under the Insolvent Act, it appearing that the defendant had been sued by the holder of the bill at the time of his discharge, and whose name he had inserted as the creditor for the amount of the bill; held, that he was thereby discharged from the debt, the only object of the s. 46, being to identify the debt, and that such insertion was sufficient notice to all persons interested in the security. *Boydell v. Champneys*, 2 Mees. & W. (Ex.) 433.

2. Where damages in an action of *tort* have been ascertained by verdict before filing the petition; held that, under s. 50 of 7 Geo. 4, c. 57, the insolvent is entitled to be discharged from the damages and costs. *Goldamid v. Lewis*, 3 Bing. N. S. (C. P.) 46; and 3 Sc. 369.

3. *Semble*, a party entitled to be discharged out of execution under 48 Geo. 3, is not deprived of the right by a prior motion against him under the compulsory clause of the Lords' Act. *Davis v. Curtis*, 3 Bing. N. S. (C. P.) 259; 3 Sc. 321; and 5 Dowl. (P. C.) 344.

4. Where a woman lived with the insolvent as

his wife, not knowing of his being married; held, that her goods in his possession did not pass to his assignees; *aliter*, if knowing of his marriage she permitted him to have the control and management of them. *Miller v. Demetz*, 1 M. & Rob. (N. P.) 479.

5. The 7 Geo. 4, c. 57, s. 32, held to apply to assignments made at any time previous to the imprisonment, with the view of petitioning the court for a discharge, and not merely to such as are made within three months before the commencement of such imprisonment. *Becke v. Smith*, 2 Mees. & W. (Ex.) 191.

6. Where an insolvent filed a bill to set aside an assignment of an interest under his father's will, stating a case of collusion between him and the executor, the court thought it was proper that the bill should be answered, and over-ruled a demurrer. *Barton v. Jayne*, 7 Sim. (Ch.) 24.

7. In a suit for the administration of an insolvent's estate, the Master held properly to have admitted proof for more than the amount specified in the insolvent's schedule, but leave given to establish the demand as a general creditor. *Barton v. Tattersall*, 2 Russ. & M. (Ch.) 541.

8. Where, after the insolvent's discharge, he gave a warrant of attorney to a creditor for the debt and a fresh advance of goods, the court set aside the execution thereon as to the old debt. *Smith v. Alexander*, 5 Dowl. (P. C.) 13.

9. Where the insolvent, having a debt due from M., secured on mortgage, but subject to a prior charge, on the bankruptcy of M., agreed verbally with the defendant to assign the debt for monies advanced, the solicitor to M.'s commission advising that no written instrument was necessary, as the dividends on M.'s estate would pass through his hands, but he did not communicate the assignment to M.'s assignee; the mortgage being unavailable, the debt was proved, and dividends received and paid over by the insolvent to the defendant; in an action by the assignee of the insolvent for money had and received, held, first, that the debt was not in the order and disposition of the insolvent, within 7 Geo. 4, c. 57, s. 30; secondly, that the assignment amounted to a valid assignment in equity; and that the debt being certain, and the assignment only of so much of the dividends as would be sufficient to satisfy the debt, the whole did not pass to the assignee, subject to the defendant's claim or lien. *Tibbitts v. George*, 5 Ad. & Ell. (X. B.) 107.

10. A bill by an insolvent against his assignees and a party in possession of an estate claimed by the insolvent, alleging that the assignees had refused to sue for the estate, but were willing to concur in the sale of it, and that, if sold, there would be sufficient to pay the creditors, and leave a surplus for the plaintiff, held, on demurrer, not sustainable. *Kaye v. Fosbrooke*, 8 Sim. (Ch.) 28.

11. Where the surety paid money after the discharge of the principal under the Insolvent Act, held that he was entitled to sue the principal; the exception in 7 Geo. 4, c. 57, s. 51, being limited to any step which may affect the discharge under that Act. *Hocken v. Browne*, 4 Bing. N. S. (C. P.) 400.



12. In ejectment by the plaintiff, as assignee of an insolvent, held, that an assignment by the provisional assignee to the creditors' assignee, in the form prescribed for the assignment by the insolvent to the provisional assignee, was valid: *quær.* whether on an assignment, reciting it to have been made by an order of the court (pursuant to 11 Geo. 4 & 1 Will. 4, c. 38), the court would intend that an order had been made without production of it. (*Dub. Denman, L. C. J., Little-dale and Williams, J. J., contra Coleridge, J.*) *Doe v. Story*, 3 Nev. & P. (q. n.) 107.

13. Where after a former, but previous to a second discharge, the insolvent became entitled to a legacy, held, that as future acquired property, it could only be obtained by the first set of assignees by entering up judgment, with leave of the court; and passed under the second assignment as a *chase* in action, to which the insolvent was then entitled. *Curtis v. Sheffield*, 8 Sim. (ch.) 176.

14. Plea in *assumpsit* for goods, discharge of the defendant under the Insolvent Act; replication, that the plaintiff, although named in the schedule, had no notice of the filing the petition, or of the time of hearing; held bad, on demurrer, for not alleging that the plaintiff's debt amounted to £5, so as to be entitled to notice under 7 Geo. 4, c. 57, s. 42. *Troup v. Boffi*, 3 Mees. & W. (xx.) 615.

15. Although certified copies of assignments to and from the provisional assignee are made evidence by 7 Geo. 4, c. 57, s. 70, yet where the insolvent petitioned, and his effects were assigned under 53 Geo. 3, c. 102, held that such copies were not sufficient. *Doe d. Threlfall v. Sellers*, 6 Ad. & Ell. (x. n.) 328.

16. But where the petition and assignment were made under 1 Geo. 4, c. 119; held, that they might be proved after 7 Geo. 4, c. 57, according to the directions of sect. 76, although it did not appear that the proceedings had gone on to the discharge of the party, and final assignment of his effects. *Doe d. Ellis v. Hardy*, 6 Ad. & Ell. (x. n.) 335.

17. Where after an acquittal on an indictment against an insolvent for omitting specified articles out of his schedule, a second was preferred, in substance the same, but including the omission of additional articles; held, that the plea of *autrefois acquit* was not a good defence to the whole of the latter indictment; but the Judge strongly advised the jury to acquit, unless they were satisfied that the omission was under essentially different circumstances. *R. v. Champneys*, 2 M. & Rob. (n. r.) 26.

18. Further provisions for relief of insolvent debtors, by 1 & 2 Vict. c. 110, s. 23.

19. Where a party, whilst unmarried, made a voluntary settlement, upon trust, in case of her ever marrying, for her husband and children, and she afterwards became insolvent, the court dismissed a bill by the assignee to have the fund transferred. *Kirk v. Cureton*, 1 Coop. (ch. c.) 191.

20. Where an insolvent was ordered to be discharged, except as to two debts, and as to those not until after 16 months from the filing his petition; held, that such debts were within the very words of s. 16 of 7 Geo. 4, c. 57, as to which an adjudication could be made; and that one of those creditors having subsequently commenced an action, the not proceeding to declare within two terms did not render the prisoner supersedeable. *Buzzard v. Bousfield*, 4 Mees. & W. (xx.) 368; and 7 Dowl. (r. c.) 1.

21. Where a demand is made by a creditor *bona fide*, and a transfer is made in pursuance of that demand, it is not a voluntary transfer within the Insolvent Act. *Magg v. Baker*, 4 Mees. & W. (xx.) 348.

22. Where by a provision in an agreement to purchase a business for a sum to be paid by two instalments, the purchaser had a right, within a limited time before the completion of the contract, to give notice of abandonment, and the sum paid to be returned; held, in an action to recover it back, that it was no defence that the defendant had been discharged under the Insolvent Act, the notice having been given within the time limited, it being a contingency not capable of being valued at the time of such discharge. *Brown v. Fleetwood*, 5 Mees. & W. (xx.) 19; and 7 Dowl. (r. c.) 386.

23. Where the defendants were employed as the attorneys of a party in embarrassed circumstances, to effect an arrangement with his creditors, and under resolutions by them proceeded to sell his estate and received the proceeds, but the party afterwards took the benefit of the Insolvent Act; held, that the retainer of a sum to satisfy their bill of costs, did not amount to a case of voluntary transfer within the Act, the money so received not originating with the insolvent, and entrusted to the defendants only as agents, and not for the benefit of any particular creditor. *Wainwright v. Clement*, 4 Mees. & W. (xx.) 385.

24. The right reserved to creditors of payment out of future effects, does not prevent the operation of the Statute of Limitations. *Browning v. Reid*, 5 Mees. & W. (xx.) 117; and 7 Dowl. (r. c.) 398.

25. The 85th sect. of 1 & 2 Vict. c. 110, controls the general words of s. 2, and no previous writ of summons is necessary to the issuing a *ca. sa.*, in order to detain an insolvent under the former section. *Turnor v. Daniel*, 7 Dowl. (r. c.) 346; and 5 Mees. & W. (xx.) 28.

26. The 1 & 2 Vict. c. 10, s. 41, only operates to prevent a *supersedeas* at common law, and does not interfere with the 48 Geo. 3, c. 123, entitling a prisoner who has applied to the Insolvent Court to his discharge. *Chew v. Lye*, 7 Dowl. (r. c.) 465.

27. Plea to an action on a bill that the defendant was discharged under the Insolvent Act; replication, that plaintiff, although in England, had not been served with a notice of the petition; held bad, the s. 42 of 7 Geo. 4, c. 57, being only directory, and not a condition precedent to the



validity of the discharge. *Reid v. Croft*, 5 Bing. N. S. (c. r.) 69; and 7 Dowl. (r. c.) 122.

And see *Bankrupt*; *Outlawry*; *Practice*, (c. L.); *Prisoner*; *Specific Performance*; *Trover*.

## INSURANCE.

### SHIPS—FIRE—LIFE.

1. Where the policy was effected on the 3d November, on the ship G., at and from M. to L., warranted to sail on the 10th October previously, and the insured communicated that the ship G. sailed with another, the F., on the 10th October, which latter had, with the underwriter's knowledge, arrived some days before, but the insured did not communicate the fact that the G. and F. had parted company in a gale on the 21st October, the court granted a new trial, although the jury had found that the fact was not a material one. *Westbury v. Aberdeen*, 2 Mees. & W. (x. r.) 267.

2. It is for the court to put a construction on what are "perils of the seas," which are terms of general import. Where casks of oil, which had not been shifted or damaged, had leaked, a witness might be asked to what he attributed it, but not whether, in such case, it is in practice considered as leakage, or loss by perils of the seas. *Quere*, whether counsel can refer to the authority of books on insurance, written by living mercantile men? *Crofts v. Marshall*, 7 C. & P. (n. r.) 597.

3. The term "cargo" being of mercantile construction, that given by the dictionary held of no authority. *Houghton v. Gildart*, 7 C. & P. (n. r.) 701.

4. In *assumpsit* for money paid on a policy effected for the defendant, plea—that the policy in respect of which the alleged payments were made was so framed as to be utterly useless to him; *semb.* the defence might well form the subject of a special plea, and demurmer thereto, as amounting to the general issue, allowed to be withdrawn, and reply *de novo*. *Cole v. Le Soeuf*, 3 Sc. (c. r.) 188; and 5 Dowl. (r. c.) 41.

5. In an action on a policy for time, with the usual warranty as to average, the ship having been injured by collision with another, and each being damaged, the question was referred to arbitration, under which it was awarded that each ship should bear half the joint expenses of the two, and in the result the ship insured had to pay a balance; the ship was also detained during the repairs of damages sustained by perils of the sea, and expended additional sums for wages and maintenance of the crew; held, that neither of these heads of damage could be taken into account by the jury, as losses for which the underwriters were liable. *De Vaux v. Salvador*, 4 Ad. & Ell. (x. s.) 420; and 6 Nev. & M. 713.

6. Where sixty actions had been consolidated, and a rule nisi for a new trial been obtained, the court refused an application for the defendant to pay the amount recovered into court, to invest

the same, upon the ground of the delay and loss which might arise from the state of the new trial paper, before the rule could be disposed of. *Ohryly v. Dunbar*, 1 Nev. & P. (x. s.) 244.

7. A consolidation of causes may be made before declaration. *Hollingsworth v. Brodrick*, 6 Nev. & M. (x. s.) 240; and 4 Ad. & Ell. 646.

And see *Practice*, (c. L.)

8. Upon a suit to ascertain whether goods, the subject of the insurance, had in fact been purchased, the court refused to allow of inquiries as to the general solvency of the purchasers. *Jan-son v. Solarte*, 2 Younge (x. xq.) 132.

9. Where the policy contained a warranty that the mills insured should be worked by day only; upon a plea in an action, that the mill was worked by night, and not by day only; held, that it was to be confined to the usual manufacture carried on therein, and that it was no breach of the warranty that a steam-engine in the mill had on one occasion been used at night to turn machinery in an adjacent building; held, also, that a plea that a certain steam-engine and shafts, "these being respectively parts of the said mills," were worked at night, was bad. *Mayall v. Milford*, 1 Nev. & P. (x. s.) 732.

10. In an action upon an insurance policy against fire, upon a dwelling-house and a kiln attached to a granary for drying corn, it appeared that, a cargo of bark having been sunk near the premises, the plaintiff had permitted it to be dried *gratis* at his kiln, in the course of which the fire occurred; held, that such single act did not amount to an alteration in the business, of which, by one of the conditions, notice was to be given, or a misdescription in the policy of the trade carried on, although the jury found that corn-drying and bark-drying are different trades, and that the latter was more dangerous than the former; that there was nothing in the policy amounting to an express warranty that nothing but corn should ever be dried in the kiln; and lastly, that, in the absence of all fraud, there is no distinction between the fire having been occasioned by the negligence of servants or strangers, or of the assured himself. *Shaw v. Robberds*, 1 Nev. & P. (x. s.) 279.

And see *Dobson v. Sotheby*, 1 Moody & Malk. 90.

11. On a warranty that the assured has not been subject, amongst other things, to *fits*, held to mean that he was not *naturally* so subject, and that having had *fits* once or more in consequence of an accident did not vacate the policy. *Chattock v. Shaw*, 1 M. & Rob. (n. r.) 498.

12. An executor held not bound to show a special ground for his testator's effecting a limited insurance on his own life: but where a policy is effected on the life of another by a party having no interest in it, and who pays the premium, and the object is to obtain an assignment of the policy; held void, as an evasion of 14 Geo. 3, c. 48, s. 1, 2. *Wainwright v. Bland*, 1 M. & Rob. (n. r.) 481.

13. On a policy from and to any port of trading



on the coast of A., and thence back to L., with liberty to call at any ports and places backwards and forwards without being deemed a deviation, and also to tranship on board any ship in the same employ, and that the ship might be used as a tender to any other ship in the same employ; the ship at B., on the coast of Africa, was employed in removing the cargo from another ship, which got on shore, and took it, not to the nearest place of safety, but to another port, and on a different voyage; held, that such assistance was not in the employment as a tender, and was a clear deviation, and having been lost on the homeward voyage, the plaintiffs were not entitled to recover; held, also, that it was a question properly left to the jury, whether the stay at B. was for an unreasonable time or not. *Hamilton v. Sheddon*, 3 Mees. & W. (xx.) 49.

14. In an action on a time policy for a year, and loss by perils of the seas, upon the question whether the defendant was entitled to deduct one-third new for old, upon the ground of the ship at the time being on her first voyage; held, that the rule had grown up to avoid controversy, but that the voyage was determined by the policy; and *seems*, it would be better to have a time specified in the policy, depending on the age of the ship. *Pirie v. Steele*, 8 C. & P. (n. r.) 200.

15. It appeared that the ship, newly built, was chartered from England to New South Wales, where the freight was payable, and, as was the custom, not being able to get a homeward cargo there, she proceeded to Madras, and was lost on the homeward voyage; held, that it was to be deemed a new ship on her first voyage, and that the rule, allowing a deduction of one-third, as new for old, did not apply. *S. C. 2 M. & Rob.* (n. r.) 49.

16. Where actions were brought by the plaintiff against different defendants, the court refused to make the consolidation rule upon the terms of the plaintiff and defendant in one action being bound by the verdict in the other, without the plaintiff's consent. *M'Gregor v. Horsfall*, 6 Dowl. (r. c.) 338; and 3 Mees. & W. (xx.) 321.

17. Since the 3 & 4 Will. 4, c. 42, Reg. Hil. 4 Will. 4, want of interest must be specially pleaded. *Mills v. Campbell*, 2 Younge & C. (xx. xq.) 397.

18. The court of Equity will not give relief by ordering a policy to be delivered up, on the ground of want of insurable interest. *Desborough v. Curlewis*, 3 Younge & C. (xx. xq.) 175.

And see *Smith v. Lord Howden*, 3 Myl. & K. 97.

19. Where upon a settlement of a wife's property, to the intent of making provision for the husband if he survived her, it was provided that the trustees should pay out of the trust fund the premiums of a policy of a stated amount on the life of the wife, and on the principal becoming payable invest the amount, and pay the interest to the husband for life, and afterwards pay the principal as the wife should appoint, or in default of appointment, to the persons entitled under the Statute of Distributions; the wife having survived, and being unwilling to continue the payment

of the premium, assigned the policy to a cousin, who paid the premiums, and his representative afterwards, who on the death of the wife received the amount of the policy; held, that such assignment was valid, and the assignee entitled to the benefit thereof. *Godsal v. Webb*, 2 Keene, (cx.) 99.

20. Where in an action on a policy of insurance, effected by the husband on the life of his wife, it appeared that she had been sent to the office to be examined, and had given general answers to the printed questions, and the jury found that the husband had no personal knowledge; held, that the allegations in the plea, as to the husband's knowledge of certain facts material to be disclosed, could not be considered as allegations that he had knowledge through the wife as his agent; but it appearing that before her marriage she had been long attended by a medical person, who ceased to be so upon her marriage, and subsequently the husband's usual family attendant had prescribed for her, once or twice, on slight indispositions, and she, to the inquiry, who was her usual medical attendant, had given the name of the latter; held, that it ought to have been left to the jury to say if he could be considered her medical attendant at all; and that, if in answering the question, she was aware that he could not be the proper person to give the account the office were desirous of obtaining, the answer must have been intended to deceive; and a new trial granted. *Huckman v. Fernie*, 3 Mees. & W. (xx.) 517.

21. Where a policy was effected on freight from C. coast to B., and the ship put in for repair at a port on the C. coast, at 7 miles from which the plaintiff procured a cargo ready to be loaded, but the ship was lost by accident in going out of dock; held, that the risk attached, and that the plaintiff's interest was properly described as freight; and that the policy covering perils of the seas and all other perils, losses and misfortunes, the loss was within the terms of the policy. *Devaur v. Janson*, 5 Bing. N. S. (c. r.) 519.

22. In an action on a policy for a voyage during 12 months, and loss alleged by perils of the sea; plea, that after the making of the policy, and during the time of her being so insured, the ship was greatly damaged, &c., and unseaworthy, and that the plaintiff might and could and ought to have repaired and rendered her seaworthy, but that the plaintiff, well knowing the premises, neglected, &c., and that the ship continued in such an unseaworthy state until the loss; held bad on demurrer, as not expressly showing that the plaintiff was aware of the unseaworthiness, and that there was time for repairing before the loss happened, or that it did so, from such neglect; and, *seems*, no warranty of seaworthiness is to be implied, except at the commencement of the voyage. *Hollingworth v. Brodriek*, 7 Ad. & Ell. (q. s.) 40; and 2 Nev. & P. 606.

And see *Agent; Attorney; Pleading*, (xq.)

## INTEREST.

1. Where a testator directed all his residue to



be converted and vested in stock, and to pay the interest and dividends to M. S. for life, and after her death over; held, that M. S. was entitled to the interest of such residue, as it was making at the testator's death, from that time up to the time of the conversion under the direction of the will. *Douglas v. Congreve*, 1 K. (ch.) 410.

2. Where in a suit for setting aside a contract, a decree in the court below, declaring it fraudulent and void, was made in 1831, and the defendant compelled to pay costs; in 1838 the decree was reversed by the House of Lords, and the cause remitted for the court below to do as should be just; held, first, that the defendant was not entitled to interest on the sum paid below for costs; secondly, the purchasers, being bound by the contract to pay the residue of the purchase-money by instalments, with interest upon the remaining sum due, by half-yearly payments, and after the suit commenced the vendor was restrained by injunction from suing for the instalments or interest, which were paid into Court; held, that as to the instalments of interest which became due on the unpaid purchase-money, subsequent to the decree below, the court would not give any relief, but that the defendant must resort to his remedy at law; thirdly, that he was entitled to be repaid the instalments of interest which became due between the suspension and decree below, but not interest thereon; fourthly, that he was only entitled to the value of the accumulations of the stock in which the payments had been invested, as sold out at the hearing; fifthly, that if the plaintiffs had not sold out the stock, but it had been merely transferred to them, they would have been liable to the defendant for the dividends received upon it. *Small v. Atwood*, 3 Younge & C. (ex. eq.) 105.

3. Where money is paid over by the erroneous act of the court, and afterwards the party is ordered to refund it, he is not liable for interest. *Ib.*

4. Where goods were sold, to be paid by bill at two months, which was never given, held, that the interest from the time when the bill would have been payable might be recovered as part of the estimated value upon the common count for goods sold and delivered. *Farr v. Ward*, 6 Dowl. (r. c.) 163; and 3 Mees. & W. (ex.) 25.

5. Where a party assigned a trust fund for the benefit of certain creditors specified in the deed, some specified as bearing interest, others not; held, that the former were entitled to interest on their debts before any payment should be made to the subsequent incumbrancers. *Jenkins v. Perry*, 3 Younge & C. (ex. eq.) 178.

6. In the case of a mortgage asking for payment not in a suit for foreclosure, but in an administration suit, in which the mortgaged estate had been sold; held, that the direction to compute interest subsequent to the Master's report of what was due on the principal only, was right. *Brewin v. Austin*, 2 Keene, (ch.) 211.

7. Where an annuity for the grantor's life was secured by bond and warrant of attorney, on which judgment had been entered up, and at the death of the grantor, who died intestate, the an-

nuity was greatly in arrear, and his estate consisted only of a fund in court which had been accumulating ever since his death; held, that the court would adopt the provisions of 3 & 4 Will. 4, c. 42, although only applicable to proceedings at law, and the grantee therefore decreed to be entitled to the arrears of the annuity, with interest at five per cent., from the death of the grantor. *Hyde v. Price*, 8 Sim. (ch.) 578.

8. Where in a suit by annuity creditors against the Crown, as the personal representative, and no contest between them and any other creditor, and since the debt ascertained by a former decree, payment could not have been enforced by any proceeding; held that interest was allowable, and at five per cent., as on a legal debt, out of the fund in court, and beyond the penalty. *Hyde v. Price*, 1 Coop. (ch. c.) 193, and cases collected there and reviewed.

9. A party is entitled to interest upon a judgment from the time that execution is delayed by a writ of error, and allowed at the rate of four per cent. *Langridge v. Levi*, 7 Dowl. (r. c.) 27; and 4 Mees. & W. (ex.) 337.

10. The case of Booth v. Leicester, 1 Keene, 247.579, affirmed by the Lord Chancellor, 3 Myl. & Cr. (ch.) 459.

And see *Bankrupt; Bill; Creditor; Legacy; Mortgage; Partner; Surety; Will.*

## INTERPLEADER.

1. Where the depositary claimed a personal interest in part of the fund claimed by one of the claimants; held, that it was not a subject of an interpleading suit. *Moore v. Usher*, 7 Sim. (ch.) 384.

2. So, where he had by admissions given to one of the claimants a right of action against him in respect of the subject of claim. *Crawshay v. Thornton*, 7 Sim. (ch.) 391. Confirmed on appeal, 2 Myl. & Cr. 1.

And see *Pearson v. Cardon*, 4 Sim. 218; and affirmed on appeal, 2 Russ. & M. (ch.) 606.

3. Where a party to an interpleading rule refused to proceed, the court refused to substitute another claimant unless the former were party to the rule for substituting the other. *Lydal v. Bidle*, 5 Dowl. (r. c.) 244.

4. Where the plaintiff in an interpleading suit, having obtained the common injunction, moved to extend it to stay trial, refused; the injunction in such a suit staying proceedings at law until further orders. *Moore v. Usher*, 7 Sim. (ch.) 383.

5. Where, on an application under s. 1 of 1 & 2 Will. 4, c. 58, the claimant did not appear, the court refused to allow the costs of the applicant out of the fund in dispute. *Lambert v. Cooper*, 5 Dowl. (r. c.) 547.

6. Where the defendant had purchased cattle of the plaintiff, and sent a bill, accepted in blank



for the drawer's name for the payment, which came into the hands of third parties for valuable consideration, the plaintiff denied that it had ever been received or indorsed by him, and he had commenced an action for the price of the cattle; the holder of the bill also threatening proceedings on it against the defendant; held, that it not being shown that the cross claims were on the same subject matter, and the defendant might be liable to one or other of the parties, it was not a case within the Act. *Farr v. Ward*, 2 Mees. & W. (xx.) 844.

7. Where in an interpleading suit, the common order for an injunction only was applied for, and intended to be made, and from necessity, it was drawn up without making the payment into court a condition precedent to the issuing of the injunction; held irregular, and the order discharged. *Sieveling v. Behrens*, 2 Myl. & Cr. (cx.) 581.

8. Where proceedings against an agent of a foreign house had been taken in the Mayor's Court by two attaching creditors, and by the curators of the foreign creditors become bankrupt, and one of the former had obtained a judgment in his favor, but the other had failed, although the judgment might not be conclusive; held a proper case for interpleader, and that the having abstained until the last moment from seeking the protection of the court, entitled the party to the favor of the court; but it appearing that the continuance of the injunction might be the means of letting in third parties to intervene, and obtain a title against both claimants, the injunction was limited to execution upon any proceedings. *Ib.*

9. Where an auctioneer was sued for the deposit, and paid the amount into court, upon a rule of interpleader between the vendor and purchaser, held entitled to his costs out of the fund, the vendor not having appeared. *Pitchers v. Edney*, 4 Bing. N. S. (c. r.) 721; and 6 Sc. 582.

10. Where an issue was directed upon a rule of interpleader, under 1 & 2 Will. 4, c. 58, to try the right; the party succeeding, held entitled, as against the unsuccessful party, to the costs of the application for an order to the stakeholder, who had been ordered to detain the property until the issue decided, and who after that and demand, had declined, until application had been made to the court. *Barnes v. Bank of England*, 7 Dowl. (r. c.) 310.

11. Where the defendant advertised a reward for information leading to the discovery of a felony, and several parties having given information more or less material, claimed the reward, held not a case within 1 & 2 Will. 4, c. 58. *Gay v. Pitman*, 4 Sc. (c. r.) 795.

12. In an interpleading suit, the common order for an injunction can only be dependant on the payment of the money into Court. *Pauli v. Von Melle*, 8 Sim. (cx.) 327.

13. *Semb.*, a notice of a docket and *fiat* issued against the party whose goods have been seized by the sheriff is not a sufficient claim to found the rule. *Tarleton v. Dumelow*, 5 Bing. N. S. (c. r.) 110; and 6 Sc. 687, 843.

14. Where the declaration on an issue, averred that the goods were not the property of the plaintiffs, or either them, plea, that the goods were the property of the plaintiffs' or one of them; held, that the defendant had the right to begin, the affirmative lying on him. *Hudson v. Crown*, 8 C. & P. (n. r.) 774.

15. Where an action on an attorney's bill was referred for taxation, but the amount of the verdict taken brought into court by the sheriff, upon a rule of interpleader; held, that it could not be considered as money paid in for the purpose of the taxation, so as to give the Court jurisdiction over it under 2 Geo. 2, c. 23. *Rogers v. Peterson*, 7 Dowl. (r. c.) 187; and 4 Mees. & W. (xx.) 588.

16. The 1 & 2 Will. 4, c. 58, s. 1, does not apply to claims for unliquidated damages. *Walter v. Nicholson*, 6 Dowl. (r. c.) 517.

And see *Bankrupt*; *Composition*; *Sheriff*; *Ship*.

## INTRUSION, WRIT OF.

1. The remainder-man, after the determination of the estate *pur autre vie*, held to be entitled to maintain the writ of intrusion, although the title of the tenant for life was only equitable, and created by devise to trustees, who were to receive the rents, and pay them over to the *cestui que vie*; held also, that such writ falls within the 32 Hen. 8, c. 2, and not within the 21 Jac. 1, c. 16, and might have been maintained when brought on a seisin within 50 years. *Piercy dem., Gardner ten.*, 3 Bing. N. S. (c. r.) 748.

2. On an information of intrusion on crown lands, it is not necessary that the title of the crown should be first found by inquest of office, the only effect of 21 Jac. 1, c. 14, being, where the crown has been out of possession for 20 years, to throw the onus of proving title on the crown in the first instance; held also, that the crown may of right lay the *venue* in the county, or have the inquisition taken in a different county than that where the *venue* is laid. *Attorney-General v. Parsons*, 2 Mees. & W. (xx.) 23; 1 Tyr. & Gr. 980; and 5 Dowl. (r. c.) 165.

## JAMAICA.

The House of Assembly in Jamaica have power to punish contempts for libellous paragraphs (found and resolved breaches of privilege of the House) by commitment to the gaol in the Co. of M. there, during the pleasure of the House; held also to be unnecessary to set out in the warrant what the libel was, but *quære*, whether a mere warrant to the serjeant-at-arms to take into custody, would justify the carrying the party to such gaol. *Beaumont v. Barrett*, 1 Moore, (r. c.) 59.

And see *West India Estates*.



## JOINT STOCK COMPANY.

1. Actions and suits by companies against individuals, being co-partners, and *vice versa*, regulated further by 1 & 2 Vict. c. 96.

2. A joint stock company, the shares of which might be increased to an unlimited extent, and be assigned or disposed of by deed or will to any persons at the discretion of the holders, held fraudulent and illegal. *Blundell v. Windsor*, 8 Sim. (cn.) 601.

3. There is no distinction between trading and mining companies: and where a party takes shares in concern, on a prospectus holding out that a certain capital is to be raised for carrying it on, he will not be liable as a partner unless the terms of the prospectus be fulfilled, or it be shown that he knows and acquiesces in the directors carrying it with a less capital; where the jury negatived such knowledge or acquiescence, and found the defendant not liable, the Court held the finding right. *Pitchford v. Davis*, 5 Mees. & W. (xx.) 2.

4. Where in consequence of the embarrassment of the affairs of a joint stock company, by deed the shareholders empowered a committee to certify what sum should be necessary to satisfy the claims on the company, and the proportion each shareholder should pay, and which the defendant amongst others covenanted to pay; in an action thereon, alleging that —l. had been so certified, and that —l. was the proportion of the defendant, and a demand and refusal by him; pleas, amongst others, one traversing that the committee had certified, as the fact was; and another, that such sum was not necessary to satisfy the claim, &c., and that the committee had fraudulently signed such certificate; and it appeared that, on a similar certificate, the defendant had paid a portion of the sum awarded against him, and that the subsequent certificate had been made for the same amount to avoid confusion amongst the other contributors, and that the defendant had notice that he would be allowed to deduct his former payment out of the subsequent claim: held, 1st, that the defendant was not estopped from showing that by reason of the previous payment, the certificate was erroneous in stating the amount necessary; but, 2dly, that the second certificate being erroneous in fact, did not under the circumstances necessarily amount to fraud in law. *Wilson v. Butler*, 4 Bing. N. S. (c. r.) 748; and 6 Sc. 541.

And see *Action; Bankrupt; Injunction; Marriage Settlement; Rail Road*.

## JOINT TENANTS.

In debt for rent by survivor, upon a joint demise by joint tenants; plea, that the parties were tenants in common, held a good bar on demurrer. *Burne v. Cambridge, M. & Rob.* (n. r.) 539.

And see *Doe v. Errington*, 1 Ad. & Ell. 750; and 3 Nev. & M. 641.

## JUDGMENT.

1. In an action against a tenant, assigning several breaches, and general damages; one of the breaches assigned being bad, the court refused to arrest the judgment, but awarded a *renuere de novo*. *Leach v. Thomas*, 2 Mees. & W. (xx.) 427, and 5 Dowl. (r. c.) 612; overruling *Holt v. Schofield*, 6 T. R. 691.

2. Where a verdict was taken, and the amount referred to be certified, and the arbitrator assessed the damages on each count separately; held that the court would not arrest the judgment on the ground of one count being bad. *Hayter v. Moat*, 2 Mees. & W. (xx.) 56; and 5 Dowl. (r. c.) 208.

3. In order to enter up satisfaction of a judgment on the rule, the warrant of attorney from the plaintiff is requisite. *Wood v. Hurd*, 3 Bing. N. S. (c. r.) 45; 5 Dowl. (r. c.) 188; and 3 Sc. 368.

4. The court refused to allow satisfaction to be entered on a judgment on an action by five plaintiffs, upon a warrant signed by four only, although the other was sworn to have left the country. *Davis v. Jones*, 4 Sc. (c. r.) 202.

5. The court refused to allow the plaintiff to enter judgment *nunc pro tunc*, where the delay arose from the laches of the plaintiff, and in the interval the defendant had died. *Vaughan v. Wilson*, 4 Bing. N. S. (c. r.) 116; 6 Dowl. (r. c.) 210; and 3 Sc. 404.

6. Upon a bill by a judgment creditor, to establish a lien on the equitable estate of the debtor; held, that it is necessary to allege on the face of the bill that the creditor has sued out an *elegit*; and demurrer allowed, supporting the judgment of the Vice Chancellor. *Neate v. Duke of Marlborough*, 3 Myl. & Cr. (cn.) 407.

7. Where purchase-money had been deposited in the hands of a third party, for the use of the defendant; held, not liable to be attached under 1 & 2 Vict., c. 110, s. 14. *Robinson v. Peace*, 7 Dowl. (r. c.) 93.

And see *Pleading* (c. l.); *Replevin*; *Requests*; *Surety*.

## JUDICIAL COMMITTEE.

1. The court possesses the same power of rectifying mistakes in embodying its judgments as all other courts of record: upon a simple order of dismissal of an appeal and affirmance of the judgment below, purporting to be upon hearing of the cause; held that the court might treat it as a simple dismissal, and rescind the order, it appearing that the appellants were infants under the protection of the Court of Wards in India, and that the guardian *ad litem* had absconded; but terms imposed. *Rae v. Govind Sing*, 1 Moore, (r. c.) 117.

And see *Dumaresq v. Le Hardy*, *ib. notis*, 127.

2. The rule requiring the prosecution of an ap-



peal within a year and day is not imperative, and an application to dismiss refused, where the respondents had forborne to apply for eight months. *St. Louis v. St. Louis*, 1 Moore (r. c.) 143.

And see *Wilson v. Arnold*, 1b. *notis*, 147.

3. Under the 5 Geo. 4, c. 113, s. 29, the judicial committee have no power to extend the time of appeal against any decree or sentence of any Court of Admiralty. *Muter v. Chipchase*, 1 Moore (r. c.) 1.

4. After a delay of six years, leave to prosecute an appeal refused. *Lindo v. Rex*, 1 Moore (r. c.) 3.

### JURY.

1. A jury are not bound to find any other than a general verdict, although the Judge directs them to find specially as to a particular fact, on which a legal question may be raised; and where they refused, the court would not disturb the verdict. *Devizes, Mayor, &c. v. Clark*, 3 Ad. & Ell. (x. n.) 506.

2. Where the defendant was aware of the mode in which the bill had been found by the grand jury, pleaded to it, and was found guilty, the court afterwards refused to quash the indictment on the ground that 25 grand jurymen were sworn, and that 13 were against the finding, as he might bring error either in law or in fact; but the court will not receive affidavits of the jury of what passes at the time of the finding of the bill; held also, that the correct number to be sworn is 23 only. *R. v. Marsh*, 1 Nev. & P. (x. n.) 187.

3. Juries to be summoned to attend at any adjourned sessions in like manner as for any general quarter sessions. 1 & 2 Vict. c. 4.

4. The Court will not listen to any affidavit containing statements made by the jury as to their mode of finding their verdict, with a view of impugning it. *Straker v. Graham*, 4 Mees. & W. (ex.) 721; and 7 Dowl. (r. c.) 223.

### JUSTICES.

1. Justices have no jurisdiction under 6 Geo. 3, c. 25, to determine disputes between masters and household servants. *Kitchen v. Shaw*, 1 Nev. & P. (x. n.) 791.

2. The jurisdiction of the Justices of Middlesex is not directly taken away by the 4 Geo. 4, c. 64, s. 13, (Gaol Act) so as to empower the Court of Mayor and Aldermen of London to prevent them from committing to Newgate, as the county gaol of Middlesex. *R. v. Cope*, 1 Nev. & P. (x. n.) 515.

3. Where the defendant, a magistrate, seized the plaintiff's goods, alleging, at the time, they were stolen; held that, having acted *bona fide*, and intending and believing that he was acting

in the execution of his duty, he was entitled to notice of action, although the jury found that he had no reasonable ground to suppose the property to have been stolen. *Wedge v. Berkeley*, 1 Nev. & P. (x. n.) 665.

4. A justice may be entitled to notice, although he may have no defence to the action. 1b.

5. Where the defendant, a magistrate, meeting the constables having in custody the plaintiff on a charge of drunkenness, ordered him to be taken back to the lock-up house, and he would see him the next day, and the plaintiff was kept confined until then, when he was ordered by the defendant to be fined; held, that it was his duty either to have gone into the case, or, if he could not do so, not to have interfered, but have let the officer take him before another magistrate, and that the action of trespass was maintainable; he has no right to imprison for breach of the peace without hearing the charge. *Edwards v. Ferris*, 7 C. & P. (n. r.) 542.

6. The notice of action being, of imprisonment in the lock-up house, evidence of what passed before the magistrate held admissible, as part of the alleged illegal transaction; but what was said by the constables before any joint act proved, held not receivable. 1b.

7. An order of justices for payment of a weekly sum for the maintenance of a father by the son, describing the application to have been made to the justices of K. by the overseers of the parish of M. in the county of K., to have an order made on T. G. of the parish of M. in the same county, &c. and proceeding to order the said T. G. to pay, &c.; held sufficiently to show that T. G. was dwelling within the jurisdiction of the justices, and that, by making their order on the said T. G., the justices had adopted those words and adjudicated that he dwelt there. *R. v. Toke*, 3 Nev. & P. (q. n.) 323.

8. The obtaining the certificate of the Judge who tries the cause is a condition precedent to the right of a magistrate who obtains a verdict in an action brought by him for an act done in his judicial capacity, for double costs, under 7 Jac. 1, c. 5. *Penny v. Slade*, 5 Bing. N. S. (c. r.) 469; and 7 Dowl. (r. c.) 440.

9. Justices' powers of acting in detached parts of counties regulated by 2 & 3 Vict., c. 88.

And see *Apprentice*; *Bastard*; *Corporation*; *Distress*; *Friendly Society*; *Mandamus*; *Trespass*.

### KING'S BENCH MARSHAL.

See *Prisoner*, 8.

### KIN, NEXT OF.

See *Administration*; *Baron and Feme*.



## LANDLORD AND TENANT.

1. Where the original agreement in writing was for a yearly tenancy, held not altered by the tenant agreeing to pay quarterly, and doing so; and that a distress for a quarter's rent was illegal. *Turner v. Allday*, 1 Tyr. & Gr. (xx.) 819.

2. Where in *assumpsit*, the declaration alleged that the defendant held lands on lease, of which the plaintiff becoming entitled to the reversion, the defendant, in consideration of a reduction of the rent, promised to hold of the plaintiff on the same terms in all other respects, and then alleged breaches; held, that the plaintiff, not being able to produce the agreement, could not rely upon implied terms of holding under the original lease without putting it in evidence, as it could not be considered as mere inducement. *Wallis v. Broadbent*, 4 Ad. & Ell. (x. s.) 877.

3. A memorandum, in the terms, "I, D. B., hereby certify that I remain in the house, at &c., upon sufferance only, and agree to give immediate possession to him at any time he may require;" held, not to amount to an agreement for a tenancy, or to require a stamp. *Barry v. Goodman*, 2 Mees. & W. (xx.) 768.

4. Upon the expiration of the tenancy, the tenant is bound to give up the entire possession, unless by the custom he is entitled to hold over any part, which custom it lies on him to prove. Where the custom was to have one-third on tillage, which he was entitled to hold until the harvest, and also, if there was an excess, when it was divided; and it was not clear whether a whole field was an excess or not, and the tenant might have a lien for the expenses of sowing; held, that the out-going tenant was entitled to maintain trespass for cutting and taking away the corn. *Caldecott v. Smythies*, 7 C. & P. (x. r.) 808.

5. And a verbal permission by the landlord to sow beyond the one-third, would be good as against him, and his in-coming tenant. *Griffith v. Tombs*, 7 C. & P. (x. r.) 810.

6. On a covenant to repair, the lessee is not liable for the expense of renewing works in an improved and more durable manner. *Soward v. Leggatt*, 7 C. & P. (x. r.) 613.

7. Where the tenancy had ceased by the conveyance of the landlord's reversion; held, that he was not entitled to follow goods removed to avoid distress. *Ashmore v. Hardy*, 7 C. & P. (x. r.) 501.

8. And the admission of the landlord in an answer in Chancery, of such conveyance, held admissible against him. *lb.*

9. Where the tenant erected saddles with stone caps, and placed thereon a wooden and thatched building, connected in no other way than by resting the beams on the saddles, and might be taken to pieces and removed without injury to the soil; held, that the tenant was entitled to remove them, and might maintain trover for the materials. *Wansborough v. Maston*, 6 Nev. & M. (x. s.) 367; and 4 Ad. & Ell. 884.

And see *R. v. Otley*, 1 B. & Ad. 161.

10. Where A., having a demise of a colliery for 21 years, with the right of erecting engines, &c., and having erected steam-engines and other implements thereon, afterwards assigned them to trustees to permit B. to enjoy the same until default made in payment of an annuity to A., and the latter afterwards recovered the premises in ejectment, in pursuance of the proviso for re-entry; held, that, upon an execution issued by a creditor of B., under which the engines and other articles on the colliery were seized by the sheriff, the trustees could not maintain trover for the engines found to be affixed substantially to the freehold, they having only the same right of removal as the tenant, and that to be exercised during the tenancy. *Minshall v. Lloyd*, 2 Mees. & W. (xx.) 450; questioning *Trappes v. Harter*, 2 Cr. & M. 153.

11. Where A., B. and C. (whilst unmarried) entered into a contract in December 1834, for a term of seven years, at a rent payable quarterly, but the plaintiff not having executed, it could not operate as a demise, but under which they entered; in the following September, C. married with one of the defendants, and A. afterwards became bankrupt, and his assignees paid the quarter's rent at Michaelmas 1835, but it did not appear by whom the previous rent was paid, although admitted to have been paid; and there was no evidence of any payment having been made before C.'s marriage, or with her assent after; held, that there was not sufficient evidence to raise an implied new tenancy, so as to charge the defendants in an action for use and occupation on a joint demise. *Doidge v. Bowers*, 2 Mees. & W. (xx.) 365.

12. Where the premises were originally taken to hold from May 1832 to February 1833, and thence from year to year, and, on 22d October 1833, a notice was served to quit "at the expiration of half a year from the delivery of the notice, or at such other time or times at which your present year's holding would expire, after the expiration of half a year from the delivery of the notice;" held, that the word "present" might be rejected, and the notice sufficient to determine the tenancy on the February 1835. *Doe d. Williams v. Smith*, 5 Ad. & Ell. (x. s.) 350.

13. Where plaintiff, the grantee of an annuity or rent charged on lands, with power of re-entry in case of the rent being in arrear, which the grantor afterwards demised to the defendant for a term, having distrained for arrears of the annuity, the lessee signed an agreement to attorn to the plaintiff, and paid him rent, distresses had also been made, and a six months' notice to quit given; held, that it created a tenancy from year to year, as between him and the annuitant, determinable on the payment of the arrears, and upon which the lease for years would revive. *Doe v. Boulter*, 1 Nev. & P. (x. s.) 655.

14. Upon an issue whether a notice of determining a tenancy of coal mines had been waived by the parties continuing afterwards to work on, by cutting away so much of the pillars of coal as might be done with safety (alleged to be usual



upon abandoning a mine); held, that the question was one of intention for the jury; held also, that a letter from an agent of former partners, not the same as at the time of giving the notice, was inadmissible against the new members of the firm, although two were still partners. *Jones v. Sheares*, 6 Nev. & M. (x. n.) 423; and 4 Ad. & Ell. 532.

15. Where the father of the deceased occupier being tenant of a farm, of which the tenancy would expire at Lady-day, the attorney of the landlord, in December, proposed to let that and other farms according to the terms of a printed paper then read, and which the deceased assented to, and agreed to succeed his father at Lady-day, but no writing was signed, and he entered and continued in possession until his death, after which his executors, the defendants, entered and paid the rent; held, that such agreement, followed by entry and payment of rent, created a tenancy upon the terms of the printed paper, and which might be referred to by the attorney to show the terms of the demise. *Lord Bolton v. Tomlyn*, 1 Nev. & P. (x. n.) 247.

16. A notice to quit, given by an agent of an agent, without any evidence of recognition by the principal, held insufficient. *Doe v. Robinson*, 3 Bing. N. S. (c. r.) 677; and 4 Sc. 396.

17. In debt to recover double yearly value, with a count for use and occupation, it appearing that the plaintiff had mortgaged the premises to the defendant in fee, with a proviso for redemption, and after the covenant for reconveyance, a proviso, that the principal should not be called in for seven years, and that if the interest were kept down, the mortgagor should hold, occupy, &c., and take and receive the rents, &c., to his own use; held, that the latter part of the deed operated as a demise to the mortgagor for the term of seven years, and that the plaintiff was entitled to recover for the use and occupation. *Wilkinson v. Hall*, 3 Bing. N. S. (c. r.) 508; and 4 Sc. 351. *Quer.* if a quarterly tenancy is within the stat. 4 Geo. 2, c. 19?

18. Where the tenant had given a joint note for the rent due, and in ejectment by the landlord, a verdict for the lessor of the plaintiff was agreed to be taken for him, consenting that the defendant should remain in possession for a fortnight, and not be called on for any rent due; held, that such agreement extinguished the claim on the note for rent. *Howell v. Lewis*, 7 C. & P. (n. r.) 566.

19. Although the landlord in distraining may impound the goods on the premises, and to secure them lock them up, yet where he locked up the plaintiff's cottage for the purpose of keeping the possession, held, that the tenant might maintain trespass for the expulsion, and that a licence by the tenant could only be pleaded specially. *Cox v. Painter*, 7 C. & P. (n. r.) 767.

20. A breach, assigning that the tenant threatened to commit waste unless he were paid certain sums, held bad. *Leach v. Thomas*, 2 Mees. & W. (ex.) 427; and 5 Dowl. (r. c.) 612.

21. Under 32 Hen. 8, c. 34, the assignee of a reversion held not entitled to arrears of rent due

prior to the assignment. *Flight v. Bentley*, 7 Sim. (cn.) 149.

22. In order to entitle the landlord to the rule under 1 Geo. 4, c. 87, s. 1, he must, at the time of moving, have a perfect lease or agreement; where it was not stamped until after the rule was obtained, the court discharged it, and held that such rule cannot be drawn up on reading a copy of the lease or agreement. *Doe d. Wood v. Roe*, 3 Sc. (c. r.) 156.

23. The case of *Neale v. Mackenzie*, (2 Cr. M. & R. 84) reversed on error, 1 Mees. & W. (ex.) 747.

24. Upon a demise of premises by agreement, stipulating *inter alia* that the lessor would, at the request and costs of the lessee, grant and execute a lease thereof; held that the landlord could not charge the latter with the expense of a counterpart if he required it. *Jennings v. Turner*, 8 C. & P. (n. r.) 61.

25. Plea in debt for rent, that by agreement between the plaintiff and defendant, before the rent became due, in consideration the latter would give up possession, he should be discharged from all liability to pay any further rent, and that the premises were delivered up accordingly, averring the tenancy to be thereby at end; held that although not setting up a surrender, the plea showed a valid excuse for non-payment of the rent. *Gore v. Wright*, 3 Nev. & P. (q. n.) 243.

26. In case for an excessive distress, the rent being payable quarterly, and the first payment being by the agreement for a lease, dated 8th September, to be made on 25th March then next following; held, that only one quarter's rent became due in March: it appeared that the broker went to the tenant's house and demanded the rent alleged to be due, and three guineas, his costs of levy, but made no inventory, and touched nothing; the tenant, however, paid the demand, and the broker left the premises; held, that it did not lie in the defendant's mouth to say there had been no actual distress: after the agreement had been signed and delivered, the number of the house was altered from 35 to 38, which the jury found to have been altered without the defendant's assent; the declaration alleging a tenancy, which was not denied, and the evidence of the distress applying only to 35, held, that although the deed was vitiated by the alteration, and the plaintiff had lost his interest thereby, the instrument was admissible to show the terms on which he held No. 35. *Hutchins v. Scott*, 2 Mees. & W. (ex.) 809.

27. Where the widow came into possession under her husband, who had conveyed to the lessor of plaintiff, held that she was estopped from setting up a prior mortgage title. *Doe v. Skirrow*, 2 Nev. & P. (x. n.) 123; supporting *Doe v. Perkins*, 3 M. & S. 271.

28. An insufficient notice to leave the premises given by the tenant, accepted by the landlord, held not to amount to a surrender by operation of law; there cannot be a surrender to operate *in futuro*. *Doe v. Milward*, 3 Mees. & W. (ex.) 323.



29. Where on an agreement of demise, the defendants were to pay all rates, &c., land-tax excepted; held, that an extraordinary assessment by the commissioners of sewers, for works producing a permanent benefit to the lands, was within the agreement, but the rate being made in proportions upon the owners and occupiers, and the tenant having for four years paid both, and in settling with the landlord's agent, who was ignorant of that agreement, deducted the former, and receipts were given for the balance; held, in an action on the agreement to recover the amount so deducted, as arrears of rent, that the facts supported a plea of payment. *Waller v. Andrews*, 3 Mees. & W. (ex.) 302.

30. Summary proceedings for recovery of tenements for not exceeding seven years, nor 20l. rent, by 1 & 2 Vict. c. 74.

31. Where upon an agreement for the purchase of premises by defendant, he was let into possession forthwith, paying interest until the payment of the purchase-money and completion of the purchase, he afterwards built on the land, no conveyance was ever tendered, nor any steps taken by the plaintiff to enforce the performance, but on failure in payment of the interest, the vendor brought ejectment; held, to amount only to a tenancy at will, determinable without any notice to quit. *Doe v. Chamberlaine*, 5 Mees. & W. (ex.) 14.

32. Upon an agreement of demise for one year certain, and so from year to year, with a proviso that either party might determine the tenancy by three months' notice; held to create a tenancy for two years certain, and a notice therefore to quit at the end of the first year was insufficient. *Doe v. Green*, 1 Perr. & Dav. (q. b.) 454.

33. Upon a demise for two years, with an option of purchase within the period, the tenant having after it had expired filed a bill for the specific performance of the purchase, and pending an ejectment by the landlord, the tenant moved for an injunction; the court granted it, only on the terms of paying the rent, without prejudice to the cause. *Pyke v. Northwood*, 1 Beav. (ch.) 152.

34. In *assumpsit*, on an agreement of demise, for not keeping them in habitable repair, plea, that he did within a reasonable time put into habitable repair, according to the true intent, &c.: held, that the plaintiff ought to begin; held, also, that the repair into which the defendant was bound to put them was to have reference to the state of the premises at the time of the demise, and also to the situation and class of persons likely to inhabit them. *Belcher v. M'Intosh*, 8 C. & P. (n. r.) 722.

35. In case for mismanaging a farm, and contrary to the custom of the country, plea traversing that the defendant was such tenant to the plaintiff, *modo et forma*; held, that upon this issue, which put only in issue a tenancy in fact, the plaintiff was not obliged to produce the lease to show that the terms of it were consistent with the alleged obligation to cultivate according to the custom. *Hallifax v. Chambers*, 7 Dowl. (r. c.) 343; and 4 Mees. & W. (ex.) 661.

36. Where after the bankruptcy, and certificate of the lessor of the plaintiff, the defendant having purchased the stock in trade, but no assignment of the premises was made, and upon an agreement for partnership it was agreed that the partnership should hold the premises of the lessor of the plaintiffs, under which, on their account, rent was paid to him; held, that upon the dissolution of the partnership, the tenancy was at an end, and the defendant could not be allowed to dispute the title of the lessor. *Doe d. Colnaghi v. Bluck*, 8 C. & P. (n. r.) 464.

37. Where lessor, after having committed an act of bankruptcy, assigned premises demised, and informed the tenant that he had so done, and requesting him to give 1s. as an acknowledgment to the assignees, which the tenant did, but he was not informed of the circumstances which rendered the assignment invalid; held, in ejectment, by the assignees, that the tenant was not estopped, nor the assignees under the commission, defending as landlords, from showing that the lessor of plaintiff was not his landlord, it being open to a party, not guilty of laches, to explain and render inconclusive, acts done under mistake or through misrepresentation. *Doe v. Brown*, 7 Ad. & Ell. (q. b.) 447; and 2 Nev. & P. 592.

And see *Action on the Case*; *Agent*; *Agreement*; *Covenant*; *Disclaimer*; *Distress*; *Ejectment*; *Lease*; *Pleading*, (c. l.); *Replevin*; *Trover*; *Wastes*.

## LAND TAX.

1. Lands in the occupation of the crown for public purposes, (as dock-yards,) held not assessable to the land-tax. *Attorney-General v. Hill*, 2 Mees. & W. (ex.) 160.

2. Where a party having been returned as a defaulter for a sum assessed upon him in a particular parish, and the same levied by writs of *levari*, and paid into the Exchequer, the court refused to set aside the writs, on the ground that the party had been assessed in a wrong parish. *Glatton Land-tax*, in re, 4 Mees. & W. (ex.) 570.

And see *Distress*.

## LEASE.

1. Where, on an agreement for letting lands on building leases, the lessee covenanted to build and secure 700l. per annum on rents of the houses he built, and the lessor agreed to lease certain parts of the remaining lands, intended as a nursery ground, at a peppercorn rent; the lessee failing to build according to the agreement, the lessor acquiesced in a variation of the plan, and with his consent an underlease was made, with covenants for building according to the varied plan to P., who proceeded with the buildings, and after completing houses on which rents to the amount of 700l. were secured to the lessor, and his interest assigned to the lessor as a security for monies advanced to carry on the buildings, failed and



left the country; held, that after such waiver of the original stipulations, the lessor could not compel the original lessee to perform them, and that he was bound to execute the lease of the land to which the lessee was entitled on the rent of 700*l.* being secured. *Jenkins v. Portman*, 1 K. (ch.) 435.

2. Where the owner of a farm obtained a lease of the tithes of the advowson, and devised them separately, with a condition, as to the latter, that the farm should at all times be exempted from the tithes; held, that upon the renewal of the lease, all who had a special interest in the old one, took the same in the renewed one, and were exempt from tithes, and that the owner of the lease could not compel him to contribute to the renewal fines; held also, that purchasers for valuable consideration stood in the place and took upon the same trusts as the original volunteers. *Webb v. Luger*, 2 Younge (ex. ex.) 247.

3. Where it appeared on the face of the instrument that the party had not, at the time of executing the agreement, power to grant a lease, held, that it could not operate as such. *Hayward v. Haswell*, 1 Nev. & P. (x. b.) 411.

4. Upon a lease to M. E., *habendum* to her and her heirs for the lives of a son and daughter and a grand-daughter of A. E., and the survivor: it appeared that A. E. had a daughter, but no grand-daughter; held, that it enured as an estate for the two lives, but not of a person not then in existence. *Doe v. Edwards*, 1 Mees. & W. (ex.) 553; and 1 Tyr. & Gr. 1006.

5. A proviso for avoiding, on assignment by the lessee, held not to apply to a case of mere equitable deposit. *Cocks, ex parte*, 2 Deac. (s.) 15.

6. Where a lease of premises, not within the restraining statutes, was made by a vicar in reversion, less than three years of the prior lease being unexpired; held valid and binding on the successor. *Vivian v. Blomberg*, 3 Bing. N. S. (c. r.) 311; and 3 Sc. 681.

7. Where the defendant entered on premises under an assignment of a void lease, and continued to occupy and pay the rent until the term expired; held liable to the stipulations in the lease to repair, and the damages to be estimated according to the state at the end of the lease. *Beale v. Sanders*, 3 Bing. N. S. (c. r.) 850.

8. An agreement to make and execute a lease with stipulated terms and covenants to be prepared at the costs of the lessee, and approved of by the lessor's solicitor; after the execution of such agreement, the intended lessor assigned the premises for a long term on mortgage, became bankrupt, and the mortgagees gave the lessee notice to pay the rent to him; held, that the instrument was properly stamped as an agreement for a lease, and that after such notice he might maintain the action for use and occupation, for the occupation after the mortgage to him. *Rawson v. Eicke*, 2 Nev. & P. (q. b.) 423.

9. Where after an offer to let, and proposals,

by letter, of terms, and for a valuation and lease to be prepared, the landlord wrote in answer, that he accepted the defendant as his tenant, agreeably to the terms, stating the time from which the term was to commence; held, that the agreement amounted to a present demise, and that the landlord was entitled to distrain. *Chapman v. Bluck*, 4 Bing. N. S. (c. r.) 187.

10. Where a lease of an infant's lands is granted during his infancy, and on coming of age he mortgaged the estate to the lessees, the deed reciting the lease held to be a confirmation of the lease. *Story v. Johnson*, 2 Younge & C. (ex. ex.) 586.

11. Where a lessee under a dean and chapter, for twenty-one years, renewable every seven years, underlet with a covenant on any renewal to execute a lease for such further term as to make up a term of twenty-four years, the lessee surrendering the existing lease, and paying a proportion of the fine, which should be imposed in consequence of new erections on the premises; held, that the lessee was not bound to pay any portion of the fine on any renewal after that which enabled the lessor to complete the term of twenty-four years. *Clutton v. Fleming*, 8 Sim. (ch.) 105.

12. Where the lessee covenanted to expend £— in repairs, &c., to be inspected and approved of by the lessor, and by a clause afterwards it was declared that he should be allowed the sum of £— towards such repairs, and be at liberty to retain it out of the first year's rent; held, that the approval of the lessor was not in nature of a condition precedent to the right to retain, and the jury having found the covenant to have been substantially complied with, held that the lessee was entitled to deduct it. *Dallman v. King*, 4 Bing. N. S. (c. r.) 105; and 3 Sc. 382.

13. Where defendants as assignees of a lease, which was void, held possession, and paid the rent reserved, held, that they were to be taken to hold upon the terms of all the covenants. *Beal v. Saunders*, 3 Sc. (c. r.) 58.

14. The certificate of the Judges in the case of *Vivian v. Blomberg*, (3 Bing. N. S. 311,) confirmed by the master of the Rolls. 7 Sim. (ch.) 548.

15. Where premises were demised by lease, dated 21st March, to hold from 25th March, for seven years, wanting seven days, at a rent payable by quarterly payments, on 25th March, &c., commencing from 25th March then instant, with covenants for payment of rent; the declaration in covenant alleged as a breach the non-payment of the two last quarters, ending 25th March, at the end of the term; held, that the covenant was to be construed to be for the payment of a beforehand rent, the first payment being expressly stipulated as payable on the 25th March, the day of the commencement of the term, and at the whole rent payable within it. *Hopkins v. Helmore*, 3 Nev. & P. (q. b.) 452.

16. Upon an agreement for a demise of premises for 99 years, to a committee in trust for the parishioners of H., for the purpose of a poor-



house, with a clause for purchasing in fee, and agreements by the committee to pay the rent, and keep in repair, &c., and to execute a lease, &c., but none was ever executed; held, that the agreement operated as a demise from the date thereof, and not as a mere agreement for a lease, and that it vested in the overseers, by force of the 59 Geo. 3, c. 12, s. 17, for the time being, and that they were liable to the covenants. *Alderman v. Neate*, 4 Mees. & W. (xx.) 704.

17. Where by the agreement for a demise of premises, to hold from a future day, at a rent payable quarterly, and to execute a lease, with the usual covenants for payment of rent, &c., it was stipulated that until such lease should be executed, the grantor might distrain for rent in arrear; held, that as such stipulation would have been nugatory if the instrument were intended to operate as a demise, it amounted only to an agreement, and that a lease stamp was unnecessary. *Bicknell v. Hood*, 5 Mees. & W. (xx.) 104.

18. Where vacant land had been let on a building lease, which expired in 1824, and the plaintiff had become possessed of a house erected thereon, from an under-lessee, and had enjoyed therewith a right of using a passage adjoining for shooting coals into his cellar, and laying water-pipes thereto, and the original lessor had, pending the lease, granted a reversionary lease of the plaintiff's house to him, with all and singular the appurtenances, to hold from the day, &c. at which the original lease would end and determine; held, that the right of passage, and of using it for such purposes, passed under the reversionary lease as a necessary incident to the subject-matter demised, although not specially named in it, and that upon the expiration of the original lease, the lessor never having for a moment a right of possession, such easement was not extinguished by any unity of possession. *Hinchliffe v. Earl of Kinnoul*, 5 Bing. N. S. (c. r.) 2; and 6 Sc. 650.

19. Where a testator devised lands in trust to his son for life, with power to lease for 21 years, and also with power to his executors to raise a sum for payment of debts and by mortgages in fee, or for years, and the son by indenture demised the premises to C. for 99 years, if he should so long live; he afterwards, in execution of the power, executed a lease for 21 years to the defendant, and subsequently, the executors, in pursuance of their power, and with the concurrence of the son, mortgaged the premises to the plaintiff for 1,000 years, and who, claiming as assignee of the reversion, brought an action for breach of farm covenants in the lease for 21 years by the son to the defendant; held, that the defendant could not set up as a defence the interest of C., the grantor, for 99 years, there having been no suspension of the leasing power of the tenant for life, so far as regarded the grantee of the term under the leasing power of the executors. *Bringloe v. Goodson*, 4 Bing. N. S. (c. r.) 726; and 6 Sc. 502.

20. Where a party being yearly tenant, in the course of a current half year entered into an agreement with his lessor, the one to let, and the other to take, a 14 years' lease, determinable at the option of either at the end of seven years, at a rent

payable half yearly; held, to amount to a lease, although the parties might not contemplate the legal consequences of the surrender of the previous term and the merger of the accruing rent. *Doe v. Benjamin*, 1 Perr. & Dav. (q. b.) 440.

21. Under circumstances of alleged misrepresentation of the sale of premises, a reference directed as to the expediency of an abatement of rent, both as to the past and future. *Millbank v. Stevens*, 1 Coop. (ch. c.) 45.

And see *Lateward v. Schreiber*, *ib.*, *notis*.

And see *Covenant; Deed; Ejectment; Landlord; Mortgage; Power; Specific Perf.*

## LEGACY.

[A] ABSOLUTE—VESTED.

[B] CUMULATIVE.

[C] SUBSTITUTED.

[D] LAPSED.

[E] SPECIFIC.

[F] RESIDUARY.

[G] IN SATISFACTION.

[H] ADEMPITION.

[I] WHEN PAYABLE—OUT OF WHAT FUNDS.

[K] DUTY.

### [A] ABSOLUTE—VESTED.

1. A bequest of a sum to A., and, in case of his decease, the same to his wife, and at her decease to her eldest daughter; held, that A., having survived the testatrix, was absolutely entitled to the legacy. *Crigan v. Baines*, 7 Sim. (ch.) 40.

2. Upon a bequest to testator's grandchildren, and in case they should all die without leaving issue, then to the children of A. and their issue equally, or unto such as should prove their right within two years next after the death of the grandchildren without issue, the first notice thereof to be given in the Gazette, to be inserted once in each month for six months after such failure of issue; A. had five children, three of whom died before the date of the will, but left issue; the other two survived the testator; held, that all the descendants of A. who were living at the time of the death of the grandchildren without issue, or born within two years and one month after that event, would be entitled to participate in the fund. *Clay v. Pennington*, 7 Sim. (ch.) 370.

3. Upon a bequest of residue in trust to apply the interest and proceeds for the use of his wife for life, and after her decease, what should be remaining equally among the daughters of D. and their issue; held that the parties only in existence at the time when the property to be taken was to be ascertained, were entitled, and that the two surviving daughters at the widow's



death were absolutely entitled. *Gibbs v. Tait*, 8 Sim. (CH.) 132.

4. Bequest of residue to be divided equally amongst the testator's daughters, "their husbands and families;" held, that the latter words were to be rejected, and that the daughters took absolutely. *Robinson v. Waddelow*, 8 Sim. (CH.) 134.

5. Upon a bequest to trustees to apply for the support of the wife of his son, and for the support and education of his son's children born in wedlock, there being no children of the son at the testator's death, although there were born after; held, that the wife took absolutely to her separate use. *Cape v. Cape*, 2 Younge & C. (EX. EQ.) 543.

6. Upon a bequest of stock to T., to receive the interest for life, and after, to her issue, and in case of her death *without issue*, then over; held, that T. took an absolute interest; the generality of the expression, "without issue" being void for remoteness. *Attorney-General v. Bright*, 2 Keene, (CH.) 57.

7. Bequest of a sum to trustees to pay the interest to his son's wife, for the benefit of herself and husband and children during his son's life, and after his death for the benefit of the wife and children, and at her death to be equally divided among the latter if they should have attained twenty-one, and if not, the interest to be applied for their maintenance; and in case of the wife marrying again, the children were to receive their shares at twenty-one; held, that their shares did not vest until they attained twenty-one. *Taylor v. Bacon*, 8 Sim. (CH.) 100.

8. Devise of real and personal estate, to accumulate for 20 years after testator's decease, in trust after payment of debts, &c., for all and every the children of his children, A., B., and C., "now born, or whom should hereafter be born during the lifetime of their respective parents, as should attain 21, or marry with consent, and whether born or unborn, when any other of them should attain the age or time aforesaid, and their respective executors," &c.: at the expiration of the 20 years, A. and B. were living, and B. had children who had attained 21; and held, that the grandchildren acquired vested interests, subject to be divested or diminished in the event of other grandchildren of A. and B. being born, who should attain 21; and that in the meantime they were entitled to the income of the accumulated fund. *Scott v. Earl of Scarborough*, 1 Beav. (CH.) 154.

9. Upon a devise of freehold, copyhold and leasehold estate, and of stock, to A., B., and C., to hold the said freehold and leasehold tenements and premises, and the stock, in trust for A.; held, that the copyhold did not pass to A., but descended to the customary heir; the trust being to permit A. to receive the rents, &c. for life, and after her decease to convey to her heirs, executors, &c., but in case A. should marry, and have no children, then to D. his son, or if he should die before A., then to his children; and the events were, that A. married, and D. died in her lifetime, without issue; held, that A. took an absolute estate, subject to be defeated by a contingent executory gift over, and that as D. died in her

lifetime, without issue, the absolute estate vested in A. could not be divested. *Jackson v. Noble*, 2 Keene, (CH.) 590.

10. Upon a bequest of a fund to children, the interest to be applied to their maintenance until 21, with power then to dispose of the interest, and the whole property to be transferred at 25; held, that such portion of the interest as was not applied during their minorities vested absolutely in them, and passed to their personal representative. *Barber v. Barber*, 3 Myl. & Cr. (CH.) 688.

11. Upon a gift of a fund in trust for the testator's sister for life, and after her death for her husband, and after his decease for his nephew and nieces, the children of his sister, who should be then living; the wife survived the husband and one of the children; and held, that such deceased child took a vested interest, the word "then" referring to the last antecedent, viz. after his decease. *Archer v. Jegon*, 8 Sim. (CH.) 446; and 1 Coop. (CH. C.) 172.

12. On a bequest to the testator's brothers and sisters absolutely, and if any died in his lifetime without issue them surviving, that their share should go amongst the survivors, and that if any should die in his lifetime leaving issue, such issue should be entitled to his share, but that none of the legatees should be entitled until attaining the age of 21; held, that on attaining 21, they took absolute interests, not affected by the limitation over in case of the death under 21 of any in the lifetime of the testator, or afterwards. *Monteith v. Nicholson*, 2 Keene, (CH.) 719.

13. On a gift of personalty to Sir G. A., bart., for life, and after his decease to his eldest son, and if he should die leaving no issue, then to the person on whom the baronetcy should devolve, but so that each succeeding baronet should enjoy only for his life, and after the extinction of the title to fall into his residuary estate; Sir G. A. died without having had any issue, and the title devolved on his brothers, J. and R.; and held, that J. took the property absolutely. *Mackworth v. Hinxman*, 2 Keene, (CH.) 658.

14. Upon a bequest of two leasehold houses to testator's sisters respectively, to be held by them during their lives, and to be disposed of at their deaths, the one to descend to his sister H.'s eldest son or daughter, and the next heir male, until the expiration of the lease, and in like manner as to the other sisters; held, that the sisters took absolutely; and, *semble*, if the premises had been freehold, that they would have taken a fee simple. *Harrison, ex parte*, 3 Younge & C. (EX. EQ.) 275.

15. Where the testator gave the interest of a sum until his son should settle in life, and then the principal to be paid him, at the option of the executors whether to pay him the whole or reserve a part for his children; held, that the legatee having attained 21, was entitled absolutely to the fund. *Williams v. Yates*, 1 Coop. (CH. C.) 177.

And see *Infant*; *Limitation, Stat. of*; *Stamp*.

#### [B] CUMULATIVE.

Where a bequest by a father to his son was,



by the will 3,000*l.*, and by a codicil 4,000*l.* in addition to the legacy of 2,000 given by the will; held, that he was entitled to the legacies given both by the will and codicil. *Gordon v. Hoffman*, 7 Sim. (CH.) 29.

## [C] SUBSTITUTED.

Where the testator directed so much stock to be invested as would produce an annuity of £279, and after the death of the annuitant, he gave £2,000 of the stock in trust to pay the dividends in sums of £5 to poor men and women, residents of A., and if more than sufficient, to divide the rest amongst such poor men and women as the trustees should think fit; by a codicil, reciting that he had sold out the £2,000, and bought £2,042 in the Long Annuities, he gave the dividends thereof to his wife for her life, and after her death to the same trustees as named in his will, in trust to pay the dividends in sums of £5 to poor men and women, natives and residents of A. and if more than sufficient, then to pay £7 instead of £5 to six poor men and six poor women; held, that the latter bequest was not a substitution of that in the will. *Attorney-General v. George*, 8 Sim. (CH.) 138.

## [D] LAPSED.

1. Upon a bequest of lands in trust to pay the rents and profits to the testator's wife for life or widowhood, and after her death or marriage to apply them for the maintenance of his children, until the youngest attained twenty-one, and he gave and bequeathed his estate to his son, paying to daughters £— each; held, that the payment being postponed for the convenience of the estate, the legacy to a daughter did not lapse by her death before the period appointed for payment. *Goulborn v. Brooks*, 2 Young & C. (EX. EQ.) 539.

2. Where the testator expressly exonerated his personal estate (other than leaseholds,) from the payment of debts, and expressly subjected his freehold and copyholds as the primary fund, and declared his leasehold estates to be the secondary fund for the payment of his debts and testamentary expenses; and he gave all his estates for the benefit of his children, and his remaining personal estate to A., exonerated from his debts; one of the children having died in the testator's lifetime, held, that as between the heir and next of kin of such child, and the residuary legatees, that the share intended for such child was to be applied in the same manner and extent as if such child had survived, and his heir and next of kin entitled respectively to what remained after such application. *Fisher v. Fisher*, 2 Keene, (CH.) 610.

3. Upon a bequest of chattels to two, share and share alike, and upon the decease of either without lawful issue, the share to go to the other; held, that the death of one in the lifetime of the testator did not prevent the gift over taking effect; held also, that the legacies given to them

on particular events, different in amount, and from different motives, and stated as "further sums," were cumulative, and not substitutional. *Mackinnon v. Peach*, 2 Keene, (CH.) 555.

## (E) SPECIFIC.

1. Where the testatrix directed her executors to invest so much as would purchase a stated sum in the three per cents., and pay the dividends to a party for life; held, that a direction to pay legacies within three months did not apply to such a gift, but that the legatee was entitled to have that amount of stock purchased, although the executor was unable to get in the estates until a period when the price of the stock had risen. *Owden v. Campbell*, 8 Sim. (CH.) 554.

2. Upon a bequest, upon certain trusts, of £— consols, and £— long annuities, and of all monies over which the testatrix had a power of appointment under a settlement, and all the residue in trust, &c.; held, that the separation of the consols and long annuities, by specific description, constituted them specific legacies.— *Kampt v. Jones*, 2 Keene, (CH.) 756.

3. Where the testator possessed only, at the date of his will and of his decease, particular stocks, devised them specifically, and afterwards gave certain other legacies, and upon the whole of the circumstances and tenor of the will, it was clear that he designed the stocks should be a fund to secure the payment of the latter, and by implication charged thereon; held, in defect of assets, that the former bequests were liable to abate. *Rogers v. Clarke*, 1 Coop. (CH. C.) 376; where see the distinction between general and specific legacies.

## (F) RESIDUARY.

1. Upon a gift, in certain events, of residue betwixt four persons, equally betwixt them, and who were also appointed executors, and one renounced probate; held, that such portion of the residue became a lapsed legacy, and became undisposed of, and as such devolved upon the testator's next of kin. *Barber v. Barker*, 3 Myl. & Cr. (CH.) 688.

2. Where the executors were directed to apply the dividends to the maintenance of R. S., and in the event of his death under 21, then to apply them as directed; the legatee dying under 21, and a part only of the dividends having been so applied, held, that the unapplied part, with the accumulations, formed part of the residue. *McDonald v. Boyce*, 2 Keene, (CH.) 517.

## (G) IN SATISFACTION.

The judgment of the Vice-Chancellor, in *Powys v. Mansfield*, 6 Sim. 528, as to the admissibility of extrinsic evidence to show that a testator stood in *loco parentis*, as regards the question of



intention to provide, affirmed; but reversed as to the subsequent provision by a settlement being in satisfaction of that given by will, and also that a child might be deemed to stand in that relation, although at the time living with its parent, and maintained by him. 3 *Myl. & Cr. (ch.)* 359.

#### [H] ADEMPMENT OF.

Where a testator resident abroad gave by his will a sum, part of money in his agent's hands, received from the Transport Board, and shortly before his death he instructed his agent abroad to direct his agents in this country to invest all monies in their hands in such of the public funds as they should think most beneficial, and he died before they received the instructions, but they had of their own accord previously invested the whole; held, that the legacy was specific and not ademed by the circumstances which had taken place. *Basan v. Brandon*, 8 *Sim. (ch.)* 171.

#### [I] WHEN PAYABLE—OUT OF WHAT FUNDS.

1. On a gift of an annuity payable quarterly, "the first payment to be made within eighteen months after testator's death;" held, that it did not commence until fifteen months after his death. Where the first payment is to be made within one month after that event, it commences immediately on the testator's death; where the first year's payment is to be made at an appointed time, the second year's payment is not due until the end of the year. *Irvin v. Ironmonger*, 2 *Russ. & M. (ch.)* 531.

2. Where testator having given a real estate and a sum of money to A. (who became subsequently his widow) for life, and afterwards to his brother, to whom, after legacies to nephews and nieces, he bequeathed the residue; the brother dying in his lifetime, he, by a codicil reciting that event, gave an annuity to his widow, and directed the trustees to pay her the income of his personal estate, and he gave also his real estates to A. for life, and after her death to sell, and the proceeds to fall into his personal residuary estate, and he also gave to each of his nieces sums "in addition to the legacies given them by the will," to be held by the trustees for their separate use; held, that the legacies to the nieces were not payable until after the death of his widow. *Overend v. Gurney*, 7 *Sim. (ch.)* 128.

3. Where testator devised all his leasehold and personal estate to trustees to sell for payment of his debts and legacies, and by a codicil gave a sum "out of his personal estate," to charitable purposes, held, that having distinguished between his leasehold and personal estate, and expressly directed the payment to be made out of his personal estate, the bequest was payable wholly out of the latter. *Wilson v. Thomas*, 3 *Myl. & K. (ch.)* 579.

4. Where a testatrix, in the execution of a

power over mixed estate of realty and personalty, appointed the whole fund to her husband for life, and then to children, and if none, she gave the whole to him, "subject as hereinafter mentioned," and then gave several conditional legacies, and also one absolutely to E., to be paid within, &c.; held, that the legacy was a charge upon the real estate, which was the subject of the appointment. *Nyssen v. Gretton*, 2 *Younge (xx. eq.)* 222.

5. Where in a suit for a legacy charged on a particular estate, and reference to the Master, to whom no question was submitted as to the liability of other estates to satisfy general creditors, and he had found that such legacy was a charge on that particular estate, after payment of judgment and bond debts, which had priority over the legacy; held, that such finding was proper, and decree affirmed with costs. *Bouverie v. Norbury*, 9 *Bli. N. S. (r.)* 611.

6. Pecuniary legatees are not entitled to have the assets marshalled against a devisee of residuary, any more than of specific devises of land; and where the testator, after giving several pecuniary and one devise of real estate, directed payment of all his debts and legacies within six months after his decease, and all the rest and residue of his estate, both real and personal, he devised to N.; held, that both debts and legacies were effectually charged on such estate. *Mirehouse v. Scaife*, 2 *Myl. & Cr. (ch.)* 635.

7. Where a testator by will duly attested, directed his real and personal estate to be converted into money, and the mixed fund to be applied in the first place to the payment of debts, funeral and testamentary expenses, and also the legacies which he might bequeath by any codicil; and he by an unattested codicil gave an annuity to his wife, held, that by the will there was a general charge on both legacies, by the will and codicil; and the annuity therefore was well charged on the real estate. *Swift v. Nash*, 2 *Keene, (ch.)* 20.

8. Where a testator by will charged his estate with the payment of portions, to be raised within two years after his sons attaining twenty-one, and as to his younger sons' portions directing maintenance in lieu of interest, and as to daughters giving maintenance expressly, but silent as to interest; held, first, that the portions were raiseable at the period stated, although before the time of payment; and, secondly, that the daughters were not entitled to interest on their portions, notwithstanding a general clause that the trustees should stand possessed of the trust funds, and the interest, &c., for the benefit of the daughters on attaining twenty-one. *Selby v. Gillum*, 2 *Younge & C. (xx. eq.)* 379.

9. Where the testator devised real estates for a term, as provision for his wife for life, portions for younger children, and for maintenance, in case of a deficiency of his personal estate, and to raise, after the death of his wife, sufficient to discharge the legacies, and he directed that all the legacies should bear interest from the time of their becoming payable; the personal estate was deficient, but there being no children, there was a considerable surplus of the rents of the estates



comprised in the term; held, that the legacies, although not to be raised until the death of the wife, bore interest from the death of the testator, and were payable out of such estates during her life (affirming the judgment below). *Milltown v. Trench*, 10 Bli. N. S. (p. 1).

10. Where the wife, exercising a power, appointed all her real and personal estate to the use of her husband for life, subject to the payment of her debts, and she also gave various charitable and other legacies, "to be paid by my husband as soon after my death as is convenient, or within three years, if it suit his convenience," and she charged her real estate with the payment of debts and legacies, and gave her husband a power of sale or mortgage of any part; held, that the legatees were not entitled to interest on their legacies until after the expiration of three years, and that the discretion given to the husband as to the sale was to be exercised as a sound discretion, and not of arbitrary or capricious choice. *Thomas v. Attorney-General*, 2 Younge & C. (xx. eq.) 525.

11. Where the testatrix gave shares of the proceeds of the sale of estates to B. and others, and afterwards revoked the bequest to B., and in lieu thereof gave a specific sum to him; she also revoked bequests of shares to the others, and gave them specific sums, to be paid out of the proceeds of sale, and a further bequest to B., payable out of her personal estate; held, that both of the legacies to B. were payable out of the general personal estate. *Buxton v. Buxton*, 1 Coop. (ch. c.) 197.

12. Upon a gift of an annuity, payable out of testator's long annuities, and to be secured thereon, and the principal after the death of the annuitant to his next of kin; held, that a sum of so much three per cents. should be purchased by sale of so much of the long annuities as would be sufficient to satisfy the annuity, and the dividends be payable to the annuitant, and the remainder of the long annuities fall into the residuary estate. *Fryer v. Butlar*, 8 Sim. (ch.) 442.

13. Where the testator empowered the trustees of a legacy given to the separate use of his daughter for life, to permit the fund to remain in the hands of such of his sons as should continue the business: the interest thereon having been regularly paid by those taking the real and personal estate on which the legacy was charged, the court would not presume, even after the lapse of 30 years, that it had been raised and retained, and that the real and personal estate remained charged. *Horne v. Sayner*, 1 Coop. (ch. c.) 168.

14. Where the testator had taken upon himself to indemnify the parish against the charge of the legatee, an illegitimate child of his deceased son, and had contributed to its maintenance up to the time of his death, and made provision for it in his will; held, that having placed himself *in loco parentis*, interest should be paid on the legacy from the period of the testator's death. *Rogers v. Soutter*, 2 Keene, (ch.) 598; and 1 Coop. (ch. c.) 96.

15. Devise of real estates, upon trust, for sale, but the testatrix directed that the trustees should not be liable to be called on to sell until after two

years from her death, and she gave the rents, &c. until sale to her daughters, and after sale the trustees were to invest a sum of £—, in the first place out of the proceeds, and she afterwards gave certain legacies to her sons out of the remaining proceeds, but which were not to bear interest until the principal legacy was paid; she also directed certain legacies to be paid within 12 months after the sale; held, that the estates were to be considered as sold at the expiration of the two years, and the principal legacy to bear interest from that time, but that the legacies to the sons did not bear interest until three years after her death. *Buxton v. Buxton*, 1 Coop. (ch. c.) 97.

And see *Marriage Sett. ; Portion*.

### [K] DUTY.

1. Where testator having given an annuity to his grandson, and directed the duty to be paid by his executors on all legacies and annuities given by the will, he by codicil gave an annuity in lieu of that given by the will; held, that the latter being a mere substitution, was to be taken with all its accidents, and was to be paid free from the legacy duty. *Earl of Shaftesbury v. Duke of Marlborough*, 5 Sim. (ch.) 237.

2. Where a testator domiciled in India, and having personal estate there and in this country, gave the latter to his wife, and the former to various legatees; one of the executors proved the will in England in respect of the property there, and the other executors obtained probate in India, and remitted the estate collected by them to this country, and it was invested and transferred into court in a suit instituted against the executors for the administration of the estate; held, that the fund so remitted was not liable to legacy duty. *Arnold v. Arnold*, 2 Myl. & Cr. (ch.) 256.

3. Where, previous to 36 Geo. 3, c. 52, a testator devised his residuary estate to the same uses as his real estate before devised, viz. to G. for life, remainder to his issue in tail, in strict settlement, remainder over to M. for life and like uses; such residue having remained invested in mortgage, and afterwards, and after the 5th April 1805, when 55 Geo. 3, c. 184, came into operation, the remainder to M. took effect; held that, being still personal estate when it devolved upon M., it was liable to the payment of legacy duty under the latter Act. *Attorney-General v. Hancock*, 2 Mees. & W. (xx.) 563.

4. Where testator gave stock to be transferred to M. S. within, &c., after his decease, and also several pecuniary legacies, and directed the legacy duty upon all the pecuniary legacies before bequeathed to be paid out of his general personal estate; held, that the legacy of stock was not exempt under that clause from payment of the duty. *Douglas v. Congreve*, 1 K. (ch.) 410.

5. Where an executor does not show cause against a rule under 42 Geo. 3, c. 99, s. 2, calling upon him to account for and pay over duties, held that, in case it shall appear upon his state-



ment that duties are due, it is to be part of the rule in future that he shall pay costs to be taxed, &c. *Robinson, in re, 2 Mees. & W. (xx.) 407.*

6. The case of *Wharton v. Earl of Durham*, reversed on appeal in *Dom. Pr., 3 Cl. & Fi. (p.) 698.*

7. On a bequest of such a sum as when invested would produce a clear yearly sum of 500*l.* on trusts in succession, some not being ascertained at the testatrix's death; held, that the word "clear" was to be construed not to exempt the fund from legacy duty, but expenses of investment. *Sanders v. Kiddell, 7 Sim. (ch.) 536.*

8. Where testator gave "one clear yearly sum of £—," and charged the same on a particular estate, which he devised to trustees on trust, to raise and levy the same and subject thereto, and all costs and expenses of raising and paying, to A. for life, with remainder over; held, that the annuity was clear of legacy duty, which was chargeable on the residuary estate. *Gude v. Mumford, 2 Younge & C. (xx. eq.) 448.*

9. Where lands were devised successively in tail, with power to each tenant for life in succession to charge the estates, by deed or will, with certain annuities by way of jointure, one of whom by will charged them with an annuity by way of jointure to his wife; held, that the appointee took by the gift of the original deviser, and the gift chargeable with the legacy duty; held, also, that the party entitled to the real estate in remainder was chargeable with such duty. *Attorney-General v. Pickard, 3 Mees. & W. (xx.) 552.*

10. Where, from the whole tenor and context of the will, the trustees have a discretion to sell real estate, and convert it into personality, until such discretion exercised, the legacy duty does not attach. *Attorney-General v. Mangles, 5 Mees. & W. (xx.) 120.*

11. Where the testator directed a sufficient sum to be invested to produce a clear sum of £— a year to be paid to A., and after her decease the principal to be divided amongst other parties, and he directed the legacy duty to be paid out of his residuary estate, of all the specific and pecuniary legacies, and of the said yearly sum; held, that the duty, as well in respect of the interest given to A., as well as those in remainder, was payable out of the residuary estate. *Calvert v. Sebbon, 2 Keene, (ch.) 672.*

12. Where a testator directed certain specified debts (barred by the Statute of Limitations) to be paid, and, after various legacies, directed one-fifth of the residue to be paid equally among certain joint creditors, who were named in a schedule; held, that such direction was not to be considered as a voluntary bounty, but a payment of subsisting debts, although not capable of being enforced, and was not liable to legacy duty; held, also, that the scheduled creditors who came in and proved after the usual advertisement, though not all those named, were the parties amongst whom that share of the residue was to be divided rateably, and that until satisfaction of their debts no part resulted to the next of kin; the represen-

tatives of such creditors as died in the testator's lifetime were also entitled to prove. *Williamson v. Naylor, 3 Younge & C. (xx. eq.) 208.*

And see *Administration; Executor.*

## LEVARI FACIAS.

Where the bishop's return to a *levari* merely stated the debtor and creditor account of the sequestrator, held that it ought to state that no other sums had been received, and be verified. *Elchin v. Hopkins, 7 Dowl. (p. c.) 146.*

## LIBEL.

1. Where reports, printed by order of the House of Commons, were sold by their appointed agent, containing matters highly slanderous on individuals, held not a privileged publication (per Denman, L. C. J.) *Stockdale v. Hansard, 7 C. & P. (n. r.) 731.*

2. Where the libel consisted of charges against the plaintiff, a constable, made in a letter to the rate-payers; held, that being a privileged communication, if made to them by word, it was incumbent on the plaintiff to show that the defendant's absence from the meeting, the pretence of writing, was wilful. *Spencer v. Ameston, 1 M. & Rob. (n. r.) 470.*

3. Where the plaintiff wrote a letter justifying himself and his conduct, and criminating the plaintiff's wife, who had been a servant to the party to whom the letter was addressed; held, for the jury to say whether the defendant merely meant *bona fide* to defend himself, and throw an alleged fraud on the servant, and if so, that it was a privileged communication. *Coward v. Wellington, 7 C. & P. (n. r.) 531.*

4. Where the libel was contained in an advertisement, stating the issuing of process against the plaintiff, and that he could not be found, and offering a reward for such information as should enable him to be taken; plea, that a *capias* had been issued and delivered to the sheriff, and that the plaintiff kept out of the way, and that the advertisement had been inserted at the request of the party suing out the writ to enable the sheriff to arrest; held a sufficient defence. *Lay v. Lawson, 4 Ad. & Ell. (x. s.) 795.*

And see *Delany v. Jones, 4 Esp. N. P. 191; and Fairman v. Ives, 5 B. & Ald. 645.*

5. In libel, where the defence is privileged communication, held that it need not be specially pleaded. *Lillia v. Price, 1 Nev. & P. (x. s.) 16; and 5 Dowl. (p. c.) 432.*

6. To an action for a libel, pleas — the general issue, and two special pleas, the issues on all of which were found for the plaintiff, with 1*s.* damages, and the Judge had certified under 43 Eliz. c. 6, s. 2, to deprive the plaintiff of costs; held that, notwithstanding the seventh rule of Hil., 4 Will. 4, the plaintiff was entitled to no more



costs than damages. *Simpson v. Hurdiss*, 2 Mees. & W. (x.) 84; and 5 Dowl. (r. c.) 304.

7. Where the terms of the libel are equivocal, subsequent words of the same import may be given in evidence; *aliter*, where the words are unambiguous, and the subsequent words of themselves actionable. *Pearce v. Ornsby*, 1 M. & Rob. (n. r.) 455; *S. P. Symmons v. Blake*, 1b. 477; in which also held, that damages recovered for previous slander might be given in evidence to show the malice.

8. Where the plea justifying a libel gave no answer to particular scurrilous and opprobrious terms used in it; held that, not containing any ground of charge or imputation against the plaintiff distinct from that which was the gist of the libel, and the truth of which was justified by the plea, the plea was sufficient, and a rule to enter up judgment *non obst. vered.* refused; held also, that under an allegation in the libel that the defendant had crushed the Hygeist system of wholesale poisoning, and that several vendors had been convicted of manslaughter, it was not necessary for the defendant to prove that the system had been entirely crushed, and that proof of the conviction of two vendors for manslaughter sufficiently proved the plea, although the evidence as to the death being occasioned by not complying with the printed regulations in some respects varied from the allegation, there being evidence for the jury as to the cause of death. *Morrison v. Harmer*, 3 Bing. N. S. (c. r.) 758.

9. In case for libel, pleas—not guilty, and a justification that the libel was a true report of what had passed in a court of justice on a charge of conspiracy against the plaintiff and others, both which were found for the defendant; the counsel, who moved the judgment against the plaintiff, being called as a witness, and having proved that he had stated the plaintiff to have (set out as an overt act of the conspiracy) written a letter which was alleged to have been written, not by him, but by a co-conspirator; held, that the plaintiff's own allegations making a necessary part of his case and proof, the character of the publication was part of the issue of not guilty, and the question properly left to the jury upon that plea. *Stockdale v. Tarte*, 4 Ad. & Ell. (x. s.) 1016.

10. Proof of the copy of the libel being in the defendant's handwriting, addressed to the editor of the T. S., and sent to the T. S. office, held evidence to show that it was sent with the intention of being published; held also, that hand-bills published by the defendant on the same subject at the same time, and also the manner of publication by being placarded and carried before the plaintiff's house, were admissible to show the animus. *Bond v. Douglass*, 7 C. & P. (n. r.) 626.

11. The post-mark on a letter held to be *prima facie* evidence of a publication. *Shepley v. Todhunter*, 7 C. & P. (n. r.) 680.

12. Where a witness, called to prove the defendant's handwriting to a libel, deposed to having seen the defendant also write in a book which was proposed to be shown to the jury to com-

pare, held inadmissible; but that a letter written to the plaintiff, referring to some of the subjects in the libel, if admissible in its own nature, it could not be withdrawn from the consideration of the jury. *Waddington v. Cousins*, 7 C. & P. (n. r.) 595.

13. Where an application for a criminal information for a libel had been discharged on an affidavit that the libel was true, and the deponent subsequently indicted for perjury thereon, but absconded, the court, reluctantly acting on a suggestion of former affidavits being untrue, under the circumstances made a second rule for the information absolute. *R. v. Eve & Parly*, 1 Nev. & P. (x. s.) 229.

14. Where the defendant, a son-in-law, addressed a letter to his mother-in-law, about to marry the plaintiff, containing slanderous imputations against him; held, that the occasion justified the writing, and that the jury were to say whether the defendant acted *bona fide*, and under a belief of the truth, although the imputations were false, and that such communications were to be regarded liberally, unless a clearly malicious intention was manifest in the act. *Todd v. Hawkins*, 8 C. & P. (n. r.) 88; and 2 M. & Rob. (n. r.) 20.

15. In an action against the publisher of a magazine containing the libel, evidence of personal malice of the editor against the plaintiff held inadmissible. *Robertson v. Wylde*, 2 M. & Rob. (n. r.) 101.

16. Publishing remarks of a slanderous nature by an elector, of a candidate, held not within the principle of privileged communications; held, also, that the libellous matter being twofold, and the plaintiff's counsel in his opening having stated evidence to disprove them, but called witnesses only as to one, held, that he could only contradict the defendant's witnesses as to the other, and not give evidence in reply in support of his original statements, (per *Denman*, L. C. J.) strongly disapproving the practice of counsel stating facts in their opening, and then not offering evidence thereon. *Duncombe v. Daniell*, 8 C. & P. (n. r.) 223.

17. An authority by the House of Commons to publish and sell their proceedings and reports, held not a justification of the party publishing matter libellous of an individual. *Stockdale v. Hansard*, 2 M. & Rob. (n. r.) 9.

18. Writing of the defendant, a floricultural exhibitor, "the name of G. is to be rendered famous in all sorts of dirty work," held not within the privilege of fair criticism. *Green v. Chapman*, 4 Bing. N. S. (c. r.) 92; and 3 Sc. 340.

19. Where in an action for libel, the defendant sought to give in evidence libellous publications by the plaintiff of the defendant in newspapers and periodical works; held, that to make such admissible, it must be shown that they came to the knowledge of the party supposed to be provoked thereby, and that the court could not infer from the mere depositing newspapers in the defendant's name, as editor, at the Stamp-office, under 38 Geo. 3. c. 78, s. 17, that they were published by or came to the knowledge of the defendant. *Watts v. Fraser*, 2 Nev. & P. (x. s.) 157.



20. In an action against the defendant for publishing libels, it appearing that five packets, addressed to individuals and enclosed in one addressed to him, had been received at the coach-office where he was porter, and he delivered them; held, that if the jury found that he did so in the course of his business, and in ignorance of the contents, he was not liable; but, being *prima facie* liable, it was for him to show such ignorance. *Day v. Bream*, 2 M. & Rob. (n. p.) 54.

21. Where the libel was contained in a newspaper, held that the defendant had a right to have other parts of the same paper, referred to in the libel, read as part of the plaintiff's case. *Thorn-ton v. Stephen*, 2 M. & Rob. (n. p.) 45.

22. Where the defendant pleads the general issue and a justification, of which he gives no evidence, but succeeds on the first issue; held, that the plaintiff is entitled to a verdict and costs on the latter. *Empson v. Fairfax*, 3 Nev. & P. (q. n.) 385.

23. In case for libel on the plaintiff in the way of his trade, imputing insolvency, and in other counts alleging special damage by the stopping of the partnership in which the plaintiff was engaged; held, that the plaintiff was entitled to maintain the action alone, as the words were not necessarily injurious to the firm, in which case only a joint action could be maintained; held, also, that a witness must prove the words spoken, and not merely the impression made on his mind. *Harrison v. Bevington*, 8 C. & P. (n. p.) 713.

24. Where the libel in a newspaper professed to be a statement of the proceedings before a justice on a charge, held that the insertion of libellous remarks by parties present could not be justified; and held, also, that on an allegation of general injury, the plaintiff might show a general diminution of business; but that, if he seeks specific damages, he must give specific evidence; and in order to show malice, the insertion of the libel, the same in substance, in other newspapers, may be given in evidence, although there may be separate counts in the declaration to meet such other publication; and a demurrer to some of the pleas does not prevent the defendant from proving the truth of the libel. *Delegat v. Higley*, 8 C. & P. (n. p.) 444.

25. In case for publishing defamatory matters, plea, that it was part of a document laid by order before the House of Commons, and published as part of the proceedings, and afterwards, by order of the House, printed and sold by their printer, and that the power of publishing such of its proceedings as it shall deem necessary or conducive to the public interests is an essential incident to the constitutional functions of Parliament; held, on demurrer, that a court of law is competent to determine whether or not the House has such privilege as would support the plea. *Stockdale v. Hansard*, 9 Ad. & Ell. (q. n.) 1.

26. Declaration for a libel, headed "an honest lawyer," and alleging that the plaintiff had been reprimanded by one of the Masters of the Court for sharp practice, with introductory averments that the plaintiff had carried on the business of an attorney, and been engaged as such in a certain

cause, and that sharp practice in such profession was considered to be disreputable to the attorney practising the same; held, that such matter was libellous, and the averment that the libel was ironical, coupled with the innuendo, that the term "honest lawyer" was used in a libellous sense, was sufficient. *Boydell v. Jones*, 4 Mees. & W. (ex.) 446; and 7 Dowl. (p. c.) 210.

27. Where the plaintiff's ship being advertised for passengers, &c., the defendant published that she was unseaworthy, and had been bought by Jews to take out convicts; held, that a plea to the whole declaration, that the ship was unseaworthy, was insufficient, as the latter allegation was calculated to deter passengers from applying. *Ingram v. Lawson*, 5 Bing. N. S. (c. p.) 66; 7 Dowl. (p. c.) 125; and 6 Sc. 775.

28. Where the statement in a newspaper, professing to give a report on an election petition, went on to comment on a party, bail for one of the petitioners, stating, "he is hired for the occasion," and the plea justified only the former part of the libel; held, that if the part left uncovered would by itself have formed a substantive ground of action, the plaintiff would be liable in damages; *aliter*, if the comment were only a necessary inference from the facts stated. *Cooper v. Lawson*, 1 Perr. & D. (q. n.) 15.

29. Where the libel (a song) from which the publication took place, was lost, and the printer produced a similar one printed at the time, which was proved to correspond with that lost, held sufficient. *Johnson v. Hudson*, 7 Ad. & Ell. (q. n.) 233, n.

30. Where the declaration only alleged the intention to impute misconduct, and that the defendant maliciously published a notice, "that any person giving information where property belonging to the plaintiff, a prisoner in the King's Bench prison, might be found, should receive five per cent. on the goods recovered," an innuendo that thereby the plaintiff had been guilty of concealing his property, with a fraudulent and unlawful intention, held bad, on demurrer, as enlarging the meaning of the terms used. *Gompertz v. Levy*, 1 Perr. & Dav. (q. n.) 214.

31. Where the declaration alleged and set out a libellous paragraph in the defendant's newspaper, and afterwards, &c. (stating other libellous matters in subsequent newspapers); held that each allegation was to be considered a separate count; one of the latter being in the terms, "we again assert the cases formerly put by us on record, we assert them against (the plaintiffs); we again assert they are such as no gentleman or honest man would resort to;" held to be construed not as used merely in denial of some assertion made by the plaintiff, but asserted as an accusation of the plaintiff, and libellous. *Hughes v. Rees*, 4 Mees. & W. (ex.) 204.

32. Plea of justification of libel, that the plaintiff had been guilty of bigamy, requires as strong proof as on an indictment for that offence; a plea, also, justifying a charge of polygamy, held sustained by proof of actual marriage in two instances, and of cohabitation and reputation as to



a third. *Willmet v. Harmer*, 8 C. & P. (N. P.) 695.

And see *Action on the Case; Evidence; Information; Pleading; Practice; Slander; Trespass.*

### LICENCE.

A mere parol licence to enjoy an easement on the land of another is not binding on the grantor after he has transferred his interest and possession to a third party; nor is any notice of the transfer necessary to determine the licence; and a parol licence executory is countermandable at any time. *Wallis v. Harrison*, 4 Mees. & W. (ex.) 538.

And see *Manor.*

### LIEN.

1. Where the plaintiff knowing that consignments made by B. to C., and bills drawn on the plaintiff, were on credit of the goods generally, and, upon the plaintiff having been obliged to pay the acceptances, the effect of the correspondence with B. amounted in equity to a contract by B., that the goods remaining in C.'s hands should be an indemnity to the plaintiff for the bills paid; held, that the plaintiff had a lien on them for his debt. *Burn v. Carvalho*, 7 Sim. (ch.) 109.

2. In trover for plates, etchings, and engravings; plea, that they were detained upon an agreement as a security for a sum due from plaintiff, and issue as to the sufficiency of a sum tendered in discharge of the lien; held, that the amount of the sum tendered was a material fact to be traversed, and was not the less material by being laid under a *videlicet*; the plea also alleging a retainer of the defendant on divers days and times to execute particular works, whereby the plaintiff became indebted, &c., and that the defendant detained the plates, &c., as a security; held, that a replication, alleging that the work was done under distinct contracts, was not an immaterial issue; held, also, that an entry by the plaintiff's deceased clerk, admitting the receipt of a sum for the purpose of the tender, and going on to say that it was not accepted, was admissible as an entry of a fact within the party's knowledge, and subjecting him to a pecuniary demand. *Marks v. Lahee*, 3 Bing. N. S. (C. P.) 408; and 4 Sc. 137.

3. Where, by the decree, deeds in the possession of the defendant's solicitor were ordered to be delivered up; held, that being real property, no lien attached. *Bell v. Taylor*, 8 Sim. (ch.) 216. (*Quare.*)

4. Where a wife, having a power of appointing real estate, just after the birth of a child, and when in extremis, executed the power in favor of her husband, who shortly afterwards executed a bond to trustees, reciting that upon the execution of such power, he had given the wife an as-

surance that he would make a provision for the child, and conditioned for securing the sum of £— to be paid to her on attaining twenty-one, or within six months after his decease; held, that such sum was a lien on the estate. *Atkins, ex parte*, 2 Younge & C. (ex. ex.) 536.

5. Where A. and B. being directors of a company which required the holding ten shares as a qualification, upon a loan by B. to A. the latter gave an order on the secretary to transfer his shares, but it was not made use of, and A. continued to act as director, but upon his subsequently becoming insolvent, B. served the order of transfer, and in a suit for the administration of A.'s estate claimed an equitable lien on the shares; held, that there was no evidence of a contract for lien, and the claim properly rejected. The mortgagee of shares is bound to give notice to the company of his incumbrance, in order to render it available against a subsequent purchaser for valuable consideration; and *semb.*, the mortgage of such shares would not annul the qualification. *Cumming v. Prescott*, 2 Younge & C. (ex. ex.) 486.

6. In trover, for certain axletrees and iron work; plea, that they were delivered to the defendant for the purpose of being wrought and repaired by the defendant in his trade of coachmaker, and claiming a lien thereon for the work done, to which the plaintiff replied, *de injuria*; held, that the plaintiff could not set up a claim to a set-off to a larger amount against the defendant's demand, unless an agreement were shown that the one demand should be set off against the other. *Pinnock v. Harrison*, 3 Mees. & W. (ex.) 532.

7. Where, in trover for a mare, it appeared that she had been sent to be covered, and the defendant claimed, besides 11s. the usual charge, a further sum for similar claims, and, on demand, refused to deliver the mare, unless the whole lien was satisfied, but the plaintiff made no tender of the 11s.; held, 1st, that the charge in respect of such benefit to the plaintiff's mare was within the principle on which a specific lien would arise; 2dly, that the claim of lien, in respect of the several sums not sustainable, did not amount to a waiver of the lien in respect of the one for which the right did exist; and, lastly, that the transaction having taken place on a Sunday, it was not invalid as an exercise of ordinary calling, within 20 Car. 2, s. 7; and, *semble*, if it even were so, yet, being an executed consideration and the possession transferred, and both in *pari delicto*, the property must remain. *Scarfe v. Morgan*, 4 Mees. & W. (ex.) 270.

And see *Attorney; Bankrupt; Pawnbroker; Ship; Vendor and Purchaser; Warehouseman.*

### LIMITATION OF ESTATES.

1. Where lands were settled to the use of the husband for life, with remainder to the use of the wife, remainder to the use of the *heir female* of the bodies of the husband and wife begotten and now living, and in default of such issue to the use of the *heir male* in like manner begotten,



and in default thereof to the right heirs of the settlor, the husband; and there was issue several sons and daughters; held, that such limitation to the *heir female* was not void, but good words of description of a purchaser, although such daughter was not heir-at-law, and that the daughters took by purchase, but for life only, and that, upon the death of the survivor, the son of the settlor's second son (the eldest dying without issue) became entitled. *Chambers v. Taylor*, 2 Myl. & Cr. (cn.) 376.

2. On a bequest of residue to testator's daughter for life, and her children who should attain 21 or die under 21, leaving issue, with a limitation over in default of his daughter having no child, or there being such, no one of them should attain 21, nor leave any issue who should attain that age; held that, as the intention was upon the whole will and codicil that the limitation should take effect on failure of grand-children who should survive his daughter and not attain 21, it was not too remote. *Trickey v. Trickey*, 3 Myl. & K. (cn.) 560.

3. Upon a gift of residue to the eldest son of P. S., and failing him, to the next and other sons in succession, the dividends, &c. to be applied during minority, and failing the male children, to certain legatees; the only male child of P. S. dying an infant, and the period of accumulation of the income having expired, held, that the income being only given by the residuary clause, and nothing for immediate enjoyment, it was made void by the statute, and constituted therefore a portion of the residue undisposed of, and belonged to the testator's next of kin. *M'Donald v. Bryce*, 2 Keene, (cn.) 276.

4. Upon a devise of certain estates to the use of testator's son H., for life, remainder to his first and other sons in tail male, remainder to his nephew G. in fee; testator also devised another estate and premises, with the furniture, &c. therein, to his son I. for life, remainder to his son H. for life, remainder to his nephew G. absolutely, and the residue of his personal estate he gave to trustees on trust, for certain legacies and annuities to his sons and their children, the residue to accumulate until his grandson B., the eldest son of I., should attain twenty-five, and then to pay the dividends to his grandson B. for life, and afterwards to such son of B. as should first attain twenty-one absolutely, and if he should have no son attain such age, on a like trust for his grandsons, the sons of I., "and in case of no son of his said son I., born or thereafter to be born in his lifetime, nor born after his decease, who should attain twenty-one," then from and immediately after the decease of all the sons and grandsons of I., in trust for the benefit of G. for life, and on like trusts for any son of G. who should first attain twenty-one absolutely: held, that the words, "after the decease of all the sons and grandsons," was to be construed, "all such sons, &c.," and that the limitation over in favor of G.'s sons was not too remote; the clear intention of the testator being, that the gift was to take effect upon the failure of the particular objects described as the objects of the former gift: the court would put a restricted sense upon the words used in the gift over, in order to effectuate the intention of the

testator. *Ellicombe v. Gompertz*, 3 Myl. & Cr. (cn.) 127.

5. After a devise to a party for life, remainder, in default of certain powers of appointment, to the testator's next of kin of the name; held, that the devise for life filling the character to whom the estates were given in certain events, was not, because he was tenant for life, to be excluded from taking under the description on the ultimate limitation which he afterwards filled. *Pearce v. Vincent*, 2 Keene, (cn.) 230; confirming the judgments of Common Pleas and Exchequer, 2 Bing. N. S. 328; 1 Cr. & M. 598; An. Dig. 1834, p. 67.

6. Where a testator created terms for raising portions for C. and D., antecedent to estates tail, limited in two estates, to A. and B., with cross remainders respectively, and in case either should die without issue, so that the survivor should become entitled to both, then to raise further portions for C. and D.; the event was, that on the death of A., without issue, both estates centered in the issue of B.; held, that, as creating a trust which could not be defeated, and a term which could not be destroyed, and tending to a perpetuity, the limitation as to the further trust was void; and demurrer to a bill filed for raising the further portions allowed. *Case v. Drower*, 2 Keene (cn.) 764.

And see *Devise*.

## LIMITATIONS, STATUTES OF.

1. Where a party, to whom attornment had been made upon his claiming as devisee in reversion after failure of the previous estates tail, did not follow it up by any assertion of right for upwards of 30 years, and the property was dealt with during the whole period by those under whom the defendants claimed as their rightful property (founded upon a recovery suffered by the first tenant for life), who received quit-rents, granted leases, and executed conveyances under which possession had been had; held, that such a solitary act did not prevent the bar under the statute of James. *Doe d. Lindsey v. Edwards*, 6 Nev. & M. (x. n.) 633; and 5 Ad. & Ell. 95.

And now see 3 & 4 Will. 4, c. 27.

2. The words in the saving clause of 21 Jac. 1, c. 16, extend to actions in *assumpsit* for unliquidated damages. *Piggott v. Rush*, 6 Nev. & M. (x. n.) 376; and 4 Ad. & Ell. 912; supporting *Chandler v. Vilett*, 2 Wms. Saund. 120; and *Crosier v. Tomlinson*, 2 Mod. 71.

3. *Semble*, since 9 Geo. 4, c. 14, a written admission, as a recital in a deed of an existing debt, cannot be coupled with parol evidence of the amount, to take the case out of the statute. *Chealyn v. Dalby*, 2 Younge (zx. xq.) 199.

4. A gift of residue is within the 3 & 4 Will. 4, c. 27, s. 49, and is barred after 20 years have elapsed, since the present right of receiving it has accrued to a party capable of giving a release for it; in case of legacies, the presumption of



payment cannot be drawn from mere lapse of time, where payment would be out of the ordinary course of payments by an executor. *Prior v. Horniblow*, 2 Younge (xx. eq.) 200.

5. Where the defendant continued in possession above 20 years before the death of the lessor of plaintiff's devisor, but the jury found such possession not adverse, and the action was brought within five years after the passing of the 3 & 4 Will. 4, c. 27; held, that the proviso in s. 15 saved the right of the lessor of the plaintiff. *Doe v. Thompson*, 1 Nev. & P. (x. s.) 215.

6. Where a testatrix, seized of customary lands, made a dormant surrender to the use of her will, and devised them to her son, but without words of inheritance, and the dormant surrenderee, considering that the son took a fee under the will, afterwards surrendered to the use of the son, his heirs, &c., who surrendered them to a purchaser who had notice of the will; the son died 40 years before the filing of the bill by the equitable heir; held, that after so long an adverse possession he was barred, and the bill dismissed with costs. *Collard v. Hare*, 2 Russ. & M. (ch.) 675.

7. Where the defendant, who had taken the stock, and undertaken to satisfy the debts of an insolvent, and been carrying on the business for a considerable time, in answer to the application of the plaintiff, a creditor, expressed his regret in a letter at not being able to comply with the plaintiff's request of his account being paid, and stated that there was a prospect of an abundant harvest, which must turn into a goodly sum, "and reduce your account, if it does not, the concern must be broken up to meet it;" held a sufficient acknowledgment to take the debt out of the statute. *Bird v. Gammon*, 3 Bing. N. S. (c. p.) 883.

8. Where the defendant gave a memorandum, whereby he promised to pay the debt as soon as it was in his power; held, that there being other evidence of the debt, and being put in, to take the case out of the statute, it was, by 9 Geo. 4, c. 14, s. 8, exempt from stamp duty. *Morris v. Dixon*, 6 Nev. & M. (x. s.) 438; and 4 Ad. & Ell. 845.

9. Where the defendant in a letter, in answer to an application for the debt, said, "I will see D., or write to him; I have no doubt he has paid it; if by chance he has not, it is very fit it should be;" held not a sufficient acknowledgment to take the case out of the statute. *Poynder v. Black*, 5 Dowl. (r. c.) 570.

10. Where the defendant, being indebted on a note bearing interest, paid £1, and said, "this puts straight all the interest for last year, except 18s., and that I will bring some day next week;" held sufficient evidence in answer to the statute, as made on account of an existing debt, and no other debt being shown. *Evans v. Davies*, 4 Ad. & Ell. (x. s.) 840.

11. It is no ground for applying to discharge the defendant out of custody, that it appears by the particulars the debt is barred by the statute. *Merceron v. Merceron*, 5 Dowl. (r. c.) 271.

12. 3 & 4 Will. 4, c. 27, amended, and new

provisions for simplifying the remedies for trying rights to real property, by 1 Vict. c. 28.

13. Where a judgment was obtained in 1805, and duly docketed, and upon the sale of the defendant's real estate in 1806, notice of the judgment remaining unsatisfied was given to the purchaser in 1806, after which for 28 years no steps were taken by the judgment creditor for enforcing payment, although he might have resorted to a sufficient fund in equity; held, that after such unexplained laches, the Court of Equity, acting upon the principles of limitation of suits at law, would adopt the same inference as to satisfaction, and the bill to enforce the charge dismissed with costs. *Grenfell v. Girdlestone*, 2 Younge & C. (xx. eq.) 662.

14. And the inference was not repelled by evidence of the debtor's insolvency during the lapse of time. An acknowledgment by the debtor to a third person will not take the case out of the statute. 1b.

15. Where the defendant, on being applied to for payment, gave the plaintiff a list of debts due to himself, with a memorandum in the terms, "I give the above accounts to you, so you must collect them, and you and me will be clear;" held insufficient, as no promise to pay could be inferred therefrom. *Routledge v. Ramsay*, 3 Nev. & P. (q. s.) 319.

16. A letter of the defendant, in answer to the plaintiff's attorney's application for the debt, in the terms, "since the receipt of your letter I have been in daily expectation of being enabled to give a satisfactory reply to your application respecting the demand of M. against me; I propose being at O. to-morrow, when I will call upon you on the matter;" held not a sufficient acknowledgment to take the case out of the statute. Where there is no evidence beyond the writing itself, its meaning is for the court, and not for the jury; *aliter* where the words are used in a technical sense, as in mercantile documents. *Morrell v. Frith*, 3 Mees. & W. (ex.) 402; and 8 C. & P. (x. r.) 246; questioning *Lloyd v. Maund*, 2 T. R. 760.

17. Where the defendant, a consul at N., being indebted on a balance to the plaintiffs, his correspondents in England, gave two promissory notes falling due in December 1825 and 1826, which being outstanding, in 1827 an arrangement was made that the defendant's agent should give his acceptance of a bill for £—, and should be authorized, by a letter, to pay £300 a year out of defendant's salary, and the proceeds of certain wines then in India be remitted in some shape or other to the plaintiff, in satisfaction of the balance; held, that the acceptance of the security of a third party, with an authority to appropriate funds to come into his hands, and which he accepted to act under, was a good consideration for the plaintiff's undertaking to forbear and give time to the defendant; the instalments were paid up to the year 1830; held, that on the breach of the latter contract, the plaintiff was remitted to his right of suit on the original debt, and was not barred by the statute, and bound to bring his action on the new promise (reviewing the cases). *Irving v. Veitch*, 3 Mees. & W. (xx.) 90.



18. Devise of personality upon trust for payment of debts owing at the testator's decease, held not to prevent the operation of the statute. *Evans v. Tweedy*, 1 Beav. (ch.) 55.

19. A direction, in a will of personal estate, for payment of debts, held not to prevent the operation of the statute, if once it has begun to run, and it does not cease during the interval of his death and the time of a person being constituted personal representative. *Freak v. Cranefeldt*, 3 Myl. & Cr. (ch.) 499.

And see *Jones v. Scott*, 1 Russ. & Myl. 255; and *Rhodes v. Smethurst*, 4 Mees. & W. 42.

20. Where the plaintiffs, as joint owners, worked in co-partnership plantations in L., and kept an account with merchants and agents at B., to whom they became largely indebted; held, not to be merchants' accounts within the exception in the statute; and a plea of the statutes of 21 Jas. 1, and 9 Geo. 4, held not double. *Forbes v. Skelton*, 8 Sim. (ch.) 355.

21. Where there has been no account in writing, nor any payment on account of a particular debt, it is not an open account within the meaning of the exception of the statute; where a payment had been made without any specific appropriation, held that the creditor was entitled to apply it in satisfaction of the part of his demand barred by the statute, but that it was not such a part payment as to take the earlier portions out of the operation of it. *Mills v. Fowkes*, 5 Bing. N. S. (c. r.) 455.

And see *Tippett v. Heane*, 1 Cr. M. & R. 45; and *Williams v. Griffith*, 2 Ed. 45; and *Bosanquet v. Wray*, 6 Taunt. 597.

22. Where, upon the settlement of an old account, a new note was given for the balance and a further sum, but was insufficiently stamped; held, that it could not be used as an acknowledgment to take the case out of the statute. *Jones v. Ryder*, 4 Mees. & W. (ex.) 32.

23. Where the statute began to run in the lifetime of the debtor, and after his death, the will being contested, there was for a considerable period no representative who could be sued, held that it did not suspend the operation of the statute. *Rhodes v. Smethurst*, 4 Mees. & W. (ex.) 42.

24. The judgment of the Master of the Rolls in *Scott v. Jones* affirmed, reversing the decision of the Lord Chancellor in D. Pr., 4 Cl. & Fi. (r.) 382; (An. Dig. 1832. 96.): held, also, that the advertisement by an executor to creditors to send in their claims was not sufficient to revive a debt already barred by the statute.

And see *Abatement*; *Annuity*; *Bankrupt*; *Bill*; *Insolvent*; *Mortgage*; *Partner*.

## LONDON, CUSTOM OF.

1. The custom for the Court of Mayor and Aldermen of London to approve or reject the person nominated by the ward to be alderman, and to elect if the same person be three times returned

by the wardmote, and rejected as unfit by the Court of Mayor and Aldermen, held reasonable and good, and that the latter custom is not repealed by the 11 Geo. 1, c. 18. *R. v. Johnson*, 5 Ad. & Ell. (k. b.) 489; nor by the by-law of 13 Anne.

2. Held also, that the fitness or unfitness of the party to fill the office having been determined by a court of competent and exclusive jurisdiction, the Judge properly discharged the jury from any finding on that point. *Id.*

And see *Custom*.

## LUNATIC.

1. In deciding upon the propriety of issuing a commission, the court is governed solely by the consideration of what is necessary for the protection of the person and property of the party, without regard to any result upon antecedent acts, or to the motives actuating the party seeking it. Where there was no sufficient evidence of unsoundness of mind at the time of a former inquisition, finding against the unsoundness, nor at the date of the affidavit, the application for a new commission dismissed. *In re J. B.*, 1 Myl. & Cr. (ch.) 38.

2. Commission allowed to issue into Middlesex, although the lunatic was residing in Hertfordshire, the property being small, and the object to save expense. *Waters*, in re, 2 Myl. & Cr. (ch.) 38.

3. Where the party was found lunatic under an inquisition taken in England, but the property of the lunatic is in Ireland, the Lord Chancellor refused to allow the nomination of the committee to be made by the Lord Chancellor of Ireland, notwithstanding a transcript of the record of the inquisition had been transmitted there with that view. *Tottenham*, in re, 2 Myl. & Cr. (ch.) 39.

4. The court increased the allowance for the maintenance of the lunatic and his daughters, in consideration of the marriage of one, and appropriated part to the establishment of her and her husband, but settled to her separate use, and a sum allowed for her outfit. *Drummond*, in re, 1 Myl. & Cr. (ch.) 627.

5. Where the defendant, an auctioneer, had been employed in appraising and selling the property of a lunatic with the sanction of the Master, and under the authority of the court, and he had in the first instance carried in his claim before the Master, but afterwards commenced an action against the solicitor in the lunacy, the court made an order to restrain him, and for referring his claim. *Weaver*, in re, 2 Myl. & Cr. (ch.) 441.

6. Points to be comprised in the reference under 1 Will. 4, c. 60, as to conveyances by trustees of unsound mind, although not found lunatic by inquisition. *Piggott*, in re, 2 Russ. & M. (ch.) 683.

7. On an issue as to the sanity of A., it cannot be asked whether a sister of A. was not insane. *Doe v. Whitefoot*, 8 C. & P. (n. r.) 272.



8. The court, on an application for the transfer of stock in the name of a lunatic trustee, refused to act upon facts relative thereto, consented to by all parties, on the arrangement of a suit in the Exchequer, but directed the usual reference. *Prideaux, in re*, 2 Myl. & Cr. (ch.) 640.

9. Further provisions for the safe custody of persons insane, and having the purpose of committing indictable offences, by 1 & 2 Vict. c. 14.

10. A fine levied by a lunatic cannot be impeached at law on the ground of fraud practised on the consor, and void on that ground. *Murley v. Sherren*, 1 Perr. & Dav. (q. s.) 126.

11. Where, during the lifetime of a lunatic a variety of deeds and papers had been deposited in the Master's office, and a report made as to the heir-at-law, held that, although the court had no jurisdiction, after the death of the lunatic, to determine who was the heir-at-law, and the inquiry is only made to obtain the assistance of the heir or next of kin in the protection of the property, and the report would not bind the right, yet, in the absence of any adverse claimant, the person found to be heir would be treated as such, and the deeds, &c. ordered accordingly to be delivered up to him; costs of the inquiry to be borne by the different parties. *Pearson, in re*, 1 Coop. (ch. c.) 314.

12. It is no objection to the wife of a lunatic instituting a suit for the recovery of his debts, that a committee has not been appointed. *Rock v. Slade*, 7 Dowl. (p. c.) 22.

13. In *assumpsit* for use and occupation of a house, the defendant being a lunatic, and, at the time, provided with a sufficient residence, held, that if the plaintiff knew that the defendant was at the time insane, and took advantage of it to induce her to enter into the contract, he could not recover. *Dane v. Lady Kirkwall*, 8 C. & P. (n. r.) 679.

14. The court refused to deal with the estate of a deceased lunatic in the absence of a report of debts, but allowed dividends to be received by a party appointed receiver, to apply in payment of the costs of the sole next of kin in the lunacy, and for maintenance. *Radcliffe v. Carter*, 1 Coop. (ch. c.) 250.

15. On an indictment for seditious words, and, upon his arraignment, an inquest taken whether he were insane or not; held, that the jury might form their opinion from his demeanor without calling in the evidence of a medical man, and it was not necessary for him to be asked if he would cross-examine the witnesses, or make any statement to the jury on the evidence. *R. v. Goode*, 7 Ad. & Ell. (q. s.) 536.

And see *Administration; Assumpsit; Baron and Feme; Fine; Partner; Trustees*.

## MAINTENANCE OF SUITS.

Where the mother of an illegitimate child deposited a sum to defray the expenses of obtaining

an act for dissolving her marriage, held not illegal. *Moore v. Usher*, 7 Sim. (ch.) 334.

## MAINTENANCE.

1. Bequest to trustees, after the death of testator's wife, to apply the rents and profits towards the support and maintenance of his nephews and nieces, and, in case of the death of any one, for the support, &c. of the survivors; they all survived the testator and his widow, and one then died; held to be absolutely entitled; the words, "in case of the death," referring to the death of any one in the lifetime of the tenant for life. *Clarke v. Gould*, 7 Sim. (ch.) 197.

2. Upon a bequest of personal estate to the testator's son-in-law, in trust to apply it towards the support of the children by the testator's daughter; held, that he was entitled to apply the funds towards the maintenance of his children, notwithstanding he was of ability to maintain them. *Hawkins v. Watts*, 7 Sim. (ch.) 199.

And see *Will*.

## MANDAMUS.

1. A *mandamus* to the commissioners of the customs to restore tobaccos claimed as wrecked goods, and upon which the lower rate of duty had been tendered, refused; as the party, if legally entitled, might maintain an action, and that the granting it would in effect be issuing the writ to the crown, whose servants the commissioners are. *R. v. Commissioners of Customs*, 1 Nev. & P. (x. s.) 536; and 5 Ad. & Ell. 380.

2. Where, upon a grant of ecclesiastical possessions to the churchwardens, &c., relieving the parishioners from tithes, they were by Act of Parliament subsequently empowered to make a rate, not exceeding a certain sum, for the purposes of paying the stipends of the curates, &c., also specified, and that all the residue should be applied to the repairs of the church; a subsequent Act placed the vestry in the situation of the former parish officers; a *mandamus* to the churchwardens, overseers, and inhabitants to call a vestry and make a rate, held to lie. *R. v. St. Saviour's Churchwardens, &c.*, 1 Nev. & P. (x. s.) 946.

3. Where churchwardens had, under 59 Geo. 3, c. 134, s. 40, borrowed a sum for rebuilding, the party agreeing not to take the principal within 20 years; held, that the churchwardens were compellable to raise, not only the interest, but an annual sum equal thereto, as a fund for the repayment of the principal, although the party advancing it could not demand it until the expiration of the 20 years, and (per Denman, L. C. J.) the Churchwardens might apply it in the interval for the benefit of the parish. *R. v. St. Michael's, Pembroke*, 1 Nev. & P. (x. s.) 69.

4. Where the county treasurer delivered in to



the justices at sessions a book of entry, showing the balance due to or from the county, and which was passed by the Justices, and redelivered to him; held that it was not to be deemed a private book, but that he was bound to deliver it with the other vouchers to the clerk of the peace, and a *mandamus* granted. *R. v. Payn*, 1 Nev. & P. (x. s.) 624.

5. Where creditors had advanced money to parish officers, under 22 Geo. 3, c. 83 (Gilbert's Act); held that the charge created under that Act was still in force, and that the provision in the subsequent Act, 43 Geo. 3, c. 110, requiring the payment of part yearly, did not absolve the parish from the liability although incurred 30 years ago, and no part of the principal paid off; and a *mandamus* to the parish officers to pay the principal and interest. *R. v. Bighton Overseers*, &c., 1 Nev. & P. (x. s.) 774.

6. Where an infant was laid at the gate of the Foundling Hospital, a *mandamus* to the officers of the parish to receive it granted. *Foundling Hospital*, ex parte, 5 Dowl. (r. c.) 722.

7. The court of K. B. has no authority to compel an inferior court of criminal jurisdiction to enter a verdict in a particular way. Where the clerk of the peace had entered it as given by the jury, "guilty by *mischance*," which latter words had been cancelled upon the chairman directing that they must find guilty or not guilty, the court held they had no authority to interfere. *R. v. Hewes*, 3 Ad. & Ell. (x. s.) 725.

8. A *mandamus* to compel the Commissioners of Woods and Forests to pay a poor rate refused; being in the hands of the crown, the lands were not rateable. *Reeve*, ex parte, 5 Dowl. (r. c.) 668.

9. Where a local act authorized the making rates, but was silent as to inspection by the rate-payers, and books of account of parochial receipts and disbursements were kept under 1 & 2 Will. 4, c. 60, of which inspection was allowed; held, that the court had not, under any statute or at common law, the power of compelling inspection of the rates made under the local Act by *mandamus*. *R. v. St. Marylebone Vestry*, 5 Ad. & Ell. (x. s.) 268.

10. Where a criminal information had been filed against a town-clerk for misconduct in his office in the election of councillors of the borough, the Court refused a *mandamus* to compel him to produce the voting papers in his custody which had been used at the election. *R. v. Nicholetts*, 5 Ad. & Ell. (x. s.) 376.

11. Where justices convicted a party under 17 Geo. 3, c. 56, and sentenced him to 11 weeks' imprisonment, who gave notice of appeal, but failed to prosecute it; held, that the convicting justices having power to commit only in case of a recognizance not being given, and the sessions only to imprison in case of the judgment on appeal being confirmed, it was so doubtful whether the justices might afterwards commit in execution, that the court would not by *mandamus* compel them. *R. v. Twyford*, 5 Ad. & Ell. (x. s.) 430.

12. Where the title of the claimant to copyhold estate was clearly barred by the 3 & 4 Will. 4, c. 27, the court refused a *mandamus* to compel the lord to admit. *R. v. Agarsdley*, Lord of Manor, 5 Dowl. (c. r.) 19.

13. The court has no power by *mandamus* to compel the mayor and assessors to insert names of parties on the burgess lists, where expunged upon an objection, that the payment of the shilling, required by 2 Will. 4, c. 45, s. 56, had not been made. *R. v. Hithe, Mayor, &c.* 1 Nev. & P. (x. s.) 239.

14. The court, considering it had no authority to interfere with the Society of Barnard's Inn, refused a *mandamus* to compel them to admit an attorney into the society. *R. v. Barnard's Inn*, 5 Ad. & Ell. (x. s.) 17.

15. Where an office is full, and the appointment has been made by a party who by the ordinary course of law has the power, the court will not, unless in a very strong case that such appointment is void, grant a *mandamus* to raise the question, particularly where there is another and more convenient remedy. Where the rector had appointed the sexton, but there appeared some evidence of a custom for the inhabitants to interfere, the court refused a *mandamus* to the churchwardens to call a vestry for the purpose of election. *R. v. Stoke Damarel*, 1 Nev. & P. (x. s.) 56.

16. Where a party, holding an office during the pleasure of the crown, had a retiring allowance granted to him; held, that it conferred no vested interest, but that the Lords of the Treasury had a discretion to revoke the grant. *R. s. Lords of the Treasury*, ex parte Smyth, 6 Nev. & M. (x. s.) 505; and 4 Ad. & Ell. 976.

17. So, they have no power to grant a permanent pension, but can only recommend to Parliament that such a sum may be voted as a pension or retiring allowance to any officer. *R. v. Lords of the Treasury*, ex parte Hand, 6 Nev. & M. (x. s.) 508; and 4 Ad. & Ell. 984.

18. So, no vested right accrues to an officer on half-pay, as to enable his executors to demand arrears accruing in his life-time. *Ricketts*, ex parte, 6 Nev. & M. (x. s.) 523; and 4 Ad. & Ell. 999.

19. Where commissioners of drainage, &c., were by a local Act directed to apply funds for all such works as should from time to time be deemed necessary, &c., and by a *mandamus*, reciting that money had been paid to them, they were ordered to proceed forthwith to put the banks in a permanent state, &c.; held, that a return by them, that they had from time to time, at all times, since the passing of the Act, hitherto proceeded to execute all such works as should be or were from time to time deemed necessary, &c., following the language of the Act, without alleging that they had done any thing, held insufficient. *R. v. Ouse Bank Commissioners*, 3 Ad. & Ell. (x. s.) 544.

20. Where the Act of 1 Jac. 2, c. 22, creating the parish of St. James out of that of St. Martin's, declared that it should be subject to the laws and



statutes then in force as to the election of churchwardens, &c., in like manner as that of St. Martin's was subject to; held, that the subsequent abandonment by St. Martin's of a custom of questionable legal origin, did not bind that of St. James to discontinue it also; and that the mode of election at the time of the separation was to be deemed as recognised by the Act of 1 J. 2, and established in St. James's, without reference to its origin. *R. v. St. James's Churchwardens, &c.*, 5 Ad. & Ell. (x. s.) 391.

21. Where a local Paving Act empowered a committee to make rates, and recover the same by distress, or action, if no sufficient distress found; and a later Act gave an unrestricted power of suing for them; held that, there being a remedy by action, the court would not compel justices to issue warrants of distress, and, there being also a reasonable doubt as to the legality of the rates, oblige them to do what might subject them to actions of trespass. *R. v. Halla*, 3 Ad. & Ell. (x. s.) 492.

22. Where the settlement arose by service under an indenture of apprenticeship assigned by indorsement, a *mandamus* for its production, in order to be stamped, refused. *R. v. Westowe*, 1 Nev. & P. (x. s.) 222.

23. Where the plaintiff, as lord of the manor, had been found liable to the repairs of a bridge, *ratione tenuræ*; held, that he might recover contribution from any who were in possession of part of the demesne lands; and that the survey of the manor in 3 Jac. 1, under a commission out of the Exchequer, was admissible to prove the defendant's lands parcel of the demesne lands. *Dimes v. Arden*, 6 Nev. & M. (x. s.) 494.

24. The fees claimed by the clerk of the session of gaol delivery of Newgate, in respect of convicts sentenced to hard labor, held, since 19 Geo. 3, c. 74, to be no longer due, the services required formerly from him being no longer required to be performed, and that Act containing no provision on the subject; held, also, that since 5 Geo. 3, c. 84, which recognized the payment of such fees to him, in respect of convicts sentenced to transportation, as had been usually paid the successor of the person in office at the time of the passing of the Act, he was not precluded from his right to such fees by his predecessor having forborne, whilst in the office (40 years), from claiming them; and a *mandamus* to the county treasurer granted, with a view of inquiring as to the usual payment. *Reg. v. Baker*, 2 Nev. & P. (q. s.) 375.

25. Where the return to a *mandamus* is not void on the face of it, the court will not allow the validity to be questioned by motion to take it off the file, upon affidavit; it can only be discussed on a *concilium* in the regular way. *R. v. Payne*, 3 Nev. & P. (q. s.) 165.

26. Where by a royal grant, (Jac. 1) the rectory was granted to the churchwardens, &c., in trust, "out of the revenue thereof to pay certain stipends to two chaplains, a school-master and usher;" and by an Act the parishioners were afterwards exonerated from all tithes, and in consideration thereof the wardens and overseers, with six inhabitants, were empowered to make a rate

yearly, not exceeding a certain sum, out of which they were directed to pay the stipends and appropriate the surplus to repairs of the church; and a subsequent Act, reciting the former enactments, and that the sums allowed to be raised, and the revenue of the rectory, were inadequate, gave power for raising increased rates, and there-out to pay certain sums in lieu of the sums paid by virtue of the original grant; held, that a *mandamus* would lie to compel the imposing and collecting the rate and paying the salaries. *Reg. v. St. Saviour's Wardens, &c.*, 3 Nev. & P. (q. s.) 126.

27. Where a party entitled to tolls on a towing-path by the old channel of the river, which had been diverted by navigation commissioners, claimed compensation, which they had refused, and on appeal to the sessions an order had been made for a certain sum for the said injury, and costs; held, that the sessions having under the Act cognizance and full power to inquire, the court would not question their finding, nor assume that the injury might not be twofold, and a peremptory *mandamus* awarded; held, also, that the refusal of the commissioners was a subject of appeal. *R. v. Thames and Isis Commissioners*, 5 Ad. & Ell. (x. s.) 601.

28. Upon a rule for a *mandamus* to justices to hear an appeal, the court refused to decide as to the costs, which must be the subject of a separate application, as on the return the parties might show they acted right in refusing. *Reg. v. Salop Justices*, 6 Dowl. (p. c.) 34.

29. Parties opposing the execution of the writ, the right in dispute being eventually established against them, ordered by the court, in the exercise of the discretion vested in them by 1 Will. 4, c. 21, to pay the costs, and the rule made absolute against all who made the return. *R. v. St. Saviour's Wardens, &c.*, 3 Nev. & P. (q. s.) 354.

30. Where the rents of premises were claimed by freemen for their exclusive benefit, but the right being also claimed by the corporate council, the defendant had been appointed to receive them until the right was settled; held, that it was not a subject for a *mandamus*, at the instance of one of the freemen interested in the fund. *R. v. Frost*, 1 Perr. & D. (q. s.) 75.

31. The Court refused the writ to compel the swearing in of the opposing candidate where one had been declared elected, and admitted a councillor, the office being full, in fact, and the remedy to try whether full in right, by *quo warranto*. *R. v. Derby Councillors*, 7 Ad. & Ell. (q. s.) 419; and 2 Nev. & P. 589.

32. A *mandamus*, to the Lords of the Treasury, to pay over, out of an indemnity fund in their hands under 59 Geo. 3, c. 31, and at the disposal of the crown, money in liquidation of a claim for property unduly confiscated by the French authority, refused. *Baron de Bode's case*, 6 Dowl. (p. c.) 776.

33. Where it was not shown that any customary fine was payable to the lord for a licence for digging brick earth on the waste, the court refused a *mandamus*, which would compel him to



license an act amounting to waste. *Reg. v. Hale*, 1 Ferr. & Dav. (q. n.) 293.

So a licence to a tenant to demur for terms. *lb.*

34. Where a local pier Act provided that, in case the person to whom compensation should be awarded for the lands taken by the company could not make a good title to the premises, it should be lawful for them to pay the amount into the bank; held, that before the party could compel the payment into the bank, he must show that he was unable to deduce a good title, and a *mandamus* therefore refused. *R. v. Deptford Pier Company*, 1 Ferr. & Dav. (q. n.) 128.

35. The court refused to issue the writ to a board of Guardians, commanding them to admit to the office of clerk, a party alleging that he had been elected by a majority of good votes: the court would not thus question the title of the voters. *R. v. Dolgelly Guardians*, 3 Nev. & P. (q. n.) 542.

And see *Bastard*; *Church-rate*; *Churchwarden*; *Church*; *Compensation*; *Corporation*; *Custom*; *Friendly Society*; *Officer*; *Patent*; *Poor*; *Railway Company*; *Requests*; *Sessions*; *Vestry*.

#### MANOR.

1. Where in ejectment to recover waste enclosed within 10 years, the lessor claimed as devisee under a will, charging the testator's lands with a gross sum payable to the testator's daughter, the devise being to trustees until the lessor of plaintiff, his son, attained 23, and then to him, subject to the charge; held, 1st, that parol evidence of holding courts for 35 years past, and appointment of gamekeepers by the trustees, was sufficient *prima facie* evidence of a manor, and of his being the lord, although no evidence of court rolls or other documents were produced; 2d, that the court could not infer that the legal estate was outstanding in the incumbrancer; and lastly, that as to the encroachment, however at first a licence might be presumed, it was sufficiently put an end to by entry and breaking down the enclosure a few days only before action brought. *Doe d. Beck v. Heakin*, 6 Ad. & Ell. (x. n.) 495.

2. Where, in 1658, a manor was conveyed to trustees, reserving certain specified lands in trust for certain persons in certain portions, according to their interest, stated in a schedule annexed, in certain tenements, and the plaintiff, as owner of one, claiming the right of sporting over the manor, in violation of resolutions formerly entered into by the tenants as to the right of enjoying such privilege, an action of trespass having been commenced against him, he had filed a bill to have his right declared, and the action restrained; held, that it not being clear that all the owners of lands within the manor were entitled, nor the right claimed such as, without appropriate words in the original conveyance of the various tenements, could be assigned, the title, as one of the *cestui que trusts*, was not sufficiently established, and even if it were, all that the *cestui que trusts* were entitled to was, to have a rateable proportion

of the rents and profits derivable from the letting such privilege. *Hutchinson v. Morritt*, 3 Younge & C. (ex. ex.) 547.

And see *Boundaries*; *Copyhold*; *Mandamus*.

#### MARKET.

1. Upon evidence of a market immemorially holden in certain places within a manor by the lord, a jury may be warranted in inferring a grant of it to be held in any convenient place within the manor, and of course with the power incident thereto, of removal from time to time. *De Rutzen v. Lloyd*, 5 Ad. & Ell. (x. n.) 456.

2. Where the lord removed the market and demised the site of the new one to lessees, and by the terms of the lease a power was given of imposing tolls on all persons for selling or exposing goods for sale, there being no evidence that stallage had ever been paid at the old market; held, that the removal was bad, as imposing restrictions on the liberty of erecting stalls; to render it valid, the site to which the market is removed ought to be on the soil of the lord, and it is essential that he should have the correction of it. *R. v. Starkey*, 2 Nev. & P. (x. n.) 165.

#### MARRIAGE.

1. The interest of a father in the legitimacy or illegitimacy of the issue of his daughter, held to be a sufficient interest to entitle him to support a civil suit to annul her marriage with the husband of a deceased sister; reversing the judgment below. *Ray v. Sherwood*, 1 Curt. (ARCHES) 193.

2. Held also, that the service of a citation, provided it state with clearness and certainty the object of the suit, is sufficient to constitute a *lis pendens*. *lb.*

3. An allegation in the libel as to the residence of the parties, expunged; the court being expressly prohibited by the Act from inquiry into such residence, after marriage once celebrated. *Ray v. Sherwood*, 1 Curt. (ARCHES) 193.

And see *Disclaimer*.

4. Marriage Registry Acts, 6 & 7 Will. 4, c. 85, 86, suspended until the last day of June 1837, by 7 Will. 4, c. 1, and amended by 7 Will. 4 & 1 Vict. c. 22.

5. The provisions of the Marriage Act, authorizing the judges of the court to give consent to the marriage of an infant, held not to extend to the case of a father beyond seas unreasonably withholding his consent, but solely to the case of a father who was *non compos*, and the guardian or mother mentioned in the Act. *J. C. ex parte*, 3 Myl. & Cr. (CH.) 471.

6. In an action against husband and wife, for the debt of the wife before marriage, strict evidence of the marriage is not necessary, and evidence of his having spoken of her as his wife,



held sufficient for a jury to decide on. *Tracy v. M'Arleton*, 7 Dowl. (P. C.) 532.

7. Before a party can be pronounced in contempt, for the purpose of proceeding in the cause, the residence must be once fixed within the diocese, as until the contrary shown, the continuance will be presumed. *Carden v. Carden*, 1 Curt. (CONS.) 558.

8. Where the husband, in a suit for a divorce by reason of adultery, after publication, brought in a new plea, alleging a fresh act of adultery, the court would not, on that ground alone, exclude an exceptive allegation; but when such allegation was not relevant to the issue in the cause, or collateral, held that it could not be received for the purpose of discrediting a witness. *Trevanion v. Trevanion*, 1 Curt. (CONS.) 406. And judgment affirmed on appeal. *Ib.* 486.

And see *Action*.

### MARRIAGE SETTLEMENT.

1. Where the testator, having invested a sum in settlement on the marriage of one daughter, and executed a bond for payment of a further sum at his death, agreed with the plaintiff, on the intended marriage of his second daughter, to make an equal provision for her with his other daughter, and a memorandum by way of instruction was given, and the settlement prepared by the father's solicitor accordingly, but he died before executing it, and before the marriage took effect, and by his will he had given a share of the residue to the married daughter; the marriage took effect, and the husband settled property on the wife pursuant to the agreement; held, on a bill filed for performance of the settlement, first, that the agreement was not to be deemed final and binding on him within the Statute of Frauds; but, secondly, that the share of the residue given to the married daughter, was to be deemed a satisfaction of the marriage portion secured by the bond. *Glengal, Earl of, v. Barnard*, 1 K. (CH.) 769.

2. Where, by the settlement, a yearly sum was charged on estates for the wife, together with the mansion, park, &c., and by will the settlor confirmed it, and gave the mansion, park, &c., to his wife for life, remainder to his nephew, to whom he also devised copyhold estates in E. and his estates in P., free from all incumbrances whatsoever; he also created two rentcharges out of his estates in E.; held, that the devise to the wife of the lands charged by the settlement did not merge the charge in it, but that she was entitled to enjoy the mansion, &c., without any deduction from the yearly sum given, and which was to be raised out of the other estates in E., devised to the nephew. *Powell v. Grigby*, 2 Cl. & F. (P.) 103.

3. Where the parents of the intended husband and wife, by marriage articles unskillfully drawn, covenanted to settle estates respectively in terms expressed to be dependent, but the whole instrument taken together, and also the covenant for

title, tended to show the intention of the parties that the covenants were not to be dependent; held, in favor of the issue of the marriage, to be independent, and decreed to be conveyed accordingly. *Lloyd v. Lloyd*, 8 Sim. (CH.) 7.

4. Limitation of the trust fund in a marriage settlement, to the husband for life, and after his decease to the wife for life, and after the decease of the survivor, the fund to go to the issue of the marriage, in case there should be any living at the death of the husband and wife, in such manner as the father should appoint, and in default of appointment then to such issue in equal shares, and if but one, then the whole to go to such only child; and in case there should not be any issue of the marriage living at the death of the survivor, then to go to such person as the husband should appoint; held, that the word *issue* was to be construed *child*, and that an appointment made by the father, upon the death of the only child of the marriage, in his lifetime, although leaving a child, was valid. *Swift v. Swift*, 8 Sim. (CH.) 168.

5. Where by a prior marriage settlement, the settlor covenanted, in case of his surviving the wife, to pay £100 to each child at 21; there were seven children of the marriage, and upon his again marrying, he conveyed his estate to trustees for a term after his decease, or upon his request in his lifetime, to raise £600, and pay to the children the portions, and he settled the estate on the eldest son; the £600 was raised and paid to the children, with interest, after his death; and held, that such second settlement and payment was to be taken as a satisfaction of the first, and that the trustees could not sustain an action on the covenant against his representative, to compel the payment of the £100 pursuant to the first settlement, and a perpetual injunction decreed. *Jones v. Morgan*, 2 Younge & C. (EX. EQ.) 403.

6. Where the wife's estate was settled to her for life, and after her decease to the intended husband, until he should become bankrupt or insolvent, or should sell or do any thing to anticipate the rents and profits, or attempt to do so, then upon trust for the children of the marriage, and in default of such, then over; there was no issue, the husband survived, and made several attempts in the lifetime of the wife to raise money by sale or mortgage of the property, but failed to do so; and held, that a party having such an interest and subject to such a limitation over, might desire and take advice as to the power to dispose and do various acts indicative of his wishes, without giving effect to the limitation over; but a reference directed as to the question of his insolvency. *Jones v. Wyse*, 2 Keene (CH.) 265.

7. Where upon a marriage between English and Scotch subjects, the father of the husband, domiciled in England, in consideration of the sums to be given by the father of the lady, agreed to settle certain estates on his son and the issue of the marriage, and the proposals concluded with a proviso, that the settlement was to contain the clause of indemnity to trustees, and "all other usual and necessary clauses;" the settlement contained no clause barring *legitim*, or the child's portion of her father's personal estate, although a usual and necessary clause in Scotch



settlements, where the father advanced a portion for his child; a decree having been obtained in Scotland in favor of the claim to *legitim*, and the judgment afterwards affirmed in Dom. Proc. Upon the alleged subsequent discovery of the proposals, and a bill filed to reform the settlement and to restrain the enforcement of the decree obtained, held, 1st, that the settlement was to be construed with reference to the subject matter, which being entirely English, the clause as to *legitim* was not to be comprehended within it; 2dly, that the father of the wife was not a party dealing adversely with her rights, and that her claim could only be barred by express contract between them; 3dly, that there was no evidence of the proposals having been the final contract, and that the court would only reform the settlement, when the evidence of mistake, and as to the real intention of the parties, was perfectly clear and satisfactory; and *semb.*, the court would not entertain such suit on the ground of discovery of new matter, after adjudication by a foreign and competent jurisdiction, and when it might still be available there. Breadalbane, Earl, *v.* Marquis Chandos, 2 Myl. & Cr. (ch.) 711.

8. Where shares in an assurance company were settled, and it was provided that any *bonus*, by way of increase of capital of the stock, should be added to and form part of the trust fund, but if given by way of interest or dividend, it should go to the parties entitled to receive the dividends; and an accumulation having been made by the company, by a reserve of part of the profits, it was resolved that a sum, at the rate of — per share, should be taken out of the profits and divided amongst the proprietors; held, that such addition was to be deemed part of the capital of the shares. Ward *v.* Combe, 7 Sim. (ch.) 634.

9. Where words of general description, which would include particular estates, clearly intended not to pass, had been inadvertently, and by mistake, inserted in a settlement, held to be within the jurisdiction of the court, and that it would declare the particular estate to form no part of the contract. Exeter, Marquess of, *v.* Marchioness of Exeter, 3 Myl. & Cr. (ch.) 321.

10. Upon a settlement, property of the wife was limited, in default of children, to her next of kin; and the husband covenanted that any property she should afterwards acquire should be settled to the like uses, and she became entitled to a fund to her for life, remainder to her children, and with remainder as she should appoint, and in default thereof, "to her executors, administrators, and assigns," and she died during the coverture, having made no appointment, held, that the funds settled, devolved upon the next of kin of the wife, and not the representatives of the husband. Graffley *v.* Humpage, 1 Beav. (ch.) 46.

11. Where a British subject domiciled in a colony, governed by the law of France, on his marriage there, by his settlement declared the intention to be to marry according to the laws of England, the benefit of which they reserved the power claiming, and stipulated that he would invest a sum, which he acknowledged to have received from her, the income of which she was solely to receive, and the principal, if she should

die in his lifetime, was to belong to him; and that, if he failed so to invest the same, she was to be entitled to take it out of his assets on his death. The events were, that he died, without, in fact, ever having received the fund, or invested a sum to that amount; held, that she was entitled to be paid it out of his estate, and also to her distributive share of his personal estate. Lang *v.* Lang, 8 Sim. (ch.) 451.

12. The judgment of the court below in Broadalbane, Marquess of, *v.* Chandos, 2 Myl. & Cr. 711; affirmed in D. P. 4 Cl. & Fi. (r.) 43.

And see *Baron and Feme; Copyhold; Coventant; Portions; Resulting Trust; Vendor and Purchaser.*

## MARSHAL OF THE QUEEN'S BENCH.

See *Escape.*

## MASTER AND SERVANT.

1. Where there was no proof of any hiring, but only of service, and payments had been made without reference to any definite period or yearly amount, and the plaintiff left in the middle of the year from sickness, and was never required to return; held, that the plaintiff was entitled to recover upon a *quantum meruit*. Bayley *v.* Rimmell, 1 Mees. & W. (ex.) 506; and 1 Tyr. and Gr. 806.

2. The causing the servant to be sent to prison on a charge afterwards abandoned, held not to amount to a dissolution of the contract, and the party therefore held entitled to the wages which would have accrued in the interval, until actual dismissal. Smith *v.* Kingsford, 3 Sc. (c. r.) 279.

3. The 5 Geo. 4, c. 96, relating to disputes between masters and workmen, amended by 1 Vict. c. 67.

4. In case by a servant against his employer, for injury by the breaking down of a van of the defendant, about which the plaintiff was employed in the carriage of goods, and alleged to be overloaded; held, that as the plaintiff must have known, probably better than his master, whether the van was likely to proceed safely, and the making the master responsible would lead to the omission of the caution which the servant is bound to use in the service of his master, the action was not maintainable. Priestley *v.* Fowler, 3 Mees. & W. (xx.) 1.

5. Where a salaried clerk claimed to be recognised as a partner with his employer, held a sufficient ground for dismissal, and without notice. Amor *v.* Fearon, 1 Perr. & Dav. (q. s.) 398.

6. The law of Scotland prohibiting all work on Sundays, "except works of necessity and mercy," held, that the master, a barber, could not employ his apprentice in shaving his customers on any part of that day, and that, by a covenant in the indenture by the apprentice not to absent himself on "*holidays* or week days without leave,"



the term *holiday* did not apply to Sunday, but other days, directed to be kept as holidays in Scotland, (reversing the judgment below.) *Phillips v. Innes*, 4 Cl. & Fi. (r.) 234.

And see *Action; Action on the Case; Bankrupt; Contract; Justices*.

### MERGER.

Where a party having a partial interest in premises, bought up, and had transferred to a trustee for him charges thereon, and he subsequently became absolutely entitled to the estate, and devised it so as to become attached to the person who should become entitled to a dignity, without any mention of the charges he had paid off; held to have merged in the inheritance. *Selsey, Lord, v. Lord Lake*, 1 Beav. (ch.) 146.

### MINES.

1. A permission to dig and search for ore, actually demised and exercised; held to be an *hereditament* within 11 Geo. 2, c. 19, s. 14, and to be the subject-matter of use and occupation. *Jones v. Reynolds*, 6 Nev. & M. (x. s.) 441; and 4 Ad. & Ell. 805.

And see *Co. Litt.* 6 a.

2. The court refused an injunction against tenants working mines, where the lord had lain by and permitted them to expend large sums in the operations, leaving him to his legal remedy; but held that, in the case of mines, a party not entitled to an injunction might still be entitled to an account, although by *lackes* he may disentitle himself to it. *Parrott v. Palmer*, 3 Myl. & K. (ch.) 624.

3. Where, upon a grant of lands, houses, and premises, reserving all mines, &c., with liberty of ingress and egress for working the same, making compensation for damage, &c., the defendant worked so near the surface, without leaving proper supports, that the plaintiff's houses, lands, &c., fell in; held, that a plea, alleging the right to all mines, &c., and that he was not bound to leave any support, could not be sustained, the defendant being bound to work in a reasonable mode. *Harris v. Ryding*, 5 Mees. & W. (ex.) 60.

And see *Action on the Case; Crown Grant; Indictment*.

### MISTAKE.

See *Election; Marriage Settlement*.

### MORTGAGE.

1. On a mortgage of premises held for lives for £130, with power to the mortgagee to expend not

exceeding £70 for a renewal; held, that a £2 stamp was sufficient. *Doe d. Jarman v. Larder*, 3 Bing. N. S. (c. r.) 92; and 3 Sc. 407.

2. Where the mortgage is for a term, and also with a trust for sale, and a bill by the mortgagee prays for a sale only; held, that he is not entitled to foreclose the fee nor the term, without amending his bill; held also, that the mortgagor, become bankrupt, was not a necessary party. *Kerrick v. Saffery*, 7 Sim. (ch.) 317.

3. Where the plaintiff in a suit for redemption had not offered to pay the principal and interest at the time appointed, the court refused to allow him to redeem, although, before the motion to dismiss made, he had tendered the amount reported due, and subsequent interest. *Faulkner v. Bokton*, 7 Sim. (ch.) 319.

4. Where the mortgagor was interested in part of the premises as tenant only, of which the landlord recovered possession in ejectment, and afterwards demised to the mortgagor by a new lease; held, that he was bound to let the new lease operate in support of his mortgage. *Doe v. Vickers*, 6 Nev. & M. (x. s.) 437; and 4 Ad. & Ell. 782.

5. Where a mortgagee purchased part of the mortgaged premises, and the principal and interest due to him, calculated to March 24, exceeded the purchase-money; held, that he was entitled to be let into possession from Christmas. *Bates v. Bonnor*, 7 Sim. (ch.) 427.

6. Where a mortgagee enters into possession, not merely in his character as mortgagee, but under a conveyance from a trustee, and as purchaser of the equity of redemption, he is bound by the title of his vendor and the validity of the conveyance he takes, and bound therefore to keep down the interest for the benefit of those in remainder, and time will not run against such remainder-man during the continuance of the previous estate; but where a mortgagee is in possession under his mortgage title alone, and no account is called for, or payment tendered, or mortgage title admitted for 20 years, his title becomes absolute; and the time begins to run from the time of his taking possession against the mortgagor, and all claiming under him, notwithstanding any disabilities to which they may be subject. *Raffety v. King*, 1 K. (ch.) 601.

7. Where the Master had found that premises agreed to be mortgaged as a security for advances, to enable the mortgagor to erect buildings, included all the messuages, lands and premises adjoining the unfinished houses, and that the mortgagee had a prior security on buildings afterwards erected, and water rents arising from springs on the mortgaged premises brought to a reservoir also built thereon, although afterwards specifically conveyed as a mortgage security; to which report exceptions were taken and allowed below; the judgment reversed upon appeal. *Fournier v. Paine*, 9 Bl. N. S. (r.) 232.

8. Where the balance of a claim upon an account had been settled by award in 1799, but not acted on or rescinded, and on a subsequent negotiation in 1819, a mortgage was executed, but, there being difficulties in making it available, the creditor proceeded upon old judgments for parts



of the amount secured by the mortgage; a bill for opening the account, and setting aside the mortgage deed on the ground of oppression was dismissed, and an account on a cross-bill, establishing the mortgage, decreed; but the creditor not allowed a claim for life insurances not proved to have been paid, and also a sum for costs erroneously included in the mortgage security. *Donegal, Marquis of, v. Grattan*, 8 Bli. N. S. (p.) 831.

9. Where, after a report of what was due, the time for payment was enlarged, with order to compute subsequent interest; held, that it ought to be computed on the aggregate sum found due. *Bruere v. Wharton*, 7 Sim. (ch.) 483.

10. Where a specialty creditor, having also a mortgage security, comes in to prove, in a suit for administration of assets, the Master has no power to put him under terms, nor to order the securities to be given up, or direct a sale of the mortgaged estates; but an order may be made on his report, marshalling the assets, or particular directions given to meet the justice of the case. *Mason v. Bogg*, 2 Myl. & Cr. (ch.) 443; and *sembl.* questioning *Greenwood v. Taylor*, 1 Russ. & M. 185.

11. An equitable depositary of a lease held to be responsible to the owner of the reversion for rent and covenants, although he may not have taken possession of the premises. *Flight v. Bentley*, 7 Sim. (ch.) 149.

And see *Lucas v. Comerford*, 1 Ves. jun. 235.

12. Where the mortgagee had purchased the equity of redemption, and united his equitable mortgage therewith; held, that he was liable to perform an agreement for a lease made after the mortgage by the mortgagor, who had become bankrupt before the lease executed, and that such lessee was entitled to have his equitable charge satisfied out of the united interests which then constituted the equity of redemption. *Smith v. Phillips*, 1 K. (ch.) 604.

13. And where the mortgagor is dead, the equitable mortgagee has a right to have the estate, affected by his lien, sold, and the proceeds applied in payment of his debt, and to stand in the place of a general creditor in respect of any balance due to him. *Brocklehurst v. Jessop*, 2 Sim. (ch.) 442.

14. Where the equitable mortgagee received the rents of the mortgaged estate, held *prima facie* to amount to a payment either of the principal or interest, within the proviso of the Statute of Limitations. 1b. 438.

15. Where in a suit for foreclosure by the first mortgagee, he consented to a sale; held, that the proceeds turning out insufficient to satisfy his principal and interest, he was entitled to the whole of the fund. *Upperton v. Harrison*, 7 Sim. (ch.) 444.

16. In ejectment by mortgagee, a defendant, not the mortgagor, but defending for his benefit, not allowed to set up a prior mortgage. *Doe v. Clifton*, 4 Ad. & Ell. (x. n.) 813.

17. And in order to found jurisdiction under 7 Geo. 2, c. 20, to relieve the mortgagor on payment of the mortgage debt and interest, it is an

essential preliminary that he should make himself defendant. 1b.

18. In ejectment by mortgagor against mortgagee, the lease for a year recited in the release, executed by the defendant, held sufficient, without producing the lease. *Doe v. Wagstaff*, 7 C. & P. (x. p.) 477.

19. Where proceedings in ejectment are stayed under 7 Geo. 2, c. 20, the costs are to be taxed only as between party and party, and not as between attorney and client. *Doe v. Capps*, 3 Bing. N. S. (c. p.) 768; and 5 Dowl. (p. c.) 633.

20. In the case of *Johnson v. Kennett*, 6 Sim. 384, judgment reversed.

21. Where the commissioners were empowered, with the consent of the owners and proprietors, to exchange lands for allotments, such consent to be certified in writing, and by the award two pieces of lands in mortgage were, with the consent of the mortgagor, exchanged, the commissioners stating on their award that the exchange was made with the consent in writing of the mortgagor, but it did not state it to have been with the consent of the mortgagee; held unnecessary, and that the court would not presume it not to have been given, and the presumption was that the commissioners had acted according to their jurisdiction, as the contrary did not appear; held, also, that a letter to the mortgagee from the mortgagor, dated previous to an assignment under his insolvency, was admissible in evidence against the defendant, his assignee, and was to be presumed written at the period of its date until the contrary shown. *Goodtitle d. Baker v. Melburn*, 2 Meea. & W. (xx.) 853.

22. A mortgagee held entitled to sustain a suit for realizing his security by a sale of the mortgaged premises, against the devisee of the real estate, an infant, although a decree had been in suits framed only for the administering the personal estate; and in such cases where the sale is clearly for the infant's benefit, a sale will be directed in the first instance, without a reference to inquire whether it will be so or not. *Davis v. Dowding*, 2 Keene, (ch.) 245.

23. Where it was sworn by a mortgagor that he had entered the usual appearance, the court would presume that he had taken the proper steps to render him the defendant in the action, although it was not stated that he had entered into the consent rule. *Doe d. Cox v. Brown*, 6 Dowl. (p. c.) 471.

24. Where deeds were deposited under a promise to forbear suing in respect of an existing debt, although for the purpose only of preparing a future mortgage, held to amount to an equitable mortgage. *Keys v. Williams*, 3 Younge & C. (xx. xq.) 55.

25. Upon a decree of foreclosure against an infant, held that a day must be given to him after he attains twenty-one, notwithstanding the 11 Geo. 4 & 1 Will. 4, c. 47; the parol demurring and giving a future day not being synonymous terms. *Price v. Carver*, 3 Myl. & Cr. (ch.) 157.

26. The court refused to allow a *cestui que trust*, defendant in a suit for foreclosure, to be permit-



ted to be sworn, where another party was an infant, and the title of the plaintiff was not denied, although not admitted, and the rights of the infant being merely submitted to the court. *Roe v. Wardle*, 3 Younge & C. (EX. EQ.) 70.

27. Where a mortgage sum of the wife's was settled on her marriage, and a decree of foreclosure was obtained, the costs of the trustee were ordered to be paid by the plaintiff and added to the mortgage debt. *Bartle v. Wilkin*, 8 Sim. (CH.) 238.

28. An equitable mortgagee seeking to enforce his security, the mortgagor held entitled to the six months to redeem. *Thorpe v. Gartside*, 2 Younge & C. (EX. EQ.) 730.

29. Biddings opened on an advance of £365 on £7,300, but the mortgagee applying, not allowed to conduct the sale. *Domville v. Berrington*, 2 Younge & C. (EX. EQ.) 723.

30. Conveyances by heirs and devisees of mortgagees under 1 Will. 4, c. 60, doubts relating to, removed by 1 & 2 Vict. c. 69.

31. In the case of *Garner v. Hughes*, 2 Younge & C. 328, decree varied in Dom. P. by order of an issue. 2 Younge & C. 731.

32. Where, by settlement, the husband, after the death of the wife and failure of issue, had an absolute interest in the settled fund, and which contingent interest he charged with a debt to D., and all interest due or to accrue, and the fund was made redeemable on payment of the sum and interest; he afterwards assigned the fund, subject to the mortgage to D., and other property, also subject to mortgages, upon trust to sell and pay both mortgages, and divide the surplus amongst his other creditors, who, by the same deed, released him. D. upon being applied to to execute the deed, refused to do so, unless his security upon the settled fund was preserved, which, by a memorandum, was indorsed on the deed; held that, in the absence of any intention to conceal the transaction, his rights, as mortgagee, against the settled fund were not affected by his having so executed the deed and signed the memorandum. *Lee v. Lockhart*, 3 Mylne & Cr. (CH.) 302.

33. Where the mortgagor was permitted to continue in possession, and he granted a lease to the plaintiff in replevin subsequently to the mortgage; the mortgagee afterwards gave notice to the lessee that the mortgage money was unpaid, and distrained for half a year's rent, due at Lady-day, which was paid; held that this did not by relation back constitute a tenancy, so as to entitle the mortgagee to distrain for rent antecedently due. A mortgagee may so bind himself by his own conduct, as to be precluded from treating his mortgagor's lessee as a trespasser. *Evans v. Elliott*, 1 Perr. & Dav. (Q. B.) 256.

34. Where a party mortgaged the estate successively to three, under a power in his marriage settlement the second mortgagee had no notice of the first, and the third mortgagee had notice of the first, but not of the second, and he procured a notice of his charge to be endorsed on the settlement, which was, with the title-deeds, in the possession of the first mortgagee; held, that he did

not thereby gain a priority over the second. *Jones v. Jones*, 8 Sim. (CH.) 633.

35. Where the defendant, in possession of mortgaged premises, claimed a right independent of the mortgagor, under a supposed lease executed after the mortgage, held not to confer any title, and upon such disclaimer, no notice to quit was necessary; if the mortgagee consents to take a party in possession, as his tenant, it constitutes only a tenancy from year to year. *Doe v. Bucknell*, 8 C. & P. (N. P.) 566.

36. Where a lease was absolutely assigned, but it appeared by a bond that it was so as a security for the debt of another, and the assignor had for 18 years continued to pay the interest on the debt, remaining in possession of the rents of the premises: the case failing in proof of alleged imposition, and the court below having declared the assignment valid as a security, the bill, praying a re-assignment or redemption, and an account, &c., dismissed, except so far as it prayed redemption, &c., and the judgment affirmed in *D. Pr. Gordon v. Selby*, 11 Bli. N. S. (P.) 351.

37. Where the stamp, *ad valorem*, extended only to the amount of the principal, and not of the rates and taxes which might be charged on the premises, and for which also the mortgage was to be a security, held that it was sufficient, and not requiring a 25*l.* stamp, as on a deed securing an indefinite sum. *Doe v. Bragg*, 3 Nev. & P. (Q. B.) 644; supporting *Doe v. Snaith*, 8 Bing. 146; and *Pruessing v. Ing*, 4 B. & Ald. 204.

38. Where a lessee contracts to sell, and another to purchase his lease, no equity arises thereon to the landlord to compel the seller to assign, or the purchaser to take an assignment; the mere depositing of a lease as a security for a debt, until the party exercises the option of having it assigned or sold, if there be an agreement for a sale, or takes possession of the premises, is ineffectual, and he remains to all intents and purposes a stranger, and the landlord has no right to interfere with him; held, therefore, that he was not liable for the rent and covenants. *Moores v. Choats*, 8 Sim. (CH.) 506.

And see the case of *Lucas v. Comerford*, (1 Ves. jun. 235, and 3 Bro. C. C. 166, reviewed.) lb.

39. Where an equitable mortgagee unsuccessfully attempted to defend the possession in an action at law, held not entitled to claim the costs out of the estate. *Dryden v. Frost*, 3 Myl. & Cr. (CH.) 670.

40. Where a mortgaged estate was devised, with a direction that the executors should pay the mortgagee interest out of the rents, until the mortgage should be paid off, and that such mortgage should be the first discharged by his executors; held, that the estate was liable only to one year's interest from the death of the testator. *Beanland v. Hallewell*, 1 Coop. (CH. C.) 344.

41. Upon a bill filed by a second mortgagee to redeem and foreclose, after decree made, a subsequent mortgagee assigned his interest to a third party, who thereupon filed a bill against all the



parties to the former suit, praying to be decreed entitled to the benefit of that suit, and to redeem prior and foreclose subsequent mortgages: bill dismissed as against all but his assignor, and the plaintiff declared entitled to stand in his place, and to prosecute the former suit in his name. *Booth v. Creswicke*, 8 Sim. (CH.) 352.

42. Where in a suit of foreclosure by the assignee of the original mortgagor, it was discovered, after a motion to dismiss an undertaking to speed, that between the mortgage and the assignment, the mortgagor had become bankrupt, the court, as the bankruptcy might be disputed, allowed the assignees to be made parties, retaining the bankrupt as a defendant on the record. *Hanson v. Preston*, 3 Younge & C. (EX. EQ.) 229.

43. Where mortgagor and mortgagee gave a joint authority to a party, agent of the mortgagee, to act as receiver, to receive rents, give notices to quit, and bring actions, &c.; held sufficient to enable him to give notice to the tenant under 4 Geo. 4, c. 28, s. 1, making the tenant holding over liable to double rent. *Poole v. Warren*, 3 Nev. & P. (Q. B.) 693.

44. The 11 Geo. 4, and 1 Will. 4, c. 60, being intended only to provide means for conveying the legal interest, held that an assignment of a mortgage debt was not within the act; nor was it intended to apply to land out of the king's dominions. *Price v. Dewhurst*, 8 Sim. (CH.) 617.

45. A mortgagee proceeding on his bond against the personal estate, held not entitled to the costs as against the devisees. *Lewis v. John*, 1 Coop (CH. C.) 8.

46. Upon a decree for sale, notwithstanding the infancy of the heir, as most beneficial to him, held to be within the 11 Geo. 4, and 1 Will. 4, c. 47, s. 11, and that the court had jurisdiction to order the infant heir to convey to the purchaser. *Schloefield v. Headfield*, 8 Sim. (CH.) 470.

47. The 1 & 2 Vict. c. 69, s. 3, was not intended to repeal any part of the former acts, 11 Geo. 4, and 1 Will. 4, c. 60, and 4 & 5 Will. 4, c. 33, but they still apply to the cases of the infant heirs of mortgagees. *Gathorne*, in re, 8 Sim. (CH.) 394.

48. A mortgagee resident out of the jurisdiction, held not a case within the statutes enabling the court to appoint persons to convey to purchasers. *Green v. Holder*, 1 Beav. (CH.) 207.

49. An equitable mortgagee by deposit, without memorandum, held entitled, as against the personal representative of the mortgagor, to the costs of sale. *Cornell v. Hardie*, 3 Younge & C. (EX. EQ.) 582.

50. Where the mortgagee, upon an agreement for the rebuilding the mortgaged premises, consented to become tenant of part, when rebuilt, on a lease, at a premium and rent stated, from the party to whom the mortgagor had assigned his interest for a term, and the mortgagee, upon the premises being rebuilt, entered into possession, but no lease was ever executed, nor the premium nor rent paid; held, that such possession was to be taken in reference to the tenancy, and not as

of mortgagee in possession; and that in the taking the mortgage accounts they were not to be taken with annual rests, the principle not being applicable to the premium or rent; nor did an acknowledgment of a balance due on one occasion, the sum made up partly of compound interest, establish it as a settled mode of dealing between the parties; and, *quære*, if such a mode would be legal. *Page v. Linwood*, 4 Cl. & F. (P.) 399.

And see *S. C.* 4 Russ 6, and 2 Russ. & M. 214, the judgment wherein affirmed.

51. Where a petition for sale of an equitable mortgage became necessary from a mistaken view by the assignees of their rights, held, that they were entitled only to costs out of the general estate: unless parties agree upon an order out of court, the whole case must be heard to enable it to decide the question of costs. *Bate*, ex parte, 1 Mont. & Ch. (N.) 58.

52. Reg. Gen., as to advancing foreclosure suits for hearing, in the same manner as other causes. 3 Reg. Gen. May, 1839. 1 Beav. (CH.) Ap. x.

53. The court refused to advance a foreclosure suit, and heard as a short cause, without the consent of the defendant. *Lewin v. Moline*, 1 Beav. (CH.) 99.

And see *Administration; Bankrupt; Baron and Feme; Ejectment; Fraud; Interest; Landlord; Lien; Receiver; Stamp; Trustee*.

## MORTMAIN.

A gift of personal residue to parties, with a request that they would intreat the lord of a manor to grant waste land for the erection of buildings for a charitable purpose; held, that not excluding the purchase of land, or if it did, yet being given as an inducement to draw land into mortmain, such gift was void. *Mather v. Scott*, 2 Keene (CH.) 172.

And see *Charity*.

## NAME.

See *Indictment*.

## NEXT OF KIN.

In a suit for administering an estate, the deceased having, by a writing purporting to be a codicil, given a legacy to a party, but no will was found, nor was any executor appointed by the codicil, the next of kin having been ascertained by the master; held that they must enter into approved recognizances for refunding in case of a will being found before the residue being paid over to them, but that no recognizances need be given by such legatee; and the parties so proved to be next of kin, although not parties to the suit,



allowed the costs of proving. *Bakewell v. Targart*, 3 Younge & C. (x. eq.) 173.

And see *Administration; Limitation; Marriage Settlement; Will*.

### NEWFOUNDLAND.

1. Where lands, alleged to have been "ships' rooms," in Newfoundland, had been held under licence from the Crown since 1759, and conveyed down to the respondent for valuable consideration, and the Judge below had, upon the trial of an information for intrusion, directed the jury to find for the respondent, on the ground that the Crown could not claim under the 51 Geo. 3, c. 45, and 5 Geo. 4, c. 51, the lands, even if ships' rooms, against such a possession as would have been a bar to that claim, had they not been clothed with that character; the judgment affirmed, and held, that it was too late on the appeal to object that the defendant ought at the trial to have pleaded such title specially. *Attorney-General of Newfoundland v. Cuddihy*, 1 Moore, (r. c.) 82.

2. But lands there, unoccupied at the time of the passing the latter Act, held within it, and grantable as waste lands under s. 15, notwithstanding enclosed and occupied before any grant made. *Attorney-General of Newfoundland v. Ryan*, 1 Moore, (r. c.) 87.

### OATHS.

Affirmations permitted to be used in lieu of, in certain cases, by 1 & 2 Vict. c. 77.

### OFFICER.

1. The right to demand a poll is by law incidental to the election of a parish officer by show of hands, where there is no special custom to exclude it; and the demand of a poll may be properly made after the show of hands; at any rate, if a poll be afterwards taken, it is a waiver of any irregularity as to the demand. Where, although the usual mode of election had always been by show of hands, yet there being no evidence of a poll ever having been demanded, and so no custom to exclude a poll, held that the right existed. A local Act for government of the parish having specially reserved the powers of vestry, and of any ancient or special usage, and thereby reserved the right demanding a poll; held, that the taking of it was to be governed by the law then in being (58 Geo. 3, c. 69), which gives a plurality of votes according to the quantity of the voter's estate. *Campbell v. Maund*, 1 Nev. & P. (x. z.) 558; and see *Anthony v. Seger*, 1 Hagg. Cons. Rep. 9.

2. Where a party, being a town councillor, his name was omitted to be inserted in the Burgess roll of the corporation, and the office was filled up by another; held that, not being merely colourable, the remedy was by *quo warranto* and not

by *mandamus* to restore. *R. v. Oxford, Mayor, &c.*, 1 Nev. & P. (x. z.) 474.

3. In trespass against parish officers distraining for poor rates, held that the defendant (the plaintiff being nonsuited) was not entitled to treble costs either under 43 Eliz. c. 2, s. 19, or 13 & 14 Car. 2, c. 12, s. 20. *Charrington v. Meatheringham*, 2 Mees. & W. (xx.) 142; and 5 Dowl. (r. c.) 313.

4. Where a police officer, although not present at any assault, afterwards on the renewal of threats to break into a house forcibly, took the plaintiff into custody at the defendant's instance, and, in an action for the assault and false imprisonment, the defendant pleaded the previous violence, and that he was forced and obliged, "in order to preserve the peace," to give the plaintiff in charge, held that such plea was good after verdict. *Ingle v. Bell*, 1 Mees. & W. (xx.) 516; and 1 Tyr. & Gr. 801.

5. Where the defendant, a police constable, took the plaintiff into custody on a charge of wilful and malicious trespass, he not having seen the fact; held that, having acted under a *bona fide* and supposed authority of the statute, he was entitled to notice of action. *Ballinger v. Ferris*, 1 Mees. & W. (xx.) 628; and 1 Tyr. & Gr. 920.

And see *Corporation; Costs; Injunction; Mandamus*.

### OUTLAWRY.

1. An outlaw cannot appear in court for any purpose but to reverse his outlawry; held, therefore, that he could not charge a plaintiff in execution for costs in a different action. *Aldridge v. Buller*, 2 Mees. & W. (xx.) 413; and 5 Dowl. (r. c.) 733.

2. Where the party was beyond seas at the time of the exigent being awarded, the court adopted the rule in C. P. of reversing the outlawry on payment of costs, and on bail being put in in the alternative. *Levi v. Claggett*, 1 Mees. & W. (xx.) 547; 1 Tyr. & Gr. 937; and 5 Dowl. (r. c.) 322.

3. The court refused to set aside the outlawry without costs, on the ground that a party receiving an annuity for the defendant under a power of attorney, and not being his general attorney, had not been first applied to. *Hunter v. Whitfield*, 3 Bing. N. S. (c. r.) 878.

4. Where a creditor has obtained judgment of outlawry, he can obtain no interest in the property until he has obtained a grant from the Crown, and a court of equity can give no relief to enable him to obtain it. *Caddon v. Hubert*, 7 Sim. (cn.) 485.

5. The plaintiff must elect at the time he issues his writ, either to compel appearance or to proceed to outlawry, and, if he issue it for the former purpose, he cannot afterwards use it for the latter. *Vere v. Gowar*, 5 Dowl. (r. c.) 404.

6. But, where the plaintiff had issued writs of summons, to save the Statute of Limitations, the



court allowed a *distringas*, with a view to outlawry, in continuation of the previous writs. *Ray v. Dow*, 5 Dowl. (r. c.) 310.

7. The court refused, on a motion to reverse outlawry after final judgment, to impose the terms of paying interest from the time of signing final judgment to the period of reversal. *Ibbotson v. Fenton*, 1 Nev. & P. (x. s.) 779.

8. Where the defendant having mortgaged fee-farm rents, had entered into a contract for sale to the mortgagee, pending which the latter died, and the plaintiff, his representative, had proceeded to outlawry against the defendant whilst abroad, but having an agent here, to the knowledge of the plaintiff, the court reversed the outlawry on terms, with costs. *Pigou v. Drummond*, 4 Sc. (c. r.) 573.

9. A prisoner in custody under a *capias utlagatum*, for non-payment of damages and costs in an action for criminal conversation, held entitled to apply to be discharged under the 7 Geo. 4, c. 57, (Insolvent,) although the outlawry not reversed. *Reg. v. Insolvent Commissioners*, in re Hamlin, 3 Nev. & P. (q. s.) 543.

10. An outlaw is entitled to apply to a court of justice to remove an irregular order, by which he is improperly detained. *Hawkins v. Hall*, 1 Beav. (ch.) 73; and affirmed on appeal.

11. Where the inquisition was returned into the remembrancer's office, an application to traverse, made on the common law side of the court, was irregular. In re Otho Manners, 7 Dowl (r. c.) 516.

And see *Arrest; Practice*, (c. l.)

#### PARENT AND CHILD.

1. Where the father was induced to give up to the plaintiff the custody of his legitimate child (born after the elopement of its mother, and about to be placed by the defendant in a foundling hospital), and he entirely relinquished all care of it; held to negative an implied contract with the plaintiff to pay for the maintenance. *Urmston v. Newcomen*, 6 Nev. & M. (x. s.) 454; and 4 Ad. & Ell. 809. *Semb.*, a parent is not bound by the common law to maintain his illegitimate child, not being part of his family.

2. Where the son was in need of clothes, and the father had seen him wearing those furnished by the plaintiff; held that it was some evidence to leave to the jury, and calling upon the father to show that his son was supplied with necessities; held also, that, if a judge thinks fit to non-suit, counsel are not bound to insist on the case going to the jury. *Law v. Wilkins*, 1 Nev. & P. (x. s.) 697.

And see *Action on the Case; Baron and Feme; Infant*.

#### PARLIAMENT.

See *Election of Members of Parliament; Libel; Practice*, (xq.)

#### PARTITION.

1. Where, after an agreement, by parol, of partition of copyhold between A. and B., having apparent but doubtful title as tenants in common, A., the elder, taking the greater portion, and he afterwards devised his portion to C.; upon A.'s death, it was discovered that at the time of the agreement he was tenant in tail and B. in remainder, who thereupon repudiated the agreement, and brought ejectment to recover the whole; the court, upholding family arrangements, decreed to support the agreement, though by parol, followed by long enjoyment, and that B. should do all acts for barring the entail, and vesting the portion allotted to A. or his devisee. *Neale v. Neale*, 1 K. (ch.) 672; and affirmed on appeal.

2. Upon a decree of partition, the court regard the equitable as well as legal rights of the parties interested, and where C., one of several tenants in common, (A. B. and C.) had conveyed his interest in two estates to two, D. and E., severally, the court, varying a former decree, directed each estate to be divided into three parts, and each part be conveyed to A. B. and D., and to A. B. and E., respectively: in decreeing partition, the court acts upon its general jurisdiction, and not ministerially in obedience to the call of the parties entitled; and it will have regard to the provisions of the 8 & 9 Will. 3, c. 31, s. 4: held, also, that a previous tenant for life of the estate having granted a lease, which two of the tenants in common had confirmed, the third tenant could not impeach the lease in a suit for partition in which he was a co-plaintiff with his co-tenants in common. *Sory v. Johnson*, 2 Young & C. (xx. xq.) 586.

3. Where one of three tenants in common was of weak intellect, but no commission had been sued out; held, that the court would nevertheless direct a commission of partition, and that the lands should be held in severalty. *Hollingworth v. Sidebottom*, 8 Sim. (x. s.) 620.

4. The court refused to interfere with the order of the commissioner, on the ground of having awarded the mansion to the testator's heir at law; nor with the valuation, unless impeached for gross mistake or fraudulent motives; the assignment of rights of way is legal where necessary on a separation of the property; so a direction to erect fences, the object being that each may enjoy in severalty, which may be effected by proper covenants to erect and keep in repair the fences. *Lister v. Lister*, 3 Young & Cr. (xx. xq.) 641.

And see *Power*.

#### PARTNER.

1. In an action against a retired partner, proof of the defendant having, by advertisements in newspapers, usually read by the plaintiff, announced his having ceased commercial connexions, and soliciting the suffrages of East India Stock proprietors, together with evidence of his having executed a power of attorney to, and naming the new members of the partnership firm;



held to be evidence of the defendant's knowledge of the change in the firm, and adoption of the new firm as his debtors. (*Diss. Bolland, B.*) *Hart v. Alexander*, 2 Mees. & W. (xx.) 484; and 7 C. & P. (n. p.) 746.

2. Where A., a part-owner and manager of a ship, which was sold by B., another part-owner, and there was evidence of ship accounts between A. and B. in the books of the latter, from 1799 to 1805; and, in 1811 and 1812, two items appeared on the debit side, not appearing to relate to the ship, and there was evidence of frequent calls for the accounts, and evasions by B.; in a suit by A. for an account of the earnings and proceeds of the sale, held within the exception of the statute of merchants' accounts, and that there was no sufficient ground for presuming payment or satisfaction. *Robinson v. Alexander*, 2 Cl. & Fi. (r.) 717.

3. Where one partner in an agency house in India directed his estate to be called in and invested on certain trusts, and appointed two of his partners executors, who allowed his share to remain in the house; afterwards B. and C., two other partners, were admitted, who knew of the share so remaining, and the trusts it was subject to; they subsequently retired, and others succeeded them, and ultimately the firm failed; held, that B. and C. were not liable for the breach of trust committed by the executors. *Twyford v. Trail*, 7 Sim. (ch.) 92.

4. Where, after the death of one partner, the surviving partners became bankrupt; held, that a creditor was entitled to resort to the estate of the deceased partner, without regard to the state of the account between the deceased and surviving partners. *Devaynes v. Noble*, 2 Russ. & M. (ch.) 495; affirming the decree below.

5. *Semb.*, the rule, that there is no contribution amongst tort-feasors, does not apply when they are so by mere inference of law, but is confined to cases where they must be presumed to be cognizant of the wrongful act. *Pearson v. Shelton*, 1 Mees. & W. (xx.) 504; and 1 Tyr. & Gr. 848.

And see *Adamson v. Jarvis*, 4 Bing. 66; and *Woolley v. Bate*, 2 C. & P. 417.

6. Where upon one of two partners retiring, the other entered upon the same business with another, and it was agreed that, the continuing partner bringing into the business £— of good debts of the late firm to meet the debts transferred to the new one, he should be entitled to two-thirds, and the new partner to one-third; no settlement of accounts was made for 14 years, and during the last five years an amount equal to the stipulated sum was paid in by the debtors to the old firm, although not so, if subsequent advances to them by the new firm were deducted from the payments; held, that the agreement was performed, the monies so paid in, without appropriation, being to be applied in discharge of the oldest debts; (reversing the judgment below). *Tralman v. Copeland*, 2 Cl. & Fi. (r.) 681; and 8 Bli. N. S. 918.

7. Where the clerk of stage-coach proprietors made up the accounts monthly; held, that he

was to be deemed the clerk of all parties and need not be called, and that his accounts were evidence against all; and, the balances not being carried forward, the partner in whose favor the balances appeared was entitled to maintain an action in respect thereof. *Brierly v. Cripps*, 7 C. & P. (n. r.) 709.

8. Where A. and B., partners in farming, carried on the trades of malting and baking therewith, which they afterwards discontinued, purchased lands with partnership monies, some of which were not conveyed, others were, as to one moiety to A. in fee (being a bachelor), as to the other moiety to B., upon trusts to bar dower (B. being married); held that, the trade being collateral to and arising out of the principal business, the estates so purchased were not to be considered as personal estates. *Randall v. Randall*, 7 Sim. (ch.) 271; reviewing the cases.

9. Where a partnership is proved to exist, it is to be presumed that the parties are interested in equal moieties. *Farrar v. Beswick*, 1 M. & Rob. (n. r.) 527.

10. Where it was clearly established that there was a joint interest between the printer and publisher in particular works, for which paper was furnished by the plaintiffs, and delivered to the printer by orders from the publisher, who afterwards became bankrupt; held, that if the jury were satisfied that at the time when the goods were furnished the defendants were partners in the concern for whose benefit they were furnished, the plaintiffs were entitled to recover, otherwise not. *Gardiner v. Childs*, 8 C. & P. (n. r.) 345.

11. Where partners assigned all their joint and separate estates on trust, out of the proceeds of the joint estate, to pay joint creditors at the expiration of one year, and the surplus to be afterwards applied in satisfaction of other trusts of the deed; it turned out that the joint estate was sufficient to pay the joint debts, with interest at four per cent., from the time appointed for payment; and held, that they were entitled to such interest, although the greater portion of the joint debts did not in their nature bear interest, and the separate estate was insolvent. *Pearce v. Sloccombe*, 3 Younge & C. (xx. xq.) 84.

12. The court will interfere to dissolve a partnership, on the ground of permanent insanity of one of the partners, but as the proceeding would be on the ground of not being able to give notice, the court will require strict evidence, and if insufficient, will refer the question of insanity to the Master. *Kirby v. Carr*, 3 Younge & C. (xx. xq.) 185.

And see *Jones v. Noy*, 2 Myl. & K. 125; and *Sayer v. Bennett*, 1 Cox. 107.

13. Where the defendant, residing in this country, was a partner in a house abroad, held that the court could not compel him to set forth a schedule of books, &c. in the house abroad, being an order which it could not enforce. *Martineau v. Cox*, 2 Younge & C. (xx. xq.) 638.

14. Where the plaintiff and defendant had been engaged as partners in particular purchases and



sales of wool, and having had mutual dealings, stated an account, stating, amongst other items, "loss on wool," and having a balance against the defendant, which he signed and admitted to be due from him; held sufficient evidence of a promise to pay it, and that the plaintiff might sue for the amount of that item, and that a subsequent assent by him to take out the balance in meat, being merely matter of accommodation, did not preclude him. *Wray v. Milestone*, 5 Mees. & W. (ex.) 21.

15. Where a father, seized in fee of the premises on which the business was carried on, on taking his son into partnership for a period, conveyed certain shares of the land to him, to be treated as joint stock; and by the articles it was stipulated that if either died or retired during the term, the other might purchase his share at the value stated in the last yearly account, and considerable sums were expended during the term in improvements out of the partnership funds; after the term had expired, the parties continued to carry on the trade without any new agreement: held, that on the father's death, the right of pre-emption expired with the term, and that the father's interest in the land, after payment of all the partnership debts, retained its original character, and descended to his heir at law. *Cookson v. Cookson*, 8 Sim. (ch.) 529.

16. Where the concern is entirely put an end to, and nothing left but to get in the debts and settle the credits, one partner cannot pledge the credit of the others; but where a retiring partner gave a general authority to the one that was to wind up the concern to do what he thought proper with the existing securities of the firm; held, that the latter might endorse bills in the partnership name, and it was not necessary that such authority should be by deed or writing. *Smith v. Winter*, 4 Mees. & W. (ex.) 454.

17. Upon a bill filed against the executor and a surviving partner, for an account of the partnership transactions, charging an unfair valuation, and that there was no settled account, or if any, that it was fraudulent and collusive, the defendant pleaded to the whole bill, (except as to the fraud and collusion, which he denied,) a settled account with the executor; held, that the plea was irregular, as being only to part of the relief and discovery, but that the defendant was not bound to set forth the settled account, or aver that he had delivered over the vouchers to the executor, and that although the alleged unfair valuation was not denied expressly, yet, not being inconsistent with a final account, unimpeachable; the plea did not cover too much. *Davies v. Davies*, 2 Keene, (ch.) 534.

18. Where A., one partner, retired, leaving his whole capital in the firm, and taking a warrant of attorney from his two continuing partners, B. and C., to himself and a trustee, but the accounts were not made up, and he continued to interfere in the concern, and raised, by mortgage of his own property and policies of insurance on his life, a sum for the purpose of paying off a partnership debt; he shortly afterwards died, leaving his late partners his executors, directing them to apply the amount received on the policies in car-

rying on the trade, giving such security to his residuary legatees as W. might approve; W. refusing to act, no security was ever given, and upon a bill filed by one of the residuary legatees, held, that the amount of the policies was to be deemed a debt due from the partners to A.'s estate, and that it could only be applied in the trade on the terms of the will, and an order therefore for payment of that sum, and a balance admitted in their hands, into court. *Costeker v. Horrox*, 3 Younge & Cr. (ex. eq.) 530.

And see *Account; Action; Administration; Bankrupt; Debts; Injunction; Joint Stock Company; Landlord; Pleading*, (c. l.); *Vendor and Purchaser*.

## PATENT.

1. In case for infringing a patent taken out "for an improvement in the manufacturing of elastic fabrics," in the specification of which the patentee stated one of the objects to be the producing cloth from cotton, flax, or other materials not capable of felting, in which should be interwoven elastic cords of India-rubber, coated round, &c., and described the mode of effecting that object to be by combining the strands (coated with filamentous material, &c.) with yarns of cotton, flax, or other non-elastic material, the strands to be in the first instance stretched to their utmost tension, and rendered non-elastic, and being in that state introduced into the fabric, they acquired their elasticity by the application of heat; held to be a proper subject-matter of a patent, and to be sufficiently described. *Cornish v. Keene*, 3 Bing. N. S. (c. r.) 570; and 4 Sc. 337.

2. Where, on a bill to restrain the infringement of patents, the bill was retained, with liberty to bring actions to try the validity, and certain admissions were ordered to be made, and documents produced; a bill of discovery was afterwards filed, which, being limited only to subsequent transactions, the defendants failed in obtaining the production of certain documents; held that, such bill having not been objected to, and the court having acted under it, the benefit of discovery might be extended to all matters in issue; and a supplemental bill filed for the discovery of those documents which the party had before failed to obtain, held proper; and *semb.* the first bill, being filed without leave of the court, was irregular. *Few v. Guppy*, 1 Myl. & Cr. (ch.) 487.

3. Where the plaintiff, afterwards the assignee of a patent for an improvement, had one of the machines made at his own manufactory, and at his own expense, but under the direction of the patentee, and under an injunction of secrecy, which was taken abroad and used in a concern of which the plaintiff was a proprietor and principal manager; held not to be such a publication as to avoid the patent for the invention. If a patent be for several improvements, and the jury find one not to be so, the patent is void altogether. *Morgan v. Seaward*, 2 Mees. & W. (ex.) 544.

4. Where no contract for remuneration had been made by a patentee for instructing the King's



officers in the dock-yards to make anchors according to the patent, the court refused a *mandamus* to the Lords of the Admiralty to fix a reasonable compensation for the use of the patent. *Pering, ex parte*, 6 Nev. & P. (x. n.) 472; 5 Dowl. (r. c.) 750; and 4 Ad. & Ell. 949.

5. Where the patentee of a patent, originally void, entered a disclaimer and memorandum of alteration of part of the specification, under 5 & 6 Will. 4, c. 83; held, that the Act was not retrospective, so as to enable him to maintain an action for the infringement, previous to the time of such amendment. *Perry v. Skinner*, 2 Mees. & W. (xx.) 471.

6. Where the specification claimed as an invention the application of a self-adjusting leverage to the back and seat of a chair, the description of which was applicable to the invention of another, although encumbered with some additional machinery; held that, although the patent might have been supported as an improver of the latter, it could not be sustained as for an original invention. *Minter v. Mower*, 1 Nev. & P. (x. n.) 595.

7. Where several parties were jointly interested in a patent and its profits, and had entered into covenants with the plaintiff, in consideration of a sum paid by him, under a joint contract, and all had signed the receipt; held, that one of the parties having by fraudulent representations, although without the knowledge of the others, occasioned losses in respect of the patent, they were all liable to repay *in solido* the money received on a consideration which had failed. *Lovell v. Hicks*, 2 Younge & C. (xx. xq.) 451.

8. In an action for infringing a patent, and plea alleging the user of the invention by other persons; held, that under 5 & 6 Will. 4, c. 83, s. 5, a Judge has jurisdiction to order a further notice of objections, but not to order the names and addresses of all those alleged so to have used it. *Balnois v. Mackenzie*, 4 Bing. N. S. (c. r.) 127; and 6 Dowl. (r. c.) 215.

9. Where the patent was taken out for new machinery for macerating flax and other fibrous substances, previous to drawing and spinning it, and for improved machinery in drawing, &c. after being so prepared, at a shorter reach than had been before practised, and it appeared that shortening and varying the reach had been known and practised by others before; held, that the latter being a subject for which a patent could not be taken out, the whole was void, and the patent not valid in law. *Kay v. Marshall*, 5 Bing. N. S. (c. r.) 492.

10. In case for infringing a patent, plea, *inter alia* that the improvements, or some of them, were in use long before; held, that under 5 & 6 Will. 4, c. 83, s. 4, it was intended that the defendant should give an honest statement of the objections on which he meant to rely, and that he must state with precision what they are; and where as general as the plea, a rule absolute granted for further and better particulars. *Fisher v. Dewick*, 4 Bing. N. S. (c. r.) 706; 6 Sc. 587; and S. C. 6 Dowl. (r. c.) 739.

11. In an action on a contract between the plaintiff and three defendants, stating that the plaintiff and each of the defendants were severally interested in patents, and that it had been agreed that they should mutually enjoy the benefit in certain proportions, and pay the plaintiff a certain annuity; it appearing that the plaintiff was only interested in his own patent with others not joined, held, on demurrer, that a plea showing that the subject of the plaintiff's patent was not at the time of the grant a new invention, whereby the grant was void, and which the plaintiff at the time of the agreement well knew, was a bar to the action; held, also, that the action ought to have been brought in the names of all the parties for whose benefit the contract was made, although the plaintiff only was to receive the consideration, and that the variance between the declaration and contract was a fatal objection, and ground of nonsuit. *Chanter v. Leese*, 4 Mees. & W. (xx.) 255.

12. On a decree in a suit for infringement of an invention, for the use of which the plaintiff had an exclusive right, and an account of profits ordered to be taken; upon exceptions taken, the Master of the Rolls, upon referring back the report, directed the Master to state the grounds upon which he came to the conclusion he might arrive at; and the principle of the calculation stated in the original report appearing to be founded in error, the appeal against the order of the Master of the Rolls dismissed with costs. *Crossley v. Derby Gas Light Company*, 3 Myl. & Cr. (ch.) 428.

13. Amendment of laws relating to, by 2 & 3 Vict. c. 67.

And see *Witness*.

## PAUPER.

1. Where the plaintiff, a pauper, after notice of trial, withdrew the record on the second day of the assizes, on the ground of amending, without applying to the Judge for leave to amend, held vexatious, and a rule to dispauper him allowed. *Facer v. French*, 5 Dowl. (r. c.) 554.

2. Where a party suing as a pauper, afterwards petitioned to be discharged under the Insolvent Act, the court refused a rule for security for costs until he had been dispaupered. *Mylett v. Hucker*, 5 Dowl. (s. c.) 647.

3. Where an heir at law defended in *forma pauperis*, and was entitled to costs; held, that in the absence of any circumstances to take the case out of the general rule, he was only entitled to ordinary pauper costs. *Stafford v. Higginbotham*, 2 Keene, (ch.) 147.

4. An order to sue in *forma pauperis* is a nullity until served, and the defendant held, on motion to dismiss for want of prosecution, entitled to costs. *Ballard v. Catling*, 2 Keene, (ch.) 906.

5. Where the plaintiff, suing in *forma pauperis*, obtained a verdict of 40s. on the first issue, and



the defendant on the other; held, that the plaintiff was not liable to have the defendant's costs set off against the costs of the issue found for him; and, *semb.* if a party be admitted to sue in *forma pauperis* after the commencement of the suit, he is not exempt from costs. *Foss v. Racine*, 7 Dowl. (p. c.) 203; and 4 Mees. & W. (xx) 610.

6. A party cannot stay proceedings in a suit where the plaintiff is permitted to sue in *forma pauperis*, on the mere payment of the debt, the pauper being entitled to his costs. *Morgan v. Eastwick*, 7 Dowl. (p. c.) 543.

7. Where the order for admission to sue was made after the commencement of the suit, held irregular, and that the plaintiff must elect to be dispaupered or to find security for costs. *Love-well v. Curtis*, 5 Mees. & W. (xx.) 158.

8. Where the party applying was possessed of sufficient skill and knowledge in the business of a watchmaker to obtain adequate employment and remuneration, the court rejected the application to carry on the suit for divorce in *forma pauperis*. *Walker v. Walker*, 1 Curt. (cons.) 561.

#### PAVING RATE.

Where owners of property within a district subject to a local Paving Act, erected houses on a road made and repaired under the provisions of a subsequent private Act; held that, by availing themselves of the latter, they could not exempt themselves from contributing to the general paving rate. *Young v. Grove*, 2 Mees. & W. (xx.) 703.

#### PAWNBROKER.

1. In trover by assignees for watches belonging to the bankrupt, plea, that they were deposited as pledges with the defendant as a pawnbroker, for monies advanced. replication, alleging a corrupt contract for the loan, and for forbearance, to wit, one whole year from the making such loan, at illegal interest, the evidence being that they were deposited from time to time, without any agreement as to the time; held, that it must be inferred that the contract was meant to be on the usual terms of a pawnbroker. *Nickesson v. Trotter*, 3 Mees. & W. (xx.) 130.

2. A pawnbroker is not entitled, under the 39 & 40 Geo. 3, c. 99, s. 2. allowing the rate of  $\frac{1}{4}$ d. a month for the loan of 2s. 6d., to charge by monthly rests as on a monthly contract; and, *quære*, where the interest involves the fraction of  $\frac{1}{4}$ d., if he can demand the full farthing. *R. v. Goodburn*, 3 Nev. & P. (q. n.) 463.

3. Where the pawnbroker had not complied with the requisites of the Act, held, that as they precede the contract and accompany it, and are not collateral, he acquired no property in the pledge, and the contract being void, his lien was

void also. *Ferguson v. Norman*, 5 Bing. N. S. (c. r.) 76; and 6 Sc. 794.

And see *Award*.

#### PAYMENT.

1. A creditor is entitled to exercise his discretion, whether he will treat a check as payment; *a fortiori*, if conditional, as when expressed to be for the balance of account. *Hough v. May*, 6 Nev. & M. (x. n.) 535; and 4 Ad. & Ell. 954.

2. In support of a replication of payment of interest, in answer to a plea of the statute, a witness who stated that he settled all accounts of the defendant, admitted his handwriting to an account having the item of payment for interest, although he swore he did not recollect the fact; held to be evidence to go to a jury. *Trentham v. Deverill*, 3 Bing. N. S. (c. r.) 397; and 4 Sc. 128.

3. The admission of money received, in a bill of particulars, cannot be taken as evidence of payment, without a plea of payment. *Ernest v. Brown*, 3 Bing. N. S. (c. r.) 674; 4 Sc. 385; and 5 Dowl. (p. c.) 637.

4. On the issue of payment and receipt in satisfaction, held that a receipt signed by the London agent for the attorney, of the debt and costs indorsed on the writ of summons, was admissible, without calling the agent. *Weary v. Alderson*, 2 M. Rob. (n. r.) 127.

And see *Lundlord and Tenant; Pleading* (c. l.)

#### PEERAGE.

A writ of summons and sitting in the Irish Parliament, where, in numerous instances of the descent falling upon females, the dignity had passed to a remote cousin, being a male; held not sufficient evidence to establish the claim of a barony in fee. *Slane Peerage*, 10 Bli. N. S. (p.) 1.

#### PENAL ACTION.

See *Pleading*, (c. l.)

#### PENAL STATUTE.

See *Pleading*, (c. l.)

#### PENALTIES.

1. Commissioners of local improvement Acts, relief from penalties and liabilities, by 1 & 2 Vict. c. 65.

2. Where the corporation (Gravesend Pier Act) were empowered to appoint clerks, a treasurer, &c., but prohibited from appointing the



clerk to be treasurer, and imposed a penalty on any clerk or his partner, or his clerk, who should officiate for the treasurers, and the corporation had appointed the clerk to be assistant treasurer, with a salary, and he had discharged some of the duties of the treasurer; held, that it was for the jury to say whether he acted *bonâ fide* in the belief of his being appointed an independent officer, or only colorably, and that in the latter case only he would be liable to the penalty. *Hawkings v. Newman*, 4 Mees. & W. (ex.) 613.

And see *Action*.

## PLEADING (COM. LAW.)

[A] DECLARATION—SUFFICIENCY OF.

[B] PLEAS—SEVERAL.

[C] REPLICATION.

[D] DEMURRER—REPLEADER.

[E] AMENDMENT.

[F] VARIANCE.

### [A] DECLARATION—SUFFICIENCY OF.

1. Counts for work, &c., done by the plaintiff as administrator, may be joined with counts for goods sold, and work and labor by the intestate. *Edwards v. Grace*, 2 Mees. & W. (ex.) 190; and 5 Dowl. (p. c.) 302.

2. Where a count in a declaration on a bill, after averring acceptance, proceeded to state the registration of the protest, and issuing of process in Scotland, and whereby the defendant became liable, &c., but not averring that such registration, &c., was a *judgment*; held, that, there being no proof of the bill, the plaintiff was not entitled to recover. *Hay v. Fisher*, 2 Mees. & W. (ex.) 722.

3. An omission in a declaration on a bill or note, that the defendant promised to pay, can only be taken advantage of on special demurrer; and *semble*, as the defendant can now only deny by his plea some matter of fact alleged, it is not necessary to allege a promise to pay. *Griffith v. Roxbrough*, 2 Mees. & W. (ex.) 734.

4. Where the agreement was to purchase goods on the valuation of two persons named, and the declaration merely alleged that the defendant and M., his valuer, refused to value, and the defendant to appoint another valuer, or to take any steps to procure the goods to be valued, or let the same be valued according to his promise; held, that the declaration was bad on special demurrer. *Thurnell v. Balbirnie*, 2 Mees. & W. (ex.) 786.

5. In covenant by lessee, stating as a breach that the defendant entered upon plaintiff's possession, and expelled and removed him, upon which issue was joined, and it appeared that the plaintiff had never entered, but upon coming to take possession under the demise was refused ad-

mission by the defendant, who continued to occupy the premises; held, that the plaintiff could not recover. *Hawkes v. Orton*, 5 Ad. & Ell. (x. s.) 367.

6. The day laid in *assumpsit* on a parol promise is immaterial, being only laid for form. *Arnold v. Arnold*, 3 Bing. N. S. (c. p.) 81; 3 Sc. 547; and 5 Dowl. (p. c.) 6.

7. The statement in a declaration in the Exchequer of the plaintiff being a debtor, &c., with the *quo minus* conclusion, held, on demurrer, to be mere surplusage and matter of form. *Alderson v. Johnson*, 2 Mees. & W. (ex.) 70; and 5 Dowl. (p. c.) 294.

8. Where the declaration contained two counts, one on a contract to carry goods from B. to D., and thence to the port of L.; and the second, on a contract to carry the same goods from the place of landing at L. to the plaintiff's place of business; held not to be a violation of the rule 5 Hil. 4, Will. 4, which allows a second count if there be a second and distinct contract in respect of the same subject matter. *James v. Bourne*, 4 Bing. N. S. (c. p.) 420.

9. In an action by two plaintiffs for work, &c., as attorneys, who carried on the business as partners; held, that the defendant could not object, that by a contract *inter se*, one was to be secured a certain part of the profits at all events, the debt in the first instance being the joint property of both. *Bond v. Pittard*, 3 Mees. & W. (ex.) 357.

And see *Waugh v. Carver*, 2 H. Bl. 246.

10. Where the count stated the defendant to be indebted to the plaintiffs and their deceased partner on an account then stated between them, and after alleging a promise to all, assigned as a breach that the defendant had not paid; held sufficient. *Debenham v. Chambers*, 6 Dowl. (p. c.) 101; and 2 Mees. & W. (ex.) 128.

11. Upon a declaration against defendants as owners, alleging the delivery of goods to be carried by the defendants as owners, and charging damage through negligence, and plea, *non assumpsit*; held, that the ownership was not admitted, it not being a material fact; the taking issue on one fact is only an admission of the other material facts necessary to be proved. *Bennion v. Davison*, 3 Mees. & W. (ex.) 179.

12. Where the declaration alleged that the defendant at O. sent an order to the plaintiffs at L., directing them to purchase and send goods in stated quantities, according as they might realize certain prices, and that the plaintiffs accepting the order, and undertaking to perform, &c.; the defendant promised to receive the goods to be purchased by the plaintiffs, and accept bills drawn by them for the price; it then alleged a purchase of a quantity larger than that specified, and that they were ready to be delivered to the defendant; held bad, as not showing that the plaintiffs were ready and willing to deliver the specified quantity, and for which the bills were by the contract to be accepted. *Dixon v. Fletcher*, 3 Mees. & W. (ex.) 146.

13. Where the defendant being bail for P., in consideration that the plaintiff would forego bail



on S. giving a *cognovit*, undertook that in case of default of payment, to render S., within fourteen days after notice of a writ of execution issued against him; held, that the declaration alleging notice to the defendant of the issuing of a *ca. sa.* was sufficient, without going on to allege delivery of the writ to the sheriff. *Turnor v. Standage*, 4 Bing. N. S. (c. r.) 208.

14. In *assumpsit* by husband and wife, alleging an account stated with the husband and wife after the marriage, of monies lent by the latter before marriage, and remaining unpaid at and after the marriage, and that, in consideration of the premises, the defendant promised to pay on a future day; held bad, as not stating that the debt remained unpaid at the time of stating the account, and alleging a different promise than that which was raised by law, without showing any new consideration: the plea stated that the money due was secured by bond to the wife, payable on a certain day, and that the account stated was of the money thereon supposed at the time to be due, but not in fact, held a good answer, but that, *semble*, it was bad for duplicity, in alleging that the account was stated erroneously; *semb.*, also, that the action was properly brought by both. *Hopkins v. Logan*, 7 Dowl. (r. c.) 360.

15. Where the contract, as stated, was for delivery of goods (growing potatoes) within a reasonable time, and it appeared in evidence that they were to be taken at the usual time of digging; held, that the judge properly directed the declaration to be amended according to the fact, no prejudice to the defendant being shown by the amendment. *Sainsbury v. Matthews*, 4 Mees. & W. (zx.) 343; and 7 Dowl. (r. c.) 23.

16. The count on an account stated need not allege any time when stated. *Leat v. Lees*, 7 Dowl. (r. c.) 189; and 4 Mees. & W. (zx.) 579.

And see *Bingley v. Durham*, 1 Perr. & D. 58; and 4 Mees. & W. (zx.) 608.

And see *infra*.

17. Where, in an action on an agreement of reference, the declaration stated that the costs were to abide the event, omitting a further provision for the costs of making the agreement a rule of court, held a fatal variance; but that, notwithstanding a demurrer, it might be amended under 3 & 4 Will. 4, c. 42, s. 23, the variance not being one material to the merits of the case, and by which the defendant could be prejudiced in his defence. *Duckworth v. Harrison*, 7 Dowl. (r. c.) 463.

18. On demurrer to debt on an account before then stated, for that no time was stated when the supposed account was stated, held sufficient. *Bingley v. Durham*, 1 Perr. & D. (q. n.) 58.

19. In case for disannexing from a factory, to which the plaintiff was entitled, a steam-engine, &c., and converting to defendant's use, with a count in trover; *semb.* not a violation of the rule of Hil. 4 Will. 4. *Weeton v. Woodcock*, 5 Mees. & W. (zx.) 143; and 7 Dowl. (r. c.) 384.

20. Where, in trover for a sheep, the venue was laid in H., but no parish or place stated in

the declaration; the defendant pleaded the taking in a market for toll, concluding, *quæ est eadem*, &c., with a verification; held bad, on special demurrer, as containing two traverses of the same matter; and *semb.*, no place being stated in the declaration, the latter traverse was unnecessary. *Cardwardine v. Watkins*, 7 Dowl. (r. c.) 484.

21. Since the new rules of pleading, the inducement to a libel is taken to be admitted unless traversed. *Fradley v. Fradley*, 8 C. & P. (x. r.) 572.

And see *Annuity; Arrest; Assumpsit; Attorney; Bankrupt; Baron and Feme; Bills; Bond; Covenant; Debt; Libel; Patent; Prescription; Slander*.

#### [B] PLEAS—SEVERAL.

1. Where the plea set up a contract incompatible with that stated in the declaration, held bad, as amounting to the general issue. *Morgan v. Pebrer*, 3 Bing. N. S. (c. r.) 457; and 4 Sc. 230.

2. In debt for goods sold; plea, stating a special contract with a warranty, and payment of a sum amounting to the real value; held bad on demurrer, as amounting to the general issue. *Dickes v. Neale*, 1 Mees. & W. (zx.) 556; 1 Tyr. & Gr. 879; and 5 Dowl. (r. c.) 176.

3. Where the plea, plainly professing to be pleaded to the whole declaration, contained an answer only as to part, held only open to objection on special demurrer. *Harvey v. Grabham*, 5 Ad. & Ell. (x. s.) 73.

4. Declaration with one count on a bill by payee against acceptor, and another on an account stated; plea, non-acceptance, and no notice taken of the second count; held bad, on special demurrer, the plea being pleaded to the whole declaration. *Putney v. Swann*, 2 Mees. & W. (zx.) 72; and 5 Dowl. (r. c.) 256.

5. Plea to the supposed cause of action, "if any such there be," held not a sufficient confession to support a plea in confession and avoidance. *Margetts v. Bays*, 6 Nev. & M. (x. s.) 226; and 4 Ad. & Ell. 489.

6. Plea to an action for an attorney's bill, that the defendant had derived no benefit, and that the plaintiff had advised the striking a docket, and promised to indemnify the defendant; held bad, as amounting to the general issue. *Hill v. Allen*, 5 Dowl. (r. c.) 471.

7. Plea to debt on bond, that after the day of payment, and before action, the obligee received certain bills of exchange not yet due in satisfaction as to part, and a sum of money as to the residue; held bad, on demurrer. *Worthington v. Wigley*, 3 Bing. N. S. (c. r.) 454; 3 Sc. 555; and 5 Dowl. (r. c.) 209. 504.

8. In debt for penalties, on 22 Geo. 2, c. 46, s. 14, for acting as an attorney whilst he was deputy clerk of the peace; plea, denying that he was such deputy, nor did he commit any of the supposed offences against the statute, &c.; held, on demurrer, bad, as double. And *semb.*, in an ac-



tion on a penal statute, the plea "not guilty" would be a good plea, notwithstanding the new rules of pleading. *Faulkener v. Chevell*, 6 Nev. & M. (x. b.) 704; and 5 Ad. & Ell. 213. The word "to" being erroneously printed for "or," the statute is not confined to the mere suing out process, as the printed copy of the statute imports.

9. In debt for work, &c. by the plaintiff as an attorney; held that, under the general issue *nonquam indeb.*, the defendant might show that the plaintiff had agreed to conduct the suit for the sums actually disbursed, and that the payment of a sum into court only admitted the employment as an attorney, but not that he was to be paid the ordinary fees payable to an attorney. *Jones v. Read*, 1 Nev. & P. (x. b.) 18; 5 Ad. & Ell. 529; and 5 Dowl. (r. c.) 216.

10. Where in case for injury, by the defendant's coach driving against the plaintiff's carriage, the defendant pleaded that the plaintiff's carriage was driven by one of his sons, and in so unskilful a manner that the collision happened thereby, and not through any negligence of the defendant's servant; held bad, on demurrer, as amounting to the general issue. The new rules of pleading have not abolished the plea of the general issue, but only circumscribed the species of evidence which may be given under it. *Gough v. Bryan*, 2 Mees. & W. (ex.) 770; and 5 Dowl. (r. c.) 765.

11. Where in case for injuring a bridge, by negligence in navigating, the plea, after alleging that the plaintiffs had wrongfully narrowed the channel, traversed that the injury was occasioned by any carelessness of the defendant; held, that they were at liberty under such plea, upon failing to establish any default in the plaintiffs, to show also that they themselves had not been guilty of negligence. *Cross Keys Co. v. Rawlings*, 3 Bing. N. S. (c. p.) 71; and 3 Sc. 490.

12. Where the defendant, having employed the plaintiff and his partner in the sale of books within six years, by letter acknowledged the return of some as imperfect, concluding, "which, together with the cash overpaid on the settlement of your account, amounts to £—, which sum I will pay you within two years from this date; held, 1st, that such letter amounted to a promissory note, and was evidence of an account stated at the time when signed, and that the cause of action did not accrue until two years after; 2dly, that a plea of the statute must conclude with a verification; 3dly, that such letter, although stamped with an agreement stamp at the time of being signed, was within the exemption of 55 Geo. 3, c. 184, s. 10, and admissible in evidence. *Wheatley v. Williams*, 1 Mees. & W. (ex.) 533.

13. Where in *assumpsit* for work, &c. the defendant pleaded *non assumpsit*, except as to £—; secondly, tender as to part after the debt arose and before action brought, and thirdly, as to the said other parcel, payment before action brought; held good on demurrer, although as to the tender it did not appear to have been made after the sum paid, and so of all admitted to be due. *Quere*, if a creditor is bound to accept part of a sum due? *Jones v. Owen*, 6 Nev. & M. (x. b.) 620; and 5 Ad. & Ell. 222.

14. In *assumpsit* for work, &c., stating the promise to be, to pay on request; plea, that it was done under an agreement, that, if it did not answer the purpose intended, nothing was to be paid; held bad, as amounting to the general issue. Where the defence shows a different contract from the one declared on, it may be gone in to upon the general issue; the distinction is between a plea confessing the contract stated, but disclosing matter which exonerates him from the performance of it, and a plea containing an allegation, that, for the reasons specially stated, the contract does not exist in the form in which it is alleged, and which latter, being only an argumentative denial of the contract, is not allowed. *Hayelden v. Staff*, 6 Nev. & M. (x. b.) 659; and 5 Ad. & Ell. 153; questioning *Edmonds v. Harris*, 2 Ad. & Ell. 414.

And see *Taylor v. Hilary*, 1 Cr., Mees. & R. 741.

15. In *assumpsit* on a charter party, assigning for breaches, not loading a cargo, not paying £— per ton, and not paying £— on an account stated; to the plaintiff's damage £300; plea, as to £—, parcel of the sums in the declaration mentioned, payment and acceptance in satisfaction of damages as to that sum, held bad on demurrer, as not showing in respect of what part of the demand it had been received. *Lorymer v. Vizeu*, 3 Bing. N. S. (c. p.) 222, 427; and 4 Sc. 190.

16. In use and occupation, the plaintiff having claimed £105 in the declaration, but in his particulars £52 10s., "being the balance of one year's rent due" &c.; the defendant pleaded as to all but £52 10s. *non assumpsit*, and as to that sum payment, and the plaintiff joined issue on the first plea, and entered a *nolle pros.* as to the latter; held that, as the plaintiff must have taken the plea as amounting to a part payment of the whole demand, having proved the whole year's occupation, although the defendant proved his plea of payment, the plaintiff was entitled to a nominal verdict. *Nicholl v. Williams*, 2 Mees. & W. (ex.) 758.

17. But where the plaintiff declared for wages, and put in a particular for wages at 15s. per week, amounting to £148, and gave credit for payment of £70, and the defendant at the trial put the particulars in evidence, and the jury found that the plaintiff was only entitled to 7s. a week; held, that the particulars were properly received as an admission of the payment, and the court refused to disturb the verdict found for the defendant. *Kenyon v. Wakes*, 2 Mees. & W. (ex.) 764.

18. Upon a justification in trespass, of force to remove the plaintiff from the defendant's house, when making a noise and disturbance, and replication *de injuria*; held, 1st, that the general proposition that motive and intention may be the subject of inquiry on the general traverse, cannot be supported; and 2dly, that the plea not justifying the excess of violence and wounding used towards the plaintiff, she was entitled to a verdict on the general issue. *Oakes v. Wood*, 2 Mees. & W. (ex.) 791; questioning *Lucas v. Nockells*, 10 Bing. 182.

19. Plea in trespass for breaking, &c., that the



entry was under a search-warrant for goods clandestinely removed by W. F. to the plaintiff's house to avoid a distress; and new assignment, that it was on another occasion, at a different time; to which the defendant pleaded the tenancy of W. F. at the rent of £—, that one year's rent was due, and that W. F. fraudulently removed the goods as before; held, that the new assignment was not an admission of the truth of the matter previously pleaded, which was to be taken to relate to another trespass, and that the defendant was bound to prove the demise at the rent stated, and of the rent in arrear, as alleged in the new assignment. *Norman v. Wescombe*, 2 Mees. & W. (ex.) 349.

20. Where, in trespass, to plea of leave and license, the replication *de injuriâ* concluded to the country, without any "&c.," and no *similiter* was added; held, that after verdict for the plaintiff it was too late to take advantage of the informality. *Stockdale v. Chapman*, 4 Ad. & Ell. (x. s.) 419; and 6 Nev. & M. 711.

21. Plea, in trespass for breaking, &c. closes "of and belonging to the plaintiff," denying that plaintiff at the said times, when, &c., was possessed of the said closes, in manner, &c., and concluding to the country; held proper. *Fleming v. Cooper*, 5 Ad. & Ell. (x. s.) 221.

22. In case against a railway company for injury to the plaintiff's reversionary interest, the court refused to allow the general issue to be pleaded, with the pleas, first, that the defendant was not possessed of the reversion, and, secondly, that the party stated in the declaration to be tenant was not tenant. *Fisher v. Thames Junction Railway Company*, 5 Dowl. (r. c.) 775.

23. Two pleas of stannary customs, one pleaded without qualification, and the second with a qualification; held, within the rule Hilary, 4 Will. 4, and not pleadable together. *Bastard v. Smith*, 1 Nev. & P. (x. s.) 242.

24. The particulars not being considered part of the declaration, held that, upon plea of payment into court in *assumpsit* in its general form, for work as an agent in letting certain houses, the defendant was not precluded from contesting his liability as to certain items in the particulars, the plea to such a general demand being to be taken to admit only some cause of action, within the description in the declaration, to the extent of the money paid into court. *Booth v. Howard*, 5 Dowl. (r. c.) 433.

25. In case, where special damage is stated, and is the foundation of the action, being traversable, if not traversed by the plea, it is admitted. *Per-ring v. Harris*, 2 M. & Rob. (n. r.) 5.

26. In case for damage by negligence in conducting railway carriages, plea, that the damage was occasioned by the negligence of both parties; held bad in substance, as amounting to the general issue. *Armitage v. Grand Junction Railway Company*, 6 Dowl. (r. c.) 340; S. C. 3 Mees. & W. (ex.) 244.

27. The formal commencement of the declaration in ejectment held immaterial, and the omission therefore of the *quo minus* clause not irregu-

lar. *Doe d. Bioram v. Roe*, 3 Mees. & W. (ex.) 187; and 6 Dowl. (r. c.) 388.

28. In case against the sheriff for a false return, the debtor having become bankrupt, held, that although the *fiat* did not issue until after the seizure, yet, the goods belonging to the assignees by relation, the sheriff could not be allowed to plead, first traversing the seizure of the goods of the debtor, and also a plea stating the dates of the act of bankruptcy, and of the date of the *fiat*. *Wright v. Lainson*, 6 Dowl. (r. c.) 152; and 3 Mees. & W. (ex.) 44.

29. Plea, in debt on simple contract, that the plaintiff covenanted to forbear suing; held, that although the breach might render him liable to action, it was not pleadable in bar. *Thimbleby v. Barron*, 3 Mees. & W. (ex.) 210.

30. Where the sheriff having seized goods of the plaintiff under a *fi. fa.*, on a joint warrant of attorney of the plaintiff's and R., to a party as trustee for the defendant, and thereupon the plaintiff executed two warrants of attorney, one for the amount recoverable upon the judgment, and the other for a debt due to the defendant from the plaintiff's father, and in consideration thereof the defendants undertook to procure the re-delivery of the goods seized: and breach in *assumpsit* for not re-delivering within a reasonable time, to which the defendant pleaded that the original warrant was not given to the said party as trustee for the defendant, in manner and form, &c., on demurrer, held bad, as putting in issue an immaterial fact, the subsequent warrants forming a good consideration for the defendant's undertaking, whether the former was held by a trustee for the defendant or not. *Radford v. Smith*, 3 Mees. & W. (ex.) 254; and 6 Dowl. (r. c.) 381.

31. In an action upon a contract for the sale of not less than 5,000, and not more than 6,000 trees of a stated size, to be delivered; averment that the plaintiff took up and delivered, at the proper time of the year, 6,000 trees, and tendered, but the defendant refused to accept them; plea, that the plaintiff did not properly take up, or tender or offer to deliver 6,000 trees; held, on demurrer, that the traverse in the plea of the delivery, &c. of the number stated in the declaration, did not render it bad; but that tendering a traverse on the taking up, &c., and offer to deliver, was bad for duplicity. *Smith v. Dixon*, 2 Nev. & P. (x. s.) 1; and 6 Dowl. (r. c.) 47.

32. In an action on a check, plea, that it was given for a gambling debt; held, on general demurrer, that the replication *de injuriâ* was good. *Curtis v. Marquis Headfort*, 6 Dowl. (r. c.) 496.

33. In *assumpsit* for goods, plea, coverture; replication, that the defendant was living separate in adultery, without the knowledge of the plaintiff, and that he dealt with her as a *feme sole*, and that she, after the death of her husband, promised to pay; held bad, as a departure, the promise in the declaration being void, and that alleged in the replication amounting only to a moral obligation. *Meyer v. Haworth*, 3 Nev. & P. (q. s.) 462.

34. In *assumpsit* for goods sold and delivered,



plea, a sale on Sunday; replication, the subsequent retainer of the goods, whereby he became liable to pay for them on a *quantum valebant*; held bad, on demurrer, no subsequent promise being alleged after such retainer. *Simpson v. Nicholls*, 6 Dowl. (r. c.) 355; and 3 Mees. & W. (xx.) 240.

35. Where the bankrupt agreed to take stones from the plaintiff's quarry at a certain price, for a building contract, which the defendants, his assignees, adopted, and took stones to the amount of 40*l.* for the purpose; in *assumpsit*, against them, plea, as to the agreement with the bankrupt, *non assumpsit*, and as to the residue of the causes of action, payment into court of £—, and acceptance by the plaintiff of that sum in satisfaction; the jury having found for the defendant on the first issue, held, that the plaintiff was not entitled by the admission in the plea of payment to have a verdict entered on the other issue. *Twemlow v. Askey*, 3 Mees. & W. (xx.) 495.

36. Plea in *assumpsit* for 500*l.* for money paid, &c., that the defendants were the holders of a bill for 500*l.*, drawn by defendants on, and accepted by one M, and that in consideration the defendants would indorse and deliver the same to the plaintiffs, they would pay the said sum of 500*l.*, as the defendants should direct, and would retain the bill for and on account, and as payment of the said sum of 500*l.*, averring that the monies paid, &c., were so in pursuance of the said agreement; held bad, as amounting to the general issue. *Maude v. Nesham*, 3 Mees. & W. (xx.) 502.

37. Plea of payment into court, new form of, and proceedings after by plaintiff; Reg. Gen. 3 Nev. & P. (q. s.) 380.

38. Payments credited in the particulars need not be pleaded, except where only a balance is claimed, nor can payment be in any case given in evidence in reduction of damages, but must be pleaded in bar. Where the general issue is pleaded under any statute, to be noted in the margin of the issue. Reg. Gen. 3 Nev. & P. (x. s.) 381.

39. In *assumpsit* on an agreement for wages as a courier for five months certain, at five guineas a month, and in case of discharge before that period, to pay fifty guineas, and the expenses of return, assigning a double breach, the dismissal before the expiration of the five months, and the refusal to pay the fifty guineas, or any sum for expenses; there was also a count for wages generally; pleas, first, except as to 2*l.*, that the defendant wrongfully quitted the service; 2*dlly.*, as to the first count, except as to 2*l.*, dismissal for improper conduct. 3*dlly.* As to the second count, except as to 2*l.*, *non assumpsit*; and 4*thly.* payment into court on the whole declaration; replications, joining issue on the first and third pleas; to the second, *de injuria*, and to the fourth, damages *ultra*; at the trial, the jury found for the plaintiff on the first and fourth issues, and for the defendant on the others; held, that there being no complete answer to the first issue, without referring to the plea of payment into court, which was to be taken to go to the whole declaration, and admitted the contract as stated in the first count,

and that something was due on both the causes of action therein stated, on each of which an undefined portion, not exceeding 2*l.*, was left unanswered, the plaintiff was entitled to nominal damages. *Fischer v. Aide*, 3 Mees. & W. (xx.) 486.

40. Whether there be a plea of payment or not, each issue must be tried by itself. 1*b.*

41. Under the new rules, a plea is to be taken as pleaded to the whole action, unless otherwise expressed; and where pleaded to part, or only against the further maintenance of the action as to that part, the plea must commence in the form prescribed. *Upward v. Knight*, 5 Bing. N. S. (c. r.) 338.

42. In trespass and false imprisonment on a charge of felony, several pleas, alleging distinct offences, in justification of the apprehension of the plaintiff, allowed, the plaintiff refusing to allow the subject matters of them to be given in evidence under the plea first pleaded. *Currie v. Almond*, 5 Bing. N. S. (c. r.) 224.

43. In *assumpsit*, with counts on four causes of action, and one promise and breach laid, plea, as to £—, parcel of the said several sums, &c., payment and acceptance in satisfaction of all the damages, by reason of the non-performance of the said promises as to the said sum of £—, held, on special demurrer, good, although not stating to which cause of action it applied. *Mitchell v. Townley*, 7 Ad. & Ell. (q. s.) 164.

44. So, where there were several counts in *assumpsit*, the damages in each being £100, and the defendant pleaded as to £—, parcel, &c., a set-off on a bill of exchange; held good, although not pleaded as to any particular count. *Noel v. Davis*, 4 Mees. & W. (xx.) 136; and 7 Dowl. (r. c.) 48.

45. The plea of payment into court on *indeb.* counts, for use and occupation for goods and fixtures, and the money counts, held to amount to an admission only that so much was due on some one of the contracts stated to the extent paid in; and if the plaintiff fails to establish the contract alleged, he cannot recover; but such a plea to a special count would admit the contract therein stated. *Kingham v. Robins*, 7 Dowl. (r. c.) 352; 5 Mees. & W. (xx.) 94; questioning *Walker v. Rawson*, 5 C. & P. 486; and *Merger v. Smith*, 4 B. & Ad. 673.

46. In *assumpsit*, by the assignees of an insolvent, plea, alleging an accounting before the insolvency, and allowance of a debt due to the defendant, and set-off and discharge of the premises in the declaration mentioned, replication, that the insolvent was not indebted to the defendant *modo et forma*; held, that on demurrer the replication was good, and that it was not necessary also to traverse the accounting alleged in the plea. *Learmouth v. Grandine*, 4 Mees. & W. (xx.) 658.

47. In *assumpsit* for commission and wages, on a contract for services on a voyage to B., and not to assist in the trading of any other ship, and in default, to forfeit such commission, &c., plea alleging a fraudulent agreement by the plaintiff



with others to act as agent for them, and to aid and assist in the trading of their ships in the like cargoes, replication *de injuria*; held, that the plea was bad, showing only an intended breach of the agreement, and the acts of assisting others, as alleged, not being such as were specified in the agreement; if the plea had been good, the replication would have been also good, such plea being only matter of excuse for non-performance of the contract. *Hemingway v. Hamilton*, 4 Mees. & W. (x.) 115.

48. In debt, with several counts, plea, that the defendant had paid to the plaintiff several sums, in the whole amounting to a large sum, to wit, the amount of the several debts in the declaration alleged; held, that the plaintiff need not new assign, but was entitled to recover the balance between amount of debt proved and payment made. *Freeman v. Crofts*, 4 Mees. & W. (x.) 1; and 6 Dowl. (r. c.) 698.

49. Plea, that after the debt accrued, and before the action was commenced, the plaintiff became a bankrupt; held, an issuable plea. *Willis v. Hallett*, 5 Bing. N.S. (c. r.) 465.

50. Where, in debt for £150, on three counts for £50 each, plea *actio non*, because the defendant had paid various sums amounting to £50; held, only demurrable, and that it was irregular to sign judgment of *nil dicit* as to the part not answered by the plea. *Wood v. Farr*, 5 Bing. N.S. (c. r.) 247; and 7 Dowl. (r. c.) 263.

51. In debt for goods sold, &c., plea as to all except 33s. 6d., *never indebted*, and as to the residue, the Court of Requests Act; held, that the plea was not bad, as going to the whole declaration, but that as to the issue raised upon the first part, not being immaterial, and not being one which could be traversed, was bad; the correct and usual form is, that the plaintiff was not indebted in any sums amounting to 40s., or to that amount. *Burroughs v. Hodgson*, 1 Perr. & Dav. (q. n.) 328.

52. In debt for work, &c., plea, that the defendant was indebted in a certain sum for work, &c., and an agreement to do further work, and to take out the amount of both, partly in malt and partly in beer, and averring that he was ready and willing, &c.; held bad, as with respect to the previous debt amounting to accord without satisfaction, and as to the subsequent work, to the general issue. *Collingbourne v. Mantell*, 7 Dowl. (r. c.) 518.

53. Plea, in debt for work, &c., except as to £15, *sumq. indeb.*, and as to that sum, *actio non*, and a tender in the usual form, held good. *Willis v. Prudht*, 7 Dowl. (r. c.) 460.

54. Where, in case by the owner of goods against the shipowner, for loss by unskilful loading them, and also for contribution, it appeared that it had been agreed merely to try the question as to a particular custom of loading such goods, and the defendant having, by pleading a set-off, endeavored to snap a verdict, the court set aside the plea, on payment of the amount claimed by it into court. *Gould v. Oliver*, 4 Bing. N.S. (c. r.) 676; and 6 Sc. 884.

55. In case against a tenant for carrying away hay off the farm, without bringing back manure, in an untenable manner, and contrary to the custom of the country, plea, no such custom; held good on demurrer. *Hartley v. Burkhitt*, 4 Bing. N.S. (c. r.) 687; and 6 Sc. 497.

56. Plea, in trover for a bill, that the plaintiff indorsed it in blank, and that it came into the hands of a third party, who deposited it with the defendant as a security for a debt, and that the defendant accepted such deposit, believing that the party had authority so to do, replication, that the defendant well knew that the party had no authority to pledge, &c.; held good, as traversing the material allegation of the plea, it nowhere appearing on the plea that he had any title to the bill. *Hilton v. Swan*, 7 Dowl. (r. c.) 417.

57. A count alleging a delivery by Y. of a horse to the defendant, to be kept and delivered by defendant on the request of Y., on satisfaction of all claims, and stating a request by Y. to defendant to deliver it to the plaintiff, and who paid all claims, alleging that the defendant wrongfully detained the horse; held bad, in arrest of judgment, the duty arising to deliver to Y. only; and the refusal not being a conversion in itself, although evidence of it, it could not be taken as a count in trover. *Tollit v. Shenstone*, 7 Dowl. (r. c.) 457.

58. In trover by assignees of a bankrupt, alleging a joint conversion, plea, admitting the property in the plaintiffs by operation of law, but alleging a *bona fide* purchase by one of the defendants, above two months before the issuing of the *fiat* without notice of an act of bankruptcy and the joint conversion; held, that amounting to a confession and avoidance, the traverse in the plea of the plaintiff's title was bad. *Pearson v. Rogers*, 1 Perr. & Dav. (q. n.) 302.

59. In trespass for breaking plaintiff's close, and issues on the pleas, of freehold of the defendant, and leave and license, it appearing that the premises had been let by defendant to the plaintiff from year to year, from 16th November; held, that an agreement to give up the possession whenever the plaintiff should require, could not be gone into, on replication to a plea of demise by the plaintiff, but should have been rejoined, nor, as being part of the original bargain, could it be received on the plea of leave and license. *Tomkins v. Lawrance*, 8 C. & P. (n. r.) 729.

60. In case for wrongfully discharging from the defendant's service, plea, that the party obstinately refused to work, wherefore he discharged, &c.; held bad, as not showing a disobedience of reasonable commands of the defendant. *Jacquot v. Bourra*, 7 Dowl. (r. c.) 348.

61. Pleas as to £—, part, &c., payment and acceptance after action commenced, in satisfaction of the debt and all damages, wherefore plaintiff ought not further to maintain, &c.; held good. *Corbett v. Swinburne*, 3 Nev. & P. (q. n.) 551.

62. In a penal action to recover the double value of goods removed to avoid a distress; held,



that the plea of the general issue (*nisi debet*) put all the facts in issue, and that the new rules did not apply to penal actions; held, also, that the 21 Jac. 1, c. 4, s. 4, is applicable to subsequent statutes. *Jones v. Williams*, 4 Mees. & W. (ex.) 375; and 7 Dowl. (p. c.) 207.

63. *Semb.*, the general replication *de injuriâ* is good in debt. *Hebden v. Ruel*, 6 Sc. (C. P.) 442.

64. Where the defendant pleaded payment of a sum, and acceptance in full satisfaction, to which the plaintiff replied that he did not accept the said sum in full satisfaction, &c.; held to put in issue the payment as well as the acceptance. *Ridley v. Tindall*, 7 Ad. & Ell. (q. b.) 134.

65. Where in *assumpsit* for a salary for services, the defendant pleaded payment of a sum into court; held, that he could not give in evidence, in mitigation, circumstances of misconduct, which might have been pleaded in bar. *Speck v. Phillips*, 7 Dowl. (p. c.) 470.

66. Where there is a special demurrer to the whole declaration, and one count or breach is good, if the demurrer be too large, the plaintiff is entitled to judgment on the whole declaration; and if the bad count or breach is good after judgment, he may recover by entering a *nolle pros.*, if bad, or having the damages separately assessed and entering a *remittitur damna*. *Boydell v. Jones*, 4 Mees. & W. (ex.) 451; and 7 Dowl. (p. c.) 210; correcting *Ferguson v. Mitchell*, 2 Cr. M. & R. 692.

And see *Account*; *Injunction*; *Tithes*.

#### [C] REPLICATION.

Replication to a plea of coverture of the plaintiff, that her husband had been absent and not been heard of for seven years; held bad, as stating evidence only for the presumption of his non-existence. *Lake v. Ruffle*, 6 Nev. & M. (x. b.) 684.

#### [D] DEMURRER—REFLEADER.

1. Where the demurrer is too large, held that the plaintiff is entitled to judgment generally, and may enter a *nolle pros.* as to any count which may be bad, to prevent error. *Wainwright v. Johnson*, 5 Dowl. (p. c.) 317.

2. Where the plea tendered an issue, held that an informal conclusion could only be taken advantage of by special demurrer. *Smith v. Smith*, 5 Dowl. (p. c.) 84.

3. In an action by indorsee against drawer; plea, that one I. E. made and indorsed the bills in defendant's name, without authority; replication, that the bills were not made or indorsed by I. E., to which the defendant demurred; held, that the plaintiff could not treat the demurrer as a nullity, and sign judgment as for want of plea. *Walker v. Catley*, 5 Dowl. (p. c.) 592.

4. Where in debt, on award, the plea, not con-

fessing the action, raised an immaterial issue, which the jury found for the defendant; held, that the proper course was to award a replader, and not to give judgment *non obst. vered.* So, where there are several pleas and issues taken, but the action is confessed in none, if one be immaterial, the court may award a replader. *Plummer v. Lee*, 2 Mees. & W. (ex.) 495; and 5 Dowl. (p. c.) 755.

5. Plea of "never did promise," in debt, held a nullity. *King v. Myers*, 5 Dowl. (p. c.) 687.

6. Where on a demurrer to the whole declaration, one count is good, the plaintiff is entitled to judgment generally; and *semb.* the count on an account stated, need not aver the time when it was stated. *Webb v. Baker*, 3 Nev. & P. (q. b.) 87.

7. Where the declaration by indorsee against drawer, containing one count on the note, and one on an account stated, alleged only one promise to pay the said several sums, a demurrer, on the ground of no promise to pay the note, set aside as frivolous. *Chevers v. Parkington*, 6 Dowl. (p. c.) 75.

And see *Action*; *Action on the Case*; *Arrest*; *Assumpsit*; *Bill*; *Bond*; *Carrier*; *Insurance*; *Sheriff*; *Trespass*.

#### [E] AMENDMENT.

1. Where from the omission of the *similiter*, no issue was joined, the court held that they would consider it a misprision of the clerk, and allow the record to be amended. *Siboni v. Kirkman*, 6 Dowl. (p. c.) 98; and 3 Mees. & W. (ex.) 46.

2. Where the declaration on a charter party, with memoranda indorsed thereon, stated a further promise, on the part of the defendant, to have an agent at C.; held, that if such promise were beyond, and in addition to the charter party, the variance was fatal, but being merely a formal statement of the legal effect of the instrument, although mistakenly, that the added promise might be struck out, or amended by stating the legal effect truly. *Whitwill v. Scheer*, 3 Nev. & P. (q. b.) 398.

3. Where the issue contained an " &c." after the replication, and no *similiter* was added, but it was properly added on the *nisi prius* record; held, that there was sufficient to justify the presumption of a perfect record, or that the party would make a perfect one, and rule for arresting the judgment discharged; and *semb.*, the rule of Trin. 2 Will. 4, s. 65, was intended only to apply to cases tried in term. *Brook v. Finch*, 6 Dowl. (p. c.) 313.

And see *Abatement*; *Replevin*.

#### [F] VARIANCE.

In case against the sheriff for a false return, the declaration being dated in the reign of the Queen, alleged the judgment in the reign of the



late King, as appeared by the record "still remaining in the said court of our said lord the late King;" held, that there being such a record, there was no variance. *Lewis v. Alcock*, 6 Dowl. (r. c.) 78; and 3 Mees. & W. (ex.) 188.

### PLEADING (IN EQUITY).

#### [A] BILLS—PARTIES—SUPPLEMENTAL—MULTIFARIOUSNESS.

##### [B] ANSWERS.

##### [C] PLEAS.

##### [D] EXCEPTIONS.

##### [E] AMENDMENTS.

#### [A] BILLS—PARTIES—SUPPLEMENTAL—MULTIFARIOUSNESS.

1. Where the word "*decree*," in the prayer of process, was omitted in a bill of discovery, held that the word "*order*" was to be considered to mean such order as was consistent with the general scope of the case made by the bill. *Baker v. Bramah*, 7 Sim. (ch.) 17.

2. Misjoinder of a merely formal party, the objection not being raised by the answer, or made until after argument on the merits, not allowed to prevail. *Raffety v. King*, 1 K. (ch.) 619.

3. Where the devisees and legatees, charged on estates in mortgage, filed a bill for an administration account and redemption against the executors and mortgagee, charging collusion; held multifarious, as seeking something to be done with which the mortgagee had no concern, and a demurrer allowed; such a bill could only be sustained when confined to the payment of the debt due to the estate. *Pearse v. Hewitt*, 7 Sim. (ch.) 471.

4. Where the defendant, an infant, attained his age subsequently to the filing of the bill, held that the plaintiff was entitled to file a supplemental bill, in order to get an answer as to material facts, which he could not obtain from the answer by guardian to the original one. *Waterford, Marquis of, v. Knight*, 9 Bli. N. S. (r.) 307.

5. Where the intestate had entered into contracts for the sale of lands, which, at the time of his death, were valid but incomplete, and the administrator and heirs-at-law had agreed that the proceeds should be deemed and divisible as personal property; in a suit by the other next of kin, alleging the receipt of rents and proceeds of timber by the administrator, and seeking to have them invested; held, on demurrer, that the purchasers, who would be entitled to an account of them when settling for the purchases, were necessary parties, and that the bill would not be multifarious by joining them. *Lumsden v. Fraser*, 1 Myl. & Cr. (ch.) 589.

6. Where two defendants were trustees under

one deed, and another under another deed, and all three executors of a will, and entitled to the fund as to which the defendants were all accounting parties; held, that an objection for multifariousness could not be supported, on the ground that the defendants were not all parties to all the instruments, in respect of which the relief was prayed; and demurrer properly overruled. *Campbell v. Mackay*, 1 Myl. & Cr. (ch.) 603; reviewing the decisions upon the subject of multifariousness.

7. Where the suit related to the wife's separate property, held that it ought not to be by her and her husband as co-plaintiffs, but by her alone by her next friend. *Sigel v. Phelps*, 7 Sim. (ch.) 239.

8. Where the two defendants obtained a lease of mines, in which the plaintiff acquired certain shares, and the defendants afterwards, without his knowledge, sold the whole interest, receiving the price partly in money and partly in shares in a new company of adventurers, formed by the purchasers; held, that the plaintiff, seeking nothing as against the new adventurers, was not bound to make them parties to his bill against the defendants, with reference to such interest as remained in them; and whether the plaintiff should receive compensation in money or shares in the new concern reserved to the defendants. *Mare v. Malachy*, 1 Myl. & Cr. (ch.) 559; reversing the judgment below.

9. Where a purchaser under a decree confirmed, had contracted for the sale of his lots, and died, his heir being abroad, the court, with consent of the parties in the cause, allowed the party contracting to be substituted as the purchaser. *Pearce v. Pearce*, 7 Sim. (ch.) 138.

10. Upon bequests of a reversionary interest in stock, after the death of testator's wife, by A. to B., and by B. to C. and C. to D., who upon the death of A.'s wife filed a bill against the trustees to have it transferred, alleging successive assets to the bequests by the executors of A., B. and C.; held, that they were not necessary parties. *Smith v. Brooksbank*, 7 Sim. (ch.) 18.

11. Where an executor had become liable, by breach of trust, to make good legacies; held, that the suit of a legatee was in fact a creditor's suit, and that it could only be maintained on behalf of himself and all other parties interested, or by making those persons parties. *Alexander v. Mullins*, 2 Russ. & M. (ch.) 568.

12. Where A., the widow of an intestate in India, who died, leaving a daughter B., afterwards married there, and had a son C., the plaintiff, and her second husband, dying, appointed her his sole executrix, and she took out administration in England by the defendant, as her attorney; during her second marriage the daughter dying, she or her husband possessed themselves of the estate of the first husband; a bill, filed by the son, claiming a moiety of his half-sister's share of her father's property, dismissed for want of joining A. as party to the suit, although out of the jurisdiction, and leave to amend refused; as the bill could be shaped in no way to obtain any relief against the defendant, as representative of the second husband, as whatever part of the estate



had come to his hands during the coverture had also passed again to A., the representative of the intestate, and who, if within the jurisdiction, would alone be liable. *Tyler v. Bell*, 2 Myl. & Cr. (ch.) 89; and 1 K. (ch.) 826.

13. An estate cannot be administered in the absence of the personal representative, and who must obtain his right to represent the estate from the Ecclesiastical Court in this country. *Ib.*

14. A party seeking to obtain the benefit of an interest accruing by intestacy, must not only make the personal representative a party to the suit, but allege that there is a surplus after payment of debts and charges; held also, that upon leave to amend by adding parties, all such matters as constitute the equity against such new party may be charged; held, also, that where the amended bill puts forward a new case, the defendant may meet the new matter either by demurrer or plea. *Stephens v. Frost*, 2 Younge (ex. ex.) 303.

15. Where A., one of a firm, was engaged with M. in a joint speculation, and deposited deeds with the firm as a security for money borrowed, and afterwards died intestate, leaving an infant heir; on a bill filed by the surviving partners, against the heir and M. for a sale of the estate, held, that the personal representative of A. ought to have been a party; held, also, that on a decree for sale, in case of an equitable mortgage, the infant heir ought not to be allowed the six months to show cause against the decree on coming of age; *aliter* in case of a decree of foreclosure. *Scholefield v. Heafield*, 7 Sim. (ch.) 667.

16. Upon a bill for specific performance of a contract for sale of the legal and equitable estate from the supposed owner of the equity of redemption; held, that neither a mortgagee, nor a person claiming an interest in the equity, nor parties to the contract, were necessary parties to the suit; and that the circumstance of the mortgagee not objecting to being a party, but requiring the sanction of the person so claiming before joining in the conveyance, did not make such person a necessary party. *Tasker v. Small*, 3 Myl. & Cr. (ch.) 63.

17. Where the plaintiff agreed to sell an estate W. to B., upon an agreement that B. should mortgage it, with another estate of his own, to the plaintiff, and the conveyances were executed, but a deed of feoffment left in the possession of B., who subsequently mortgaged the W. estate to the defendant; held, that B. was a necessary party to a suit for foreclosure of the latter estate; *semb.*, the defence of purchase for valuable consideration, without notice, would be available as a defence against a party relying on mere legal title. *Payne v. Compton*, 2 Younge & C. (ex. ex.) 457.

18. In a creditor's suit instituted under 3 & 4 Will. 4, c. 104, the bill not praying the will to be established, held, that the heir was not a necessary party. *Weeks v. Evans*, 7 Sim. (ch.) 546.

19. Where a bill of discovery in aid of a defence to an action at law, contains a prayer for

relief, in addition to the ordinary prayer, the defendant is not bound to give any further discovery than that which is incidental to the relief sought by the bill. *Desborough v. Curlewis*, 3 Younge & C. (ex. ex.) 175.

20. Where the defendant, an infant, put in his answer by guardian, but did not make the required discovery: after his coming of age, held, that the plaintiff might file a supplemental bill, alleging the existence of new facts and praying discovery and relief. *Waterford, Marquis, v. Knight*, 3 Cl. & F. (r.) 270.

21. Where a bill was filed by the trustees of a life assurance company, to have a policy delivered up to be cancelled on the ground of fraud; held, that having no interest in the profits of the company, and being liable to the costs of an action on the policy, they were properly made the sole plaintiffs, and the shareholders co-defendants; the bill being filed against the shareholders, who were very numerous, and alleging that the plaintiffs did not know, and could not ascertain the names of all, it was unnecessary to make them parties: the policy not being void on the face of it, held that the suit was properly brought in the lifetime of the assured, and gave the plaintiffs a better equity than if they had waited until the claims arose on the death of the party. *Fenn v. Craig*, 3 Younge & C. (ex. ex.) 216.

22. Where funds were distinctly appropriated by a testator, held that the parties might sue respectively for their shares, without making the others entitled parties to the suit. *Hutchinson v. Townsend*, 2 Keene, (ch.) 675.

23. A legacy being given to two, in equal moieties, each held entitled to file a bill for his moiety, without making the other a party. *Hughson v. Cookson*, 3 Younge & C. (ex. ex.) 578.

24. Where the suit is for the recovery of the wife's exclusive property, the husband ought not to be joined as a co-plaintiff. *Owden v. Campbell*, 8 Sim. (ch.) 554.

25. Where the husband files a bill to recover property of the wife, he must make her a party, although the amount be under £200; but where the record was amended, by simply joining her as a co-plaintiff, held that it was a new record, and no issue being joined upon it, the cause could not be heard: and where the court sees that the cause cannot be brought to a hearing, through defect of parties, the party through whose fault the defect has occurred, will be liable to costs. *Bailey v. Dennett*, 3 Younge & C. (ex. ex.) 459.

26. Where the suit for tithes was instituted by the vicar and his lessee, and the answer admitted the demise to the latter, the court, in the absence of any evidence, would construe the term, "demised," as by parol, as giving effect to the bill, and in which case the vicar was rightly joined as a co-plaintiff. *Foot v. Bessant*, 3 Younge & C. (ex. ex.) 320.

27. Where the widow as administratrix claimed for arrears of an annuity due to her late husband, held that she might be a party in respect of her interest in having the accounts taken. *Smith v. Farr*, 3 Younge & C. (ex. ex.) 328.



22. Where one of two tenants in common having brought an ejectment, but discovered that a term was outstanding, filed a bill praying for accounts, and the delivery up of title-deeds, held that the other tenant was a necessary party, although out of the jurisdiction, but not the trustee of the outstanding term. *Brookes v. Burt*, 1 Beav. (ch.) 106.

23. Where upon an agreement for separation the husband agreed to pay an annuity, and assigned property to a trustee to secure it, but the husband paid it without the interference of the trustee, and the wife afterwards borrowed money on the faith of the annuity, and the lender afterwards filed a bill against the husband and wife for payment of his debt out of the annuity; held that the trustee was a necessary party, and that a suit by the husband against the trustee and the lender was not sustainable, either as a bill *quia timet*, or of interpleader, the original suit not being sustainable in its existing frame. *Palmer v. Fraser*, 3 Younge & C. (xx. eq.) 491.

30. Where a feme covert married the testator, and he gave all his real and personal estate "to his dear wife C. D." and appointed her sole executrix, and she after his death contracted a third marriage; on a bill to set aside the will, and for an account, held that the first husband was a necessary party, although he had never interfered, but not the last, although he had possessed himself of part of the estate. *M'Kenna v. Everitt*, 1 Beav. (ch.) 134.

31. Where a bill for payment of an annuity charged upon real estate sought a discovery of all prior incumbrances; held, that a plea of want of such parties could not be sustained; held also, that in order to judge of the validity of a second plea, the court will consider the original and amended bill as one record, and look at the whole of the proceedings: and where the plea alleged that an incumbrance was vested in a party, it ought to be alleged to be so at the time of the bill being filed. *Rawlins v. Dalton*, 3 Younge & Cr. (xx. eq.) 447.

32. Where in a suit for the administration of an estate, one of the executors had become bankrupt, but his official assignee had not been made a party, the Court allowed the plaintiff to amend by adding parties; and *semble*, under such an order he might file a supplemental bill. *Wood v. Wood*, 3 Younge & Cr. (xx. eq.) 580.

33. Where the original bill was filed by three alleged to have an interest in the account sought, one of them afterwards mortgaged his interest, and became insolvent, and a supplemental bill was filed by the other two original parties and the assignees of the third against the mortgagee; held, that the original defendants, the accounting parties, ought to have been made parties to the supplemental suit, as entitled to know to what parties they were accountable. *Feary v. Stephenson*, 1 Beav. (ch.) 42.

34. Where after answer put in to a bill originally multifarious, the plaintiff amended his bill, but did not materially vary the case, and retained a great portion of statement which had been answered; held, upon a demurrer to the whole

bill, that the court would look into the record to see if it were so, and that being admitted, the answer overruled the demurrer. *Ellice v. Goodson*, 3 Myl. & Cr. (ch.) 653.

35. Where one of several defendants demurred for multifariousness, which was allowed, and the other defendants then pleaded the allowance of the demurrer; held, that the plea was bad; although the bill might be multifarious as to one defendant, it did not follow that it was so as to the rest. *Attorney General v. Craddock*, 8 Sim. (ch.) 467.

36. Where parties were added by supplemental bill, where the original bill might have been amended, the original defendants not being made parties to the supplemental bill, held not irregular. *Lloyd v. Russell*, 1 Coop. (ch. c.) 258.

37. Where the plaintiff being the purchaser of an estate conveyed by way of mortgage on trust, with a general power to the trustee, by sale or mortgage, to pay off the mortgage, and to bring actions in the name of the mortgagor, and to appoint other trustees in his stead; his trustee afterwards instituted a suit in the name of plaintiff, to enforce a contract with a purchaser of the estates, and subsequently appointed another trustee, who carried on the suit, plaintiff having entered into an arrangement with the purchaser without the consent of the new trustee, the suit was suspended; held, that the new trustee could not by petition interfere, but only by a supplemental bill, and the petition dismissed with costs. *Pentland v. Quarrington*, 3 Myl. & Cr. (ch.) 249.

And see *Baron and Feme; Charity; Insolvent; Patent; Set-off; Trustee*.

## [B] ANSWERS.

1. Where a general answer includes also an answer to a particular charge, it is sufficient. *Anon.* 2 Younge, (xx. eq.) 310.

2. Where the defendants suing on a bill, given as a consideration for executing a deed of composition, in fraud of creditors, were alleged by the plaintiffs, on a bill for an injunction and discovery, to be merely trustees for the owners of the bill, stating certain facts; held, that an answer denying only those facts, and omitting to deny the general charge as to their being trustees, was insufficient. *Culverhouse v. Alexander*, 2 Younge (xx. eq.) 218.

3. Where the plaintiff amended the bill before taking exceptions; held, that after a demurrer to part of the bill overruled, he was not precluded from calling for an answer to those parts of the bill covered by the demurrer. *Taylor v. Bailey*, 3 Myl. & Cr. (ch.) 677.

4. Where the bill anticipating a legal bar, in the shape of a plea of the statute of limitations, introduced a charge which, if true, would remove the bar by preventing the operation of the statute, and the defendant pleaded the legal bar, but did not answer the charge introduced for the purpose of meeting and displacing the contemplated bar;



plea overruled, supporting the decision of the Vice Chancellor, and leave to withdraw the answer refused. *Foley v. Hill*, 3 Myl. & Cr. (CH.) 475.

5. On a bill for satisfaction of an annuity payable out of rents, and of a sum secured by bond and mortgage, the defendant having by his answer set up equitable circumstances as a defence, and examined witnesses in support of it; held, that it was too late to set up an objection to the jurisdiction, on the ground that the plaintiff's remedy was at law. *Williams v. Down*, 1 Coop. (CH.) 360.

6. Where the plaintiff sets down for argument a plea of a suit pending in another court for the same matter, the plea will be allowed, unless defective in form; and if he does not obtain an order to refer it to the Master, to inquire if the suit be for the same matter, the defendant may, after a month, move to dismiss; but upon the allowance of the plea to the whole bill, the cause is not out of court until a subsequent order for dismissing it obtained, and the proceedings are substantially the same in the Exchequer. *Tarleton v. Barnes*, 2 Keene, (CH.) 632.

### [C] PLEAS.

1. In a suit by the heir of a devisee, the bill praying discovery and restraint of setting up outstanding terms, &c.; plea, that there were none, and also a demurrer for want of title; the defendant also demurred *ore tenus*, for want of equity; held, that the plea was good, but that the demurrer on record, being applicable to the whole bill, was bad, and therefore to that covered by the plea; a defence applicable to the whole bill cannot stand with another defence applied to another distinct part of the bill; but held also, that such objection did not apply to the demurrer, *ore tenus*, which the court, being of opinion that the plaintiff was not entitled to the discovery and relief sought, allowed. *Crouch v. Hickin*, 1 K. (CH.) 386.

2. A negative plea, professing to be to the whole bill, except certain parts, traversing some of those parts, held bad. *Denys v. Locock*, 3 Myl. & Cr. (CH.) 205.

3. A plea, of proceedings pending in another court of competent jurisdiction, must show not only that the same issue was joined, but that the subject matter was the same, that the proceedings were for the same purpose, and that the result would be conclusive to bind the judgment of every other court. *Behrens v. Sieveking*, 2 Myl. & Cr. (CH.) 602.

4. Where a bill was filed for the delivering up a bill on which an action had been brought and judgment recovered, demurrer allowed. *Threlfall v. Lunt*, 7 Sim. (CH.) 627.

### [D] EXCEPTIONS.

1. Where upon exceptions taken to the answer

and examination on two interrogatories, both which the Master reported sufficient, and one general exception was taken to the report; the Vice-Chancellor, holding the answer and examination insufficient as to one, overruled the exception, but refused to make any order as to costs, but gave the plaintiff the deposit. *Ward v. Fitzhugh*, 7 Sim. (CH.) 42.

2. A party excepting to a separate report must do so by filing exceptions in the usual manner, and not by petition. *Drever v. Maudeley*, 7 Sim. (CH.) 240.

### [E] AMENDMENTS.

1. Where the party, two days before the argument, gave notice of submitting to a demurrer for want of parties, held, that he could not amend his bill without a special application. *Lewthwaite v. Clarkson*, 2 Younge (EX. EQ.) 370.

2. Where the demurrer for want of equity, is allowed, the bill stands dismissed. *Ib.* 375.

And see *Charity*.

### POLICE.

1. Police of the metropolis, and regulation and extension of powers of courts of police, 2 & 3 Vict. c. 47. 71.

2. The new police Bill contemplates the separation of the civil and criminal jurisdiction of the magistrates, and that some of the present number may be specially appointed to the former duty in a separate court.

### POOR.

#### [A] SETTLEMENT.

- (a) *By estate—parrelage.*
- (b) *Renting a tenement.*
- (c) *Apprenticeship.*
- (d) *Hiring and service.*
- (e) *Serving an office.*
- (f) *Payment of rates.*

#### [B] REMOVAL.

#### [C] RELIEF.

#### [D] RATE.

#### [E] APPEAL—NOTICE OF.

#### [F] OVERSEERS.

### [A] SETTLEMENT.

- (a) *By estate—parrelage.*

1. Where the pauper's husband devised all his real and personal estate to trustees to sell, and,



after payment of his debts, to pay the residue to the pauper, and added, "and I give and bequeath the same money and premises accordingly;" held, first, that she had an equitable estate in the lands, as, if the personality were sufficient to pay the debts, she would be entitled to a conveyance, and the sessions were not competent to go into the sufficiency of assets; and, secondly, that, by residence in the parish where the estate was situate, it was the same as if she resided on the estate, the possession of the trustees not being adverse. *R. v. Aslackby*, 6 Nev. & M. (x. s.) 582; and 5 Ad. & Ell. 200.

2. Where the pauper, being seized of freehold and copyhold lands in the parish wherein he resided, conveyed them to trustees for sale and payment of his debts, and to pay any surplus to him, with covenants to surrender the lands, and before any surrender to a purchaser, he resided above 40 days within the parish, but not on any part of the property; held, that having the legal estate he gained a settlement by such residence. *R. v. Ardleigh*, 2 Nev. & P. (x. s.) 240.

And see *R. v. Dorstone*, 1 East, 296.

And *vid. infra*.

3. Where the sessions book contained a regular caption, stating the authority of the sessions, and the order set out, it not appearing that there was ever any other record, held admissible to prove the quashing of the order of removal of the pauper's parent to the appellant parish; held, also, that such an adjudication in 1824 was *prima facie* evidence of the parent's settlement being in some other parish; and it appearing that the child was unemancipated in 1817, the court must presume that he continued so, although it was not shown that he had returned to his parents' family whilst under 21. *R. v. Yeavely*, 1 Perr. & D. (q. s.) 60.

#### (b) By renting a tenement.

1. Where a house consisted of three floors, and the access to each was by separate outer doors; held, that the occupier of one floor had a distinct tenement within the statute. *R. v. Usworth and Biddick*, 5 Ad. & Ell. (x. s.) 261.

2. Where the pauper hired a granary, consisting of an entire floor above another, but having no communication with it, and only entered externally by a ladder from the ground; held not to be a separate and distinct tenement to confer a settlement. *R. v. Henley-upon-Thames*, 1 Nev. & P. (x. s.) 445.

3. Where an agreement throughout had reference to wages and service, and the sessions had found that the occupation of a cottage was in the character of servant and not of tenant, the court refused to interfere with their decision. *R. v. Snape*, 1 Nev. & P. (x. s.) 429.

4. Upon the construction of 1 Will. 4, c. 18, the subject-matter which forms the tenement must be occupied; where, therefore, the pauper hired two cottages and three acres of land at an

entire rent, and let off one, the one he occupied himself with the land being of the value of £10; held insufficient to gain a settlement. *R. v. Berkswell*, 1 Nev. & P. (x. s.) 432.

5. Where the pauper occupied and paid 10*l.* rent, held that his settlement was not invalidated by the fact that the tithe, amounting to 6*s.*, was paid by the landlord. *R. v. St. John's Bedwarsins*, 3 Nev. & P. (q. s.) 302.

And see *R. v. Thurmaston*, 1 B. & Ad. 731.

6. Under the words "separate and distinct," in 6 Geo. 4, c. 57, the tenant must be unconnected with any other person, and be a separate occupier; held, therefore, that no settlement was gained when the tenement was hired by distinct persons as joint tenants, although the quota paid by the pauper amounted to 10*l.* *Reg. v. Cavernwall*, 1 Ferr. & Dav. (q. s.) 426.

#### (c) By Apprenticeship.

1. Where the binding was within a local jurisdiction, but over which the county justices had a concurrent one, an order of allowance by two county justices only held sufficient; and the court will presume notice to have been duly proved before them, without which they would not have properly allowed the indentures. *R. v. Witney*, 6 Nev. & M. (x. s.) 552; and 5 Ad. & Ell. 191.

2. The indenture is not made void by being antedated, the 8 Anne, c. 9, s. 35, imposing a penalty only, and not including such among the cases in which the Act declares them void; and the notice required to be printed at the foot by 5 Geo. 3, c. 46, s. 19, does not of itself operate as an enactment rendering them void. *R. v. Harrington*, 6 Nev. & M. (x. s.) 165; and 4 Ad. & Ell. 618.

3. The 56 Geo. 3, c. 139, requiring only notice to be given on a binding into another parish by indenture, held, that it was not necessary in case of an assignment; held also, that the intention being clear by the terms of the indorsement, it was a sufficient acceptance, although the pauper was misnamed therein. *R. v. Eamington*, 1 Nev. & P. (x. s.) 603.

4. Where, at the time of the binding to a carpenter, the master declared he would take no apprentice unless they would agree to work on the land as well as at the trade, and the sessions found that it was a contract of hiring and service; the court, upon the facts, held that it was a defective contract of apprenticeship, and quashed the order of sessions. *R. v. Ightham*, 6 Nev. & M. (x. s.) 320; and 4 Ad. & Ell. 937.

5. Where the pauper, being of age, entered into a contract of apprenticeship in a foreign country, under which he served and resided in this country 40 days under it; held to confer a settlement. *R. v. Cloworth*, 1 Nev. & P. (x. s.) 437.

6. Where the service was under the indenture with a second master, expressly with the assent of the original one; held, that it was immaterial



that the second master knew of the pauper being an apprentice or not. *R. v. Sandhurst*, 1 Nev. & P. (x. s.) 296.

And see *R. v. Banbury*, 5 B. & Ad. 176.

7. Where a parish apprentice received a general permission from his master to seek work where he could, and he did so, and resided above 40 days in the appellant parish prior to the passing 50 Geo. 3, c. 139, and after which his master was made acquainted with and expressed his assent to such service; held, not to be an assent (by relation back) to the particular service prior to the statute, and after which no valid assignment could take place but with assent of justices. *R. v. Maidstone*, 6 Nev. & M. (x. s.) 545; and 5 Ad. & Ell. 326.

8. Where the indentures were fraudulently antedated, with the view of contravening 5 Eliz. c. 4, s. 31, held, that they were altogether void, and defeated the settlement, although the appellant's parish was no party to the fraud. *R. v. Barmston*, 3 Nev. & P. (q. s.) 167.

9. Where the pauper returned to his father in consequence of illness, and resided above 40 days, until the indentures were cancelled, during which time his master occasionally visited him, and asked him to carry about and sell tickets for the disposal of articles manufactured by him, by way of lottery, giving him 1s. a ticket; held, that such residence and service was connected with the apprenticeship, and a settlement gained in the father's parish, and was not affected by any illegality of such employment. *R. v. Somerby*, 1 Ferr. & D. (q. s.) 180.

And see *Mandamus*.

(d) *By hiring and service.*

1. Where the pauper served under a monthly hiring until Michaelmas 1833, when she engaged for a year (the 4 & 5 Will. 4, c. 76, s. 65, coming into operation on 14 August 1834); held that, the contract of hiring and service not having been completed at the time of the Act passing, no settlement was obtained. *R. v. Rettenden*, 1 Nev. & P. (x. s.) 448.

2. Where the pauper was hired from 5 April to 5 April, to do the work of a colliery, to forfeit the same for the days he should lay himself idle, as he should receive when laid idle by the proprietors, except on pay Saturdays (every alternate one), when the pit was going single shaft, and that he should do a full day's work on every working day, (a day of 12 hours being single shift,) and when working all the 24 hours (being double shift,) or forfeit 2s. 6d. for every default; when the pit was working double shift, the men made 12 shifts of 12 hours in alternate fortnights respectively, and the proviso as to working single shift on pay Saturdays, applied to men working double shift; the pauper worked sometimes single and sometimes double shift; held, that the hiring was exceptive. *R. v. Cowpen*, 5 Ad. & Ell. (x. s.) 333; and 6 Nev. & M. 559.

3. Where, by the terms of the contract with the father, the son was to serve the master for a certain period in his business of a wheel-wright, at the expiration of the term the master to pay 5l. to the son, the father to find his son clothes and other necessities, and the master meat and lodging; held to amount to a contract of hiring and service only, and not of an apprenticeship. Where the sessions lay before the court a written document, it is a question of law as to what is its effect; where the hiring and service are made *viva voce*, it is a question of fact; and the court cannot attend to anything which takes place at the sessions which is not stated in the case, as whether conversations at the time of the contract were receivable or not. *R. v. Billinghay*, 1 Nev. & P. (x. s.) 149.

4. Where the notice of appeal stated as the ground, that the contract of service in S. contained a stipulation that the pauper should be allowed "two days" holidays at S. club-feast," and, at the hearing, the pauper proved that he bargained "for one day's holiday to go to H. fair;" held, that such evidence was inadmissible, the parties being held strictly to the notice given; and the sessions having found it an exceptive hiring, quashed the order, and the court quashed the order of sessions. *R. v. Holbeach*, 1 Nev. & P. (x. s.) 137.

5. Service under a hiring for a year, during which the 4 & 5 Will. 4, c. 76, passed, held not to be united with previous service, although completing a year before the passing of the act. *Reg. v. St. John the evangelist*, 6 Ad. & Ell. (q. s.) 300, n.

6. Where, upon the hiring, the servant told his master he should want some time to go to his feast, and the master agreed he should have a holiday for that purpose, held to be an exceptive hiring. *Reg. v. Threkingham*, 8 Ad. & Ell. (q. s.) 866.

(e) *Serving an office.*

A verbal appointment by the rector to the office of parish clerk and sexton is sufficient, and the execution of the duties and receipt of the emoluments held to give a settlement, although at the time of the appointment the party was not settled there; and *semble*, no notice need be given to the parish. *R. v. Bobbing*, 1 Nev. & P. (x. s.) 166.

(f) *Payment of rates.*

Where the occupation of the tenement rated is such as to satisfy the provisions of 6 Geo. 4, c. 57, held that the settlement is not affected by the 1 Will. 4, c. 18. *R. v. Stoke Dammarel*, 1 Nev. & P. (x. s.) 453.

[B] *REMOVAL.*

1. The 4 & 5 Will. 4, c. 76, s. 57, rendering



the husband liable to maintain the children of the wife by a former marriage, and that they shall be deemed part of his family; held not to change the settlement of such children, or give justices power to remove them to the husband's parish. *R. Walthamstow*, 1 Nev. & P. (x. s.) 460.

2. The 3 & 4 Will. 4, c. 40, continued until 1 May 1839, by 7 Will. 4, c. 10.

3. Where the pauper had been removed, with a copy of his examination, in which he had stated a hiring with Mr. P., and service with the wife, on which statement a notice of appeal was given, and the ground alleged that no settlement appeared on the examination; held, that the respondents could not introduce a new state of facts, which if communicated might have induced the appellants to have withdrawn their appeal, or have prepared themselves with fresh evidence. *R. v. Misterton*, 2 Nev. & P. (x. s.) 109; and 6 Ad. & Ell. 878.

4. Under 4 & 5 Will. 4, c. 76, s. 79, the notice of chargeability must be served by the removing parish; together with the copy of the order of removal. *R. v. Brixham*, 3 Nev. & P. (q. s.) 408.

5. Where the wife resided in the parish where her husband was confined in gaol, but she had access to him, held that an order of removal of her and her children was bad, as a separation of man and wife. *Reg. v. Stogumber*, 1 Perr. & Dav. (q. s.) 409.

6. The children of a former marriage not within the age of nurture, and left chargeable to the parish in which they are residing by the stepfather, who had absconded, held to be removeable to the place of settlement of their own father, notwithstanding the obligation of the stepfather to maintain them until the age of 16, under 4 and 5 Will. 4, c. 76, s. 57. *Reg. v. Stafford*, 1 Perr. & Dav. (q. s.) 414.

7. The Foundling Hospital, not being extra-parochial, and the objects received there being with the approval, and under certain regulations, by the directors; where a child had been left at the gate, though afterwards taken care of, on the refusal by the parish to take it into the poorhouse, held, that the child had not been so received by the Hospital as to relieve the parish from the burden of providing for it as casual poor. *R. v. St. Pancras Directors*, 7 Ad. & Ell. (q. s.) 750.

#### [C] RELIEF.

1. Under 4 & 5 Will. 4, c. 76, s. 38, 39, the Poor Law Commissioners have not jurisdiction to make an order for the election of a board of guardians in single parishes, where the administration of the poor laws is already vested by a local act in a board of directors. (Williams, J. diss.) *R. v. Poor Law Commissioners*, 1 Nev. & P. (x. s.) 371.

2. Where the pauper came into the respondent parish, *animo morandi*, and met with an accident, by reason whereof he became chargeable, and for

a considerable time could not be examined or removed; held, that such chargeability was not to be deemed as of casual poor, but whereon an order of removal and suspension might have been made, and the appellant parish therefore liable to the expenses incurred during such suspension; *aliter*, if he had not come with intent to inhabit, or was a foreigner, having no other settlement. *R. v. Oldland*, 3 Nev. & M. (x. s.) 529; and 4 Ad. & Ell. 929.

3. Facilities for the purchase of lands for poorhouses, under 4 & 5 Will. 4, c. 76, and 5 & 6 Will. 4, c. 69, amended by 1 Vict. c. 50.

4. Where a parish consisted of a royal burgh and a landward district, both of which had been always considered as one district for the management of the poor, and no distinction ever made as to questions of settlement or assessment; held, that in questions turning upon statutory enactments, although where the enactments are clear, usage would have no effect, yet that when silent, or expressed in terms of doubtful import, it may afford the construction, as affording a contemporaneous exposition, and the usage having been uninterrupted, the poor were entitled to relief indiscriminately from the parish funds. *Dunbar Corporation v. Roxburgh*, 3 Cl. & F. (r.) 335.

5. Where part of a parish was by a local Act separated and made a distinct parish by the name of G., for ecclesiastical purposes only, but continued for all other parochial purposes part of the original one, although in many acts they were spoken of as united parishes, the administration being vested in a board elected from them jointly, and they jointly maintained their own poor; held, that they were not to be deemed a union incorporated by any local act within the meaning of the exception in s. 32 of 5 & 6 Will. 4, c. 76, but the whole to be taken as a single parish, and which the commissioners might unite with others without the consent of two-thirds of the existing board of guardians. *Reg. v. Poor Law Commissioners*, in re Holborn Union, 3 Nev. & P. (q. s.) 77; and 6 Ad. & Ell. (x. s.) 56.

6. Under 4 & 5 Will. 4, c. 76, s. 26, the commissioners are empowered to include in unions any parish or district having a local act for managing the poor, although the guardians or trustees do not consent. *R. v. Poor Law Commissioners*, in re Whitechapel Union, 2 Nev. & P. (x. s.) 8; and 6 Ad. & Ell. 34.

7. And where the acts directed by the Poor Law Commissioners are clearly within their power, the court will not entertain the question whether they have exercised a sound discretion. *R. v. Poor Law Commissioners*, in re Newport Union, 6 Ad. & Ell. (x. s.) 54.

8. The notice under 4 & 5 Will. 4, c. 76, s. 73, of an application for an order of maintenance of a bastard child, signed by overseers of a township, but not by its own church officers (chapel wardens), held sufficient; and *quære* if necessary for all the overseers to sign it. *R. v. Yorkshire Justices of North Riding*, 2 Nev. & P. (x. s.) 103.



9. Repayment of loans for building workhouses, &c. regulated by 1 & 2 Vict. c. 25.

10. Assignment of army or naval pensions to guardians of poor, by 2 & 3. Vict. c. 51.

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[D] RATE.

1. Under an Inclosure Act, giving the rector of a corn-rent in lieu of tithes, and directing that, in the valuation, they should be deemed to be equal in value to one-fifth of the annual net value of such lands; held, that he was liable to be rated, there being no clause of exemption. *R. v. Westow*, 6 Nev. & M. (x. s.) 567; and 5 Ad. & Ell. 250.

And see *R. v. Boldero*, 4 B. & Cr. 467.

2. Where paving commissioners were empowered to erect gas works, and let out or grant lights, the rents of which were applicable to defray the expenses of such works, and the surplus to be applied to the other purposes of the Act; held, that the commissioners, holding premises for the purposes of such works, were not rateable as proprietors or occupiers thereof. *R. v. Beverley Gas Works*, 1 Nev. & P. (x. s.) 646.

And see *R. v. Liverpool*, 7 B. & Cr. 61.

3. Where by a local Act the guardians were directed to value the lands, &c., for the purpose of rating to the relief of the poor, and, by the custom of rating under the Act, machinery erected was not rated, nor the buildings as increased thereby in value, and a gas company, having their gas manufactory out of the parish, laid their pipes only by the licence of the paving commissioners, without any property in the soil; the company were rated for the houses and lands to which the gasholders were attached, also for the gasholders, and then for the pipes separately; held, that such rate was bad, by reason of the omission to rate other property in the parish, according to the increased value. *R. v. Birmingham Gas Company*, 1 Nev. & P. (x. s.) 691.

4. Where, prior to the passing a local Inclosure Act, the freemen of a certain ward were entitled to right of stray and average over a moor, which rights were extinguished by the Act, and allotments in lieu thereof made; and it appeared that the regulation of the exercise of the rights were in certain pasture-masters and wardens, appointed by the mayor and aldermen, of whom the mayor was always one, the rest being aldermen, and who audited their accounts; held, that, although they received no benefit in their corporate capacity, except as any of them might be entitled as such freemen, the corporation were the parties rateable. *R. v. York Mayor, &c.*, 1 Nev. & P. (x. s.) 530.

5. Where a local Act for rebuilding a church, empowered the trustees to make a rate on the houses, &c., and hereditaments "rated or rateable to the poor;" held, that tithes were rateable, and, being clearly so, a *mandamus* lay to justices to compel the issuing a distress warrant against a

tithe occupier refusing to pay the rate. *R. v. Bucks Justices*, 1 Nev. & P. (x. s.) 503.

6. Where one of two overseers refused to concur in making a poor's rate, held, that the other might apply for a *mandamus* directed to all; and that the 1 Will. 4, c. 21, s. 6, makes no alteration as to the parties who may obtain the writ, but only with regard to the costs on such applications. *R. v. Gadsby*, 1 Nev. & P. (x. s.) 572.

7. A *mandamus* granted absolutely in the first instance, against the churchwarden and overseer of a district of the parish refusing to concur in a poor-rate, unless certain lands were stated therein to be in a particular district. *R. v. Edlaston Overseers, &c.*, 1 Nev. & P. (x. s.) 20.

8. Where governors of poor rented premises out of their district, and occupied them as lodgings for their poor, which were rateable in the parish where situated; held, that the occupation being only for the disposal of the poor, was not a ground of exemption from rateability to the relief of the poor of such parish. *Bristol Governors, &c. v. Wait*, 6 Nev. & M. (x. s.) 383; and 5 Ad. & Ell. 1.

9. Where the local Act imposed the rate on all persons occupying and enjoying any land, &c., tenement or hereditament; held to mean only such hereditaments as were capable of actual corporeal occupation, and not to incorporate hereditaments, for which the party would not have been liable to be rated under 43 Eliz. c. 2. *Colebrook v. Walker*, 6 Nev. & M. (x. s.) 483; and 4 Ad. & Ell. 916.

10. Trustees of a road made under a local Act, although beneficially interested in the tolls, held exempt from rate in respect thereof, under 3 Geo. 4, c. 126, s. 51. *R. v. Dover-street Trustees*, 1 Nev. & P. (x. s.) 157.

11. Where a gas company had laid down pipes, &c. for the supply of gas, through various parishes and certain colleges, &c., extra-parochial, held, 1st, that the principle of rating the company in one parish upon what amount a responsible tenant would give for the whole apparatus, after making deductions for the wear and tear of machinery, &c. was the correct criterion of rating; 2dly, that the proper deduction from such rent was such an annual sum as would replace the works when worn out; 3dly, that a claim of deduction for "the profits in trade," of the company, being independent of and beyond the rent, was properly disallowed; 4thly, that the distribution of the assessments in each parish, in proportion to the amount of profits received in each respectively, was wrong, the company being liable to be rated in respect of its occupation in each parish, and that none could be imposed upon such parts as were in extra-parochial places, the proportion of which was to be deducted. *R. v. Cambridge Gas Company*, 3 Nev. & P. (q. s.) 262.

12. Where upon the original hiring of the appellant as a brewer's servant, at a salary, and to occupy premises belonging to his employers, free of rent and taxes; he continued to occupy for some time, and then left it and took a house, for which his employers paid the rent and rates, but



not belonging to them, and the appellant was assessed in his own name for the King's taxes and poor-rate, he also paid the registration fee, and voted as the occupier; held to have been properly rated, he being in fact the tenant of the house, and the payment of the rent by his employers giving them no control over it. *R. v. Wall-Lynn*, 3 Nev. & P. (x. s.) 411.

13. Where a bridge, standing in the parishes of A. and W., consisted of a wooden structure resting on piles in the bed of the river, and brick abutments on the sides, and in the parish of A. resting on piles in the river, was a toll-house, occupied by the collector of the bridge tolls; the repairs had been from time to time done by the appellant, who repaired also the planking of the carriage way, but not the road itself upon the bridge, and who, as grantee from the crown, received the bridge tolls. It appeared that he demised them by parol agreement to E. from year to year, at a rent to be paid by monthly instalments, and secured by a warrant of attorney, but there was no grant or demise executed; and held, that there being no demise of land *eo nomine*, and the tolls passing only by deed, no interest passed out of the appellant, who was to be considered as still in possession of them, and therefore properly rated; held, also, that as it appeared he took under a grant by the description of a toll traverse, and that it was so described in ancient documents, that the sessions were warranted in so treating it. *R. v. Marquis of Salisbury*, 3 Nev. & P. (q. s.) 476.

14. Real property is to be rated according to its actual value, as combined with the machinery attached to it, without considering whether such machinery be real or personal property so as to be liable to distress or seizure under a *fi. fa.*, or whether it would belong to the heir or executor, landlord or tenant, at the expiration of the lease. *R. v. Guest*, 2 Nev. & P. (q. s.) 663; 8 Ad. & Ell. (q. s.) 950.

And see *R. v. Birmingham and Staffordshire Gas Comp.* 6 Ad. & Ell. 634.

15. Where the rents and profits of lands vested in the corporation, by the 5 & 6 Will. 4, c. 76 (Municipal Corporation Act), were received by the treasurer of the borough to the account of the borough fund, and under s. 92, applicable to public purposes, held not rateable to the poor. *Reg. v. Liverpool, Mayor, &c.*, 1 Perr. & Dav. (q. s.) 334.

16. Where the original relation was that of lord and commoners, and there was nothing to show that the interest of the freemen of a corporation over wastes was more than that of commoners, although with large and unusual enjoyments, and nothing more than an incorporeal hereditament, held that the rate could not be sustained. *Reg. v. Alnwick Chamberlains, &c.*, 1 Perr. & Dav. (q. s.) 343.

17. Upon the construction of the several Acts regulating the Leeds and Liverpool Navigation Company, held, that they were liable to be rated for the land occupied by the canal, basins and towing paths, according to the general value of the land immediately adjoining them; that for

branches, not being part of the original line, but communicating therewith, they were to be considered as part of the whole navigation, and to be rated according to their amount in value as mere land at the time of rating; and that the wharfs and quays, as well as warehouses, &c. were to be rated according to the value of similar property in the parish. *Reg. v. Leeds and Liverpool Navigation Company*, 2 Nev. & P. (q. s.) 540; and 7 Ad. & Ell. 671; reviewing and supporting the case of *R. v. Monmouthshire Canal Company*, 3 Ad. & Ell. 619; 5 Nev. & M. 68.

18. Assessment and collection of rate regulated by 2 & 3. Vict. c. 84.

And see *Mandamus; Officer.*

#### [E] APPEAL—NOTICE OF.

1. Service of the notice of appeal on an attorney, although appearing to be the attorney of the respondent parish, held insufficient; but the sessions having a power to adjourn, held that they might receive the appeal, although no statement of the grounds had been given; the 4 & 5 Will. 4, c. 76, s. 81, only prevents the appeal being heard: the statement of grounds, and notice of appeal, are to be considered separate instruments. *R. v. Kimbolton*, 1 Nev. & P. (x. s.) 606.

2. Where the notice only stated the grounds to be that the paupers were settled in another parish, without going on to state the nature of that settlement, held a sufficient compliance with 4 & 5 Will. 4, c. 76, s. 81; and a *mandamus* to the sessions to enter continuances and hear the appeal. *R. v. Cornwall Justices*, 5 Ad. & Ell. (x. s.) 134; and 1 Nev. & P. 20.

3. But where the statement of the grounds of appeal alleged that the pauper gained a settlement by hiring and service in a third parish; held, too general and insufficient, and the sessions having refused to hear the appeal, the court refused a *mandamus* to them to enter continuances and hear it; held also, that the notice and statement signed by the two overseers was sufficient, although there was also one churchwarden. *R. v. Derbyshire, Justices of*, 1 Nev. & P. (x. s.) 703.

4. Where, from the copy of the examination, it appeared that the pauper stated that his father belonged to the parish of C., and that he was a certificated man from C.; held that, under this notice, a settlement of the father by apprenticeship in C. might be shown. *R. v. Helvedon*, 1 Nev. & P. (x. s.) 138.

5. The grounds of appeal required to be stated in the notice are not confined to those on which evidence is to be given, and the sessions therefore held justified in refusing to hear objection as to defects on the face of an order of removal. *Quare*, if the omission to state the names and ages of children removed is necessarily bad? *R. v. Withearnwick*, 1 Nev. & P. (x. s.) 423.

6. The mere fact of being left out of the rate, where no undue motive appears, does not of itself import a grievance to ground an appeal. *R. v. George*, 1 Nev. & P. (x. s.) 451.



7. Where the sessions grant a case upon an appeal, it being a complete remedy against a misdecision, the court will not grant a *mandamus* to them to enter continuances and hear the appeal. *R. v. Suffolk Justices*, 1 Nev. & P. (x. s.) 306.

8. Where a pauper was removed with his wife and six children (named) by an order confirmed on appeal, and by a subsequent order, a child born during the marriage, but not named in the first order, and unemancipated, was removed to the same parish; held, on appeal against the latter order, that although the former one was conclusive as to all the facts stated in it, it was competent to the appellants to show a state of facts which had arisen subsequently, viz. that by a decision of the Ecclesiastical Court the marriage had been declared void *ab initio*, and so to defeat the derivative settlement. *Reg. v. Wye*, 3 Nev. & P. (q. s.) 6.

9. The 5 & 6 Will. 4, c. 76, s. 81, requiring the statement of the grounds of appeal to be delivered 14 days at least before the first day of the sessions, held to mean 14 clear days, exclusively of the day of delivery and the first day of the sessions. *R. v. Salop Justices*, 3 Nev. & P. (q. s.) 286.

10. The parish being only aggrieved by the actual removal, although they may be contingently liable to expenses and costs under 4 & 5 Will. 4, c. 76, s. 79, held that an appeal to the sessions next after the removal was a sufficient time. *Reg. v. Salop Justices*, 6 Dowl. (p. c.) 28.

11. An appellant having given a statement of the grounds of appeal rightly signed by the parish officers, held not estopped from showing that it is by the proper number, although the notice of appeal may have been signed by a greater number; held, also, that the order, good on the face of it, having been quashed at the instance of the respondents, from not being prepared with proof of facts, it was to be taken as having been quashed on the merits, and the decision of the sessions conclusive. *Reg. v. Church Knowle*, 2 Nev. & P. (q. s.) 359.

12. The statement of the grounds of appeal, signed by the majority of the parish officers, is sufficient, and *semb.*, service on one only, if without fraud. *R. v. Warwickshire Justices*, 2 Nev. & P. (x. s.) 153; and 6 Ad. & Ell. 573.

And see *R. v. Derby Justices*, 1 Nev. & P. 703; and 6 Ad. & Ell. 585.

13. The appellants cannot insist on any point for quashing the order, not stated in the grounds of appeal; held therefore, that the respondents were not obliged to give evidence of the settlement on which the removal was made, where the notice was of a settlement in a third parish. *Reg. v. Hockworthy*, 2 Nev. & P. (q. s.) 383.

14. Where the copy of the examination sent with the order of removal stated a hiring and service in 1813, but the proof at the hearing of the appeal was, that it took place in 1810, held a fatal variance, and the sessions right in rejecting the evidence of the hiring in 1810. *Broseley, ex parte*, 2 Nev. & P. (q. s.) 355.

15. Where a local road act, giving a power of appeal against assessments to any party thinking himself aggrieved, empowered also the trustees to sue and be sued in the name of any one or more; held, that a notice of appeal by one on behalf of the trustees, was sufficient, although no authority proved, they having made no disclaimer. *R. v. Surrey Justices*, 5 Ad. & Ell. (x. s.) 701, n.

16. Where the sessions quashed an order, and refused to state a case, and the orders, notices, and a statement, were brought up by *certiorari*, when the notice of appeal under 4 & 5 Will. 4, c. 74, s. 81, appeared to be defective, the court refused to interfere with the order of justices, which appeared good on the face of it. *Reg. v. Abergele*, 3 Nev. & P. (q. s.) 406.

17. Where the order of removal was served on the 8th June, the sessions being on the 28th, and the practice requiring fourteen days' notice of appeal, and none having been given, the removal was made on the 29th, when notice was given for the October sessions; held, that the sessions were bound to hear the appeal, the parish not being aggrieved until the actual removal. *R. v. Carpenter*, 2 Ad. & Ell. (x. s.) 894.

18. Where a township, having a chapel and its own chapelwardens, was wholly independent of the parish, except contributing a small sum to the repair of the church, held not to be, by virtue of the office, overseers, and a notice signed by the overseers of the township only, valid: upon an objection that the notice was not signed by the assistant overseer, the party must show that it was his duty to sign. *R. v. Yorks, North Riding*, 6 Ad. & Ell. (x. s.) 863.

19. An assistant overseer being a servant of the vestry, though with a limited authority, an appeal lies, against his accounts; held, also, that the time for giving notice of appeal to the next general sessions is to be calculated from the time of the parish having the opportunity of knowing the contents of the account, and that the allowance of the account is to be considered as published at the time when deposited (according to 17 Geo. 2, c. 38, s. 2), with the parish officers for public inspection; where, therefore, that was done on the 8th of May, the June sessions were the proper sessions to which the appeal was to be made. *Reg. v. Watt*, 2 Nev. & P. (q. s.) 367.

And see *Sessions*.

#### [F] OVERSEERS.

1. The 4 & 5 Will. 4, c. 76, prohibiting a parish officer from supplying goods by way of relief to *any person* in the parish, *semb.* repeals the penalty under the former Act, 55 Geo. 3, c. 137, s. 6; held, therefore, that an action could not be maintained under the latter Act against an officer for a supply to an individual pauper. *Henderson v. Sherborne*, 2 Mees. & W. (ex.) 237; supporting *Proctor v. Mainwaring*, 3 B. & Ad. 145.

2. An item in overseers' accounts for defending an appeal against their accounts, held to be in no supposable case allowable. *R. v. Johnson*, 6 Ad. & Ell. (x. s.) 340.



3. Where cottages were erected on lands purchased with charitable funds given for the use of the poor, and others were afterwards added from funds arising from the sale of waste lands under an inclosure act, directed to be applied to the relief of the poor; the repairs were afterwards paid out of the poor-rates, and the rents, which were always collected, were accounted for as rates; held, that such cottages were not to be deemed workhouses within the 4 & 5 Will. 4, c. 76, and 5 & 6 Will. 4, c. 69, which the guardians were entitled to take, although in occasional instances paupers had been placed in such cottages, it not being the general purpose to which they were applied. *Cantrell v. Windsor Union*, 4 Bing. N. S. (c. r.) 348.

4. Where the putative father of a bastard paid a sum to the defendants, being then parish officers, in exoneration of all claim, and the child dying before the year expired, they paid over the balance not expended to their successors; held, that the money paid being on a transaction originally illegal and void, was, from the first, money in the hands of the defendants, had and received to the use of the plaintiff, and he was entitled to recover it back from them. *Chappell v. Poles*, 2 Mees. & W. (ex.) 867.

And see *Townson v. Wilson*, 1 Camp. 396.

5. Where a parish consisted of six separate districts, five of them having been always distinct chapelries, disconnected with each other, and separately maintaining their own poor; the sixth was also divided into two districts, one, P., having no church, but the inhabitants attending the church of St. A., the other district; but P. had a constable, and collected its own church, highway, county, and constable's rates; St. A. had two overseers, and the vicar's churchwarden; P. elected the other, and had also one overseer; the poor-rates for the two districts, P. and St. A. were separately made and collected, but formed a common fund, and the poor were maintained in a common workhouse in St. A.: held, that P. was not a separate district, entitled to the benefit of 43 Eliz., c. 2, and that an appointment of two overseers for it was bad. *Reg. v. Worcestershire Justices*, 3 Nev. & P. (q. s.) 434.

6. In trespass for levying a poor rate under a warrant of distress issued by the defendants as justices, the rate being alleged void on the ground of the overseers having been unduly and fraudulently appointed at a meeting of borough justices; the jury having negatived the fraud, a new trial refused; the appointment being a judicial act, and the validity of the appointment questionable on an appeal to the sessions, it could not be questioned in a collateral way. *Pinney v. Slade*, 5 Bing. N. S. (c. r.) 319.

And see *Distress*, 7.

## PORTIONS.

1. Where, on the marriage of one daughter, the father covenanted to make her fortune equal to that of her sisters, and by his will gave her a

sum equal to that given to them, but limited their shares to them for life, with remainders to their issue, with survivorship among them on one dying without issue; held, that the absolute interest given to such daughter being equivalent to the interest given to the others and their issue, with the contingent interest on the share of each other, upon the death of one without issue, the first had no title to claim a further provision in respect of the addition accruing to her sisters. *Clegg v. Clegg*, 2 Russ. & M. (ch.) 570.

2. Where estates were limited in a settlement for a term, to raise £——, for portions of all the children of the marriage, except an eldest or only son, to be vested and paid at such times as the husband should appoint, and, in default of his appointment, at twenty-one, but not to be paid until after his death, with proviso that if any son should become an eldest or only son before the time appointed for payment of his portion, that then his share should go to the others; the events were, that an eldest son attained twenty-one, and afterwards, with the father, suffered a recovery, and re-settled the estates to the use of the father for life, remainder to the son in fee; the other children, a son and three daughters, all attained twenty-one, and the eldest died intestate and without issue, and the father appointed the sum amongst the surviving son and three daughters, directing that the shares should vest on the execution of the deed, but not be paid until after his death; and the second son also died before his father: held, that the share so appointed to him did not go over to the sisters. *Spencer v. Spencer*, 8 Sim. (ch.) 87.

3. Where by settlement the estate was limited on the husband for life, then on the wife for life, and from and after her decease to trustees for a term, for the raising and levying younger children's portions, to be paid at twenty-one, or marriage; the wife died, leaving younger children, who all attained twenty-one; held, that the portions were raiseable immediately, and the term saleable in the lifetime of the father; in the construction of settlements, the court will collect the intention of the settlor from the instrument taken altogether, and not from any views of expediency of its own. *Smyth v. Foley*, 3 Younge & C. (xx.) 142.

4. Where, in a settlement, a term was created for raising portions for younger children, which upon the request of the husband might be raised during the lives of the husband and wife, but the intention was clear that the portions should not be payable until after their deaths, and amongst such as came within the terms; in case of sons, of attaining twenty-one, or leaving issue; and, if daughters, attaining eighteen, or of marriage, and to survive, to the survivor and survivors of them; held, that upon the principle of the intent governing such instruments, a daughter who attained eighteen, but died before the husband and wife, was not entitled to a portion. *Whatford v. Moore*, 7 Sim. (ch.) 574.

5. Where by settlement, estates were limited to the settlor for life, remainder to the first and other sons in tail, and a term created for raising portions for younger children, the interest to be



vested in sons at 21, payable after the determination of the estate for life; the eldest son attained 21, suffered a recovery, and barred the estate in remainder, but dying during the continuance of the estate for life, he devised it to his brother for life; and held, that the second son never having acquired a vested interest in the portion, and the interest in the estate having been defeated by means incident to the estate created by the settlement before he acquired the character of an eldest son, he was not entitled to any share of the portion. *Peacocke v. Pares*, 2 Keene (CH.) 689.

6. Where a testator, clearly intending to provide for his daughters equally, by will devised each 100*l.*, and a rentcharge of 50*l.* out of the estate bequeathed to his son, to arise on the death of the mother, and contingent as to the amount on the event of survivorship, and he afterwards, by a codicil, devised an after-purchased estate to them as tenants in common, and on their respective marriages, he advanced the one by money or bond, and the other by a settlement of an estate, and also by an advance of money, held, that the latter did not amount to an ademption: mere difference of amount, or slight circumstances of difference in the times of payment would not prevent the presumption of the one being an ademption of the other: but the principle does not extend to devises of real estate, which would be to repeal the statute of frauds, nor does the bequest of a residue fall within the rule. *Davys v. Boucher*, 3 Younge & Cr. (EX. EQ.) 397.

7. The case of *Whatford v. Moore*, 7 Sim. 574, affirmed by Lord Chancellor, 3 Miln. & Cr. (CH.) 270.

And see *Legacy; Marriage Settlement*.

## POWER.

1. An appointment under a power to one of the objects of the power, upon an understanding between them that the fund shall be lent to the appointor, held bad. *Arnold v. Hardwick*, 7 Sim. (CH.) 343.

2. Where a testatrix, having a power to appoint property under the will of her mother, after giving specific legacies, and reciting that the amount of her property was not yet ascertained, the same awaiting the settling of her mother's affairs, directed that, if her money and personal estate should not turn out sufficient to pay the legacies in full, they should abate, and she then disposed of her furniture, &c. and the residue of her money and personal estate, no reference being made to the power or the subject of it; held not an execution of the power. *Buxton v. Buxton*, 1 K. (CH.) 753.

3. Where the appointment was to be by will, signed, sealed and published in the presence of, and attested by three or more credible witnesses; and the party executed an instrument, commencing, "I do publish and declare this to be my last will," &c., and concluded, "In witness whereof, I have, to this my last will, &c., set my hand and seal—Witness, A. B., C. D., E. F.;" held a good

execution of the power, and that after 30 years, on the production of it, the attestation was sufficiently proved, without calling one of the attesting witnesses who was still alive. *Doe d. Spilbury v. Burdett*, 4 Ad. & Ell. (K. B.) 1; and 6 Nev. & M. 259.

And see *S. P. Buller v. Birt*, 1b. 281.

4. The use of the term "witnesses" in the attestation clause, operates as an affirmation of what has been done in the presence of the witnesses, and stated in the body of the instrument. *Ib.*

5. Where the will did not refer to the power, and the testatrix was possessed of property to which the language of the will would properly apply; held, that a gift of articles which might or might not have been subjects of the power, was not sufficient to make the will operate as an execution of it. *Hughes v. Turner*, 3 Myl. & K. (CH.) 666.

6. Where, upon partition by coparceners and their husbands, the share of one was limited, after life estates to the parents, to the use of the children for ever, without words of inheritance, "subject to such divisions, directions, orders and appointments as the husband, by deed or will, should think fit to direct or appoint:" held to be construed as if limited to such uses as he should by deed or will appoint, and, in default, to the children as joint-tenants for life, and to amount to a general power of appointment in him of the reversion, and not merely of distribution. *Doe d. Chadwick v. Jackson*, 1 M. & Rob. (N. R.) 553.

7. Where, by a devise, power was given to the tenant for life to grant leases, at the best yearly rent that could be reasonably got without taking any fine, and that there should be a clause of re-entry for non-payment of the rent; under which power a lease was granted to hold from 11 Oct. 1833, at the rent of £—, payable by equal half-yearly payments, viz. on, &c., in every year, "except the last half-year's rent, which was thereby reserved and agreed to be paid on the 1st August next, before the determination of the term;" and it contained a clause of re-entry, if the rent should be unpaid for 42 days after it became due; held, that it was a valid execution of the power. *Doe v. Rutland*, 2 Mees. & W. (EX.) 661.

8. Where, upon marriage, the husband's estate was settled to his use for life, remainder to the use of all and every, or such one or more of the children, or for such estates, &c., and charged, &c., as he should appoint; and he appointed to trustees upon trust to pay the rents, &c. to his daughter for her sole and separate use during the life of her husband, without power of anticipation; held to be a valid execution of the power. *Thornton v. Bright*, 2 Myl. & Cr. (CH.) 230.

9. Where a power was to be executed by any writing, attested by two or more witnesses, or by will, attested by three or more witnesses; held, that an execution by a testamentary paper, attested by two only, was not valid. *Bainbridge v. Smith*, 8 Sim. (CH.) 86.

10. Where a married woman was to execute the power by her will, signed and published in the presence, &c.; held, that it was well executed, although the attestation stated the will to have



been signed, sealed, and *delivered*, delivery being equivalent to the publication of a will. *Curtis v. Kenrick*, 3 Mees. & W. (rx.) 461.

11. Upon a bequest of a fund to the testator's daughter for life, and after, to his niece, to be transferred if unmarried, but in case she should then be married, to transfer to such persons as she, whether sole or married, should appoint, and in default thereof over; the niece married in the lifetime of the daughter, and during coverture, by will executed the power given her; held a good execution of the power. *Ashford v. Cafe*, 7 Sim. (cn.) 641.

12. A power of appointment by husband and wife, held not revoked by the conveyance by the husband only to his provisional assignee, on his taking the benefit of the Insolvent Act; but that a subsequent conveyance by both in execution of their joint power of appointment to trustees, for the benefit of his creditors, was a valid appointment. *Jones v. Winwood*, 3 Mees. & W. (rx.) 653.

13. Where a *feme covert*, entitled to an annuity, assigned to trustees in trust, to pay to such persons as she should appoint, but so as not to deprive herself of the benefit of it by sale or anticipation, and for want of such appointment to pay the same to her separate use; held, that she had both a limited power of appointment, and also the uncontrolled dominion over the property. *Barrymore v. Ellis*, 8 Sim. (cn.) 1.

14. A trustee having power to nominate any other to succeed him in the trust, held that he might appoint three. *Sands v. Nugee*, 8 Sim. (cn.) 130.

15. Where, upon the marriage of the bankrupt, estates were limited to him for life, and after providing a jointure for the wife, a power was given to them jointly, or to the survivor, to appoint to the children of the marriage, and in default thereof, the limitation was to such children as should be living at the death of the surviving parent, with an ultimate remainder to the husband in fee; before any appointment, he became bankrupt, after which, with the wife, he executed an appointment in favor of the children, and after his death, and after the filing of the bill, the wife executed an appointment to the like uses; held, that as the bankruptcy and assignment would have extinguished the power if it had been to be exercised by the husband only, he could not, by joining his wife, defeat the effect of the act of law to which his estate had become subject, his own disqualification rendering it impossible that the joint power should be exercised; held, also, that the wife having survived, and no life estate limited to her, the limitation to the children at the death of the survivor failed, and no appointment made by her alone could be valid. *Hole v. Escott*, 2 Keene, (cn.) 444.

16. Where, by settlement, a power was given to the wife of appointing, "amongst her children, or remoter issue," and she appointed to the children, including one at the time under age, and unmarried, but subsequently limited the interest to that daughter for life, and after her decease amongst her issue, held that such limitation was too remote, and the appointment being complete,

she took an absolute interest. *Kampt v. Jones*, 2 Keene (cn.) 756.

17. Where the testator gave to his widow a power of sale for the benefit and advantage of his children, and declared that he empowered her to sell "all my estates whatsoever, and the money arising therefrom, with my personal estate, my said wife shall divide and proportion amongst my said children as she may think proper;" held, that she took a life interest, and that it was imperative on her to execute that power, and by implication gave the money to the children, and having survived them all without having made any appointment, the gift of the fund to the grandchildren was not an execution of the power; held, also, that the direction to sell operated as a conversion of the real estate, and that the children were entitled to take the proceeds of the sale as personality. *Grievson v. Kirsopp*, 2 Keene (cn.) 653.

18. Where lands were devised on trusts as to one-fifth to the testator's son for life, and on his death to be conveyed, with certain limitations, to his children; and as to another fifth, in trust for his daughter, until she attained 25, or was married, and then to be conveyed and settled to her use as they might think proper; held, that the events having taken place on which the trusts were to be performed, the trustees having omitted to perform them, the power was at an end by the determination of the trusts as intended by the testator: the trust, although existing, was not a continuance of the trust intended by the will, and reposed in the trustees by the testator. *Wood v. White*, 2 Keene (cn.) 664.

19. Bequest of three per cent. stock in trust for testator's daughter for life, and afterwards for such persons and purposes as she should, by deed, or her will, signed and published, and attested by two witnesses, appoint, and in default of her appointment in trust for her children: the daughter died unmarried, and by will, signed and sealed only, but attested by three witnesses, directed certain pecuniary legacies to be paid out of the monies invested in her name, "in the four per cent. Government securities," she having no stock of any kind, except the stock standing in the names of the trustees under her father's will, nor any other fund to satisfy the legacies, held, that the party producing her will to witnesses, who attested the signing and sealing it in her presence, was to be taken as a publication, and the power therefore duly executed in form: held, also, that the description, though erroneous, sufficiently pointed out the property upon which she meant her power to operate, and was a good execution in substance. *Mackinley v. Sison*, 8 Sim. (cn.) 561.

20. Where, by settlement, funds were vested in trust for the widow, and afterwards to transfer in such parts and shares among the children of the testator, and subject to such regulations with regard to the settling such shares of the appointees in their separate use, as the widow should appoint, held, that an appointment to the husband of one of the objects of the power, after deducting a sum due to the appointor, was not a valid execution of the power; nor did the power author-



ize an appointment to the grandchildren, but that an alternative gift over by surviving children, in case any deed in the lifetime of the appointrix without issue, was good. *Hewitt v. Lord Dacre*, 2 Kene (H.) 622.

And see *Devises; Lease*.

## PRACTICE (COM. LAW).

- [A] PROCESS—SERVICE.
- [B] APPEARANCE—DISTRINGAS TO COMPEL.
- [C] DECLARATION—VENUE—STRIKING OUT COUNTS—IRREGULARITY.
- [D] PLEAS—SEVERAL—ADDING—RULES TO PLEAD—TIME FOR—NOTICE OF—DEMAND OF—OYER.
- [E] DEMURRER.
- [F] AMENDMENT.
- [G] PARTICULARS.
- [H] AFFIDAVITS.
- [I] ORDERS—RULES—MOTIONS—SERVICE OF.
- [K] STAYING PROCEEDINGS.
- [L] ATTACHMENTS.
- [M] EXAMINATION OF WITNESSES—COMMISSIONS FOR—PRODUCTION OF PAPERS—ADMISSIONS.
- [N] ISSUES.
- [O] TRIAL—NOTICE OF—COUNSEL—RIGHT TO BEGIN—EXAMINATION—WITHDRAWING JUROR—VERDICT—NEW TRIAL.
- [P] JUDGMENT.
- [Q] COSTS—TAXATION OF.

### [A] PROCESS—SERVICE.

1. The Uniformity of Process Act requiring the copy of the *capias* to be delivered to the defendant "forthwith" after the arrest; held, that a delivery at seven in the evening, where the arrest took place at nine in the morning, was not a compliance with the statute. *Shearman v. McKnight*, 5 Dowl. (r. c.) 572.

2. It is not necessary that the *capias* should be returned previous to issuing the *alias*, it is only so in order to prevent the operation of the Statute of Limitations, or of proceeding to outlawry. *Gregory v. Des Anges*, 3 Bing. N. S. (c. r.) 85; 3 Sc. 534; and 5 Dowl. (r. c.) 193.

3. A mistake in the year in the *teste* of the copy of writ, the writ itself being correct, is merely an irregularity, and waived by the defendant not applying before the time for appearing has elapsed. *Edwards v. Collins*, 5 Dowl. (r. c.) 227.

4. Where a defective copy of the process is served on the defendant, he is not bound to show that a similar defective copy was delivered to the sheriff; and, unless an answer is given by the

plaintiff, the defendant will be discharged out of custody. *Hodd v. Langridge*, 5 Dowl. (r. c.) 721.

5. Where the writ contained no other description of the defendant than his surname, held irregular, and the defendant entitled to be discharged out of custody. *Margetson v. Tugghie*, 5 Dowl. (r. c.) 9.

6. So, where no place of residence was given. *Ward v. Watts*, 1b. 94.

7. But held immaterial in the Exchequer, where no rule requires the indorsement of the defendant's residence. *Strong v. Dickenson*, 5 Dowl. (r. c.) 99.

8. Where the writ of summons was not truly stated in the writ of trial; held irregular, and all subsequent proceedings set aside, although the defendant did not appear at the trial. *White v. Farrar*, 2 Mees. & W. (ex.) 288.

9. Where the *capias* was indorsed as issued by, &c., "agent for the plaintiff in person, who resides at B.," held irregular. *Lloyd v. Jones*, 1 Mees. & W. (ex.) 549; and 5 Dowl. (r. c.) 161.

10. A return to a *capias*, "he is not to be found in my bailiwick," held unusual and irregular; but held, that want of due diligence in making the arrest is not a ground for an attachment. *R. v. Sheriff of Kent*, 2 Mees. & W. (ex.) 316; and 5 Dowl. (r. c.) 451.

11. Where the process was issued by the agent of the plaintiff in person, and omitted to state the particulars of the plaintiff's residence; held insufficient. *Lloyd v. Jones*, 5 Dowl. (r. c.) 161.

12. A misdirection of the writ to the constable of "Castle of Dover," instead of "Dover Castle;" held no ground for discharge of the defendant. *Frank v. James*, 5 Dowl. (r. c.) 723.

13. The court refused to set aside the proceedings on the ground that the writ of summons against Thomas G. was served on William G. *Griffin v. Gray*, 5 Dowl. (r. c.) 331.

14. The Act not having defined what shall be deemed personal service, it is sufficient if the court is satisfied, from the circumstances shown, that the defendant had possession of the process. *Williams v. Piggott*, 1 Mees. & W. (ex.) 574; 1 Tyr. & Gr. 953; and 5 Dowl. (r. c.) 320.

And see *Rhodes v. Innes*, 7 Bing. 329.

15. Where the writ of summons had been only served on an agent of the defendant, the *distringas* refused. *Gridley v. Thorn*, 5 Dowl. (r. c.) 383.

16. The affidavit of service of notice upon a creditor by leaving it with a person who resided in the house, who informed the deponent it had been delivered, not going on to allege a belief of such statement; held insufficient. *Robinson v. Gompertz*, 4 Ad. & Ell. (x. s.) 82.

17. Where the *distringas* was served with a notice subscribed, that it was to compel an appearance, held that it could not be made the foundation of subsequent process of outlawry. *Vere v. Gowar*, 3 Bing. N. S. (c. r.) 503; 5 Dowl. (r. c.) 494; and 4 Sc. 287.



18. A plaintiff is entitled to a *distingas* in continuation of former writs for the purpose of proceeding to outlawry, although they may have been sued out only to save the Statute of Limitations. *Reay v. Youde*, 2 Mees. & W. (zx.) 188.

19. A *distingas* issued after the four months during which the summons was returnable, set aside. *Abbotts v. Kelly*, 3 Bing. N. S. (c. r.) 478; 4 Sc. 256; and 5 Dowl. (r. c.) 478.

20. Where the copy served commenced, "William Fourth," &c., instead of, "Victoria," &c.; service set aside with costs. *Drury v. Davenport*, 6 Dowl. (r. c.) 162; and 3 Mees. & W. (zx.) 45.

21. The rule requiring indorsement of the amount of debt and costs on the writ, held not to apply to an action of debt for penalties for bribery under the Municipal Corporation Act, (5 & 6 Will. 4, c. 76, s. 54.) *Davies v. Lloyd*, 6 Dowl. (r. c.) 173; and 3 Mees. & W. (zx.) 69.

22. It is not irregular to sue out separate writs of summons against separate defendants for the same cause of action, provided they be issued upon one *præcipe*, and bear the same date. *Angus v. Coppard*, 6 Dowl. (r. c.) 137; and 3 Mees. & W. (zx.) 57.

23. Writ of *hab. corp.* sued out by a prisoner amended by substituting 7 Will. 4, (the year of the reign,) for 1 Vict., as the court would take notice that the queen did not then reign. *Davies, ex parte*, 4 Bing. N. S. (c. r.) 17; 3 So. 241; and 6 Dowl. (r. c.) 181.

24. Where by the affidavit for a *distingas* to compel appearance to a writ of summons, it appears that the defendant is abroad, the entry of appearance and judgment signed thereon held irregular, the proper course being by process of outlawry. *Partridge v. Wallbank*, 2 Mees. & W. (zx.) 893.

25. Where the process could not be served personally, the defendant being lunatic, and his keeper not allowing him to be seen, the court refused to allow an appearance to be entered upon the return of *nulla bona* and *non est inventus*. *Starkie v. Skilbeck*, 6 Dowl. (r. c.) 52.

26. Where the affidavit in support of a *distingas* to compel appearance only deposed as to inquiry at the defendant's supposed place of residence, held insufficient. *Eadaile v. Marshall*, 4 Bing. N. S. (c. r.) 172.

27. Upon such an application, the affidavit must show expressly that the deponent believes the party to be resident in England; and held insufficient where it only alleged inquiries to have been made at the last place of abode. *S. C.*, 6 Dowl. (r. c.) 400.

28. Where the service of the writ of summons was irregular, held that a rule to set aside the service and copy of the writ, did not ask too much. *Argent v. Reynolds*, 6 Dowl. (r. c.) 480.

29. Where three defendants were arrested on bailable process, and one, being administratrix, was discharged, and the plaintiff declared against

the other two; held, that after they had obtained time for pleading, and they had pleaded, it was a waiver of irregularity. *Bartrum v. Willia us*, 4 Bing. N. S. (c. r.) 301; and 6 Dowl. (r. c.) 397.

30. Description of the defendant in the writ and declaration, by the initial of his Christian names only, held only a ground for amending at the plaintiff's costs, and not of setting aside the writ and subsequent proceedings. *Rush v. Kennedy*, 7 Dowl. (r. c.) 199; and 4 Mees. & W. (zx.) 586.

31. The description of the last place of the defendant's abode, when his actual residence cannot be found, is sufficient, the indorsement thereof being for the benefit of the defendant and not of the sheriff: where no additional place was indorsed on the *ca. sa.*, held irregular. *Bettys v. Thompson*, 7 Dowl. (r. c.) 322.

32. Description of the defendant as of Newcastle-upon-Tyne, within the county of Northumberland, a part of that place being now within that county, held not bad on the face of the writ. *Rippon v. Dawson*, 5 Bing. N. S. (c. r.) 206; and 7 Dowl. (r. c.) 247.

33. Where the *capias* described the defendant with the addition of "gentleman," which was omitted in the copy served, held bad, as not complying with 2 Will. 4, c. 39, s. 4, although the addition need not have been inserted. *Cooke v. Vaughan*, 4 Mees. & W. (zx.) 69; and 6 Dowl. (r. c.) 695.

34. The description of the cause of action stated as "an action on the case promises," held insufficient. *Youlton v. Hall*, 7 Dowl. (r. c.) 186; and 4 Mees. & W. (zx.) 582.

35. A plaintiff is authorized, where the defendant's place of residence is unknown, to treat the place mentioned in the promissory notes on which the action is brought as the supposed residence of the defendant; held, also, that a writ of *alias* or *pluries*, or a *distingas* thereon, may issue by leave of the court or of a Judge, and bear *teste* after the previous writ or summons has expired; and where the plaintiff had taken out an *alias pluries* to compel appearance, whilst a *distingas* for the purpose of proceeding to outlawry was pending, but which had never been delivered to the sheriff, and was in fact abandoned, held, that the *distingas* was not to be considered as an existing writ, so as to prevent the plaintiff from continuing his writs of summons. *Norman v. Winter*, 5 Bing. N. S. (c. r.) 279; 6 Sc. 378; and 7 Dowl. (r. c.) 304.

36. Where the defendant, whose real name was H. D. R., was described in the process as H. R., and the affidavit for an application to set aside the *distingas* was entitled as in a cause against H. D. R., sued as H. R., held incorrect, there being, until appearance, no such cause as that described in the affidavit. *Borthwick v. Ravenscroft*, 5 Mees. & W. (zx.) 31; and 7 Dowl. (r. c.) 393.

37. Where the summons had the date of the month inserted, but not of the year, the last figure being omitted, held that it was not a nullity. *Solomon v. Nainley*, 7 Dowl. (r. c.) 459.



38. Where, in an action of trover in the Common Pleas, an affidavit was sworn before a commissioner of that Court, during the circuit, and an application made for an order for the arrest, before the Lord Chief Baron, the judge at chambers, held that such affidavit was a business depending within the meaning of 11 Geo. 4, c. 70, s. 4, and that the Lord Chief Baron had jurisdiction. *Griffin v. Taylor*, 6 Dowl. (r. c.) 621.

39. An indorsement on the writ as issued by J. R., 10, Gray's Inn Square, Holborn, held a sufficient description of the attorney's residence. *Youlton v. Hall*, 7 Dowl. (r. c.) 175; and 4 Mees. & W. (xx.) 582.

40. Service of the writ in the county of C., although the party was described in it as of the county of the borough of C., held immaterial; held, also, that 10 days after the service was too late to move to set it aside, but that entering an appearance for the defendant under the statute was not such a step in the cause as to prevent an application to set aside the service for irregularity. *Davis v. Sherlock*, 7 Dowl. (r. c.) 530.

41. Service on the defendant's attorney, who was prosecuting a cross-action, cannot be made good service, although the defendant be keeping out of the way to avoid service, but the proceeding must be by *distringas*, as in any other case. *Farmer v. Reid*, 7 Dowl. (r. c.) 545.

42. Writs, new forms of, Reg. Gen., 1 Perr. & Dav. (q. b.) 313; and 3 Younge & C. (xx. eq.) App. v.

And see *Arrest; Attorney*.

#### [B] APPEARANCE—DISTRINGAS TO COMPEL.

1. To ground the *distringas*, it must appear that the defendant was at home or in the neighborhood when the calls were made. *Williams v. Hosier*, 1 Tyr. & G. (xx.) 805.

2. An affidavit that the defendant keeps out of the way to avoid service, does not dispense with the rule of making three calls, &c., in order to obtain the *distringas*. *Clayton v. Marsham*, 5 Dowl. (r. c.) 542.

3. But where the defendant's residence cannot be discovered, service at his last known place of residence and appointments, and with an agent receiving his rents and stating himself to be in communication with him, held sufficient. *Grindley v. Thorn*, 5 Dowl. (r. c.) 544.

4. In making the appointment, it is indispensable that the hour should be mentioned. *Atkinson v. Clean*, 5 Dowl. (r. c.) 252.

5. Where the *distringas* issued upon a Judge's order, and, upon an application to set it aside, the defendant did not deny that the letter containing the demand, and notice of calling again had been received, the court refused to set aside the Judge's order. *Gale v. Winkes*, 3 Bing. N. S. (c. r.) 295; 3 Sc. 667; and 5 Dowl. (r. c.) 348.

6. On motion to set aside the *distringas*, the only question is whether there appears enough on

the face of the plaintiff's affidavit to have justified the issuing it, the court cannot enter into the inquiry as to whether the defendant has sustained no substantial injury. *White v. Johnson*, 5 Tyr. (xx.) 1033.

7. Service of the rule to compute, by leaving it at the defendant's apartments when no one therein, held insufficient. *Chaffers v. Glover*, 5 Dowl. (r. c.) 81.

8. Where the defendant omits to appear, the plaintiff has four terms from the service of the writ in which to enter it for him. *Leddel v. Cranch*, 5 Dowl. (r. c.) 662.

9. Where, after a *distringas* issued, but not served, the defendant admitted the service of the summons; held, that the plaintiff might enter an appearance for him. *Saunders v. De Chastelain*, 5 Dowl. (r. c.) 154.

10. Where one defendant had been discharged on the ground of a defect in the affidavit, and nothing said in the rule about appearance, held that the plaintiff was not entitled to enter one for him. *Wilkins v. Parker*, 5 Dowl. (r. c.) 150.

11. The penal clause of 9 Will. 3, c. 25, s. 33, for not having entered an appearance, held to have been repealed by the effect of the later statutes, and an application dismissed, with costs. *Thomas v. Nokes*, 5 Dowl. (r. c.) 650.

12. Where the plaintiff irregularly enters an appearance, the defendant is bound to apply as soon as steps are taken showing an intention to proceed on it. *Strange v. Freeman*, 5 Dowl. (r. c.) 407.

13. A rule to plead is necessary in all cases, whether the defendant has appeared or not, but the objection held to be waived by a summons for time; held also, that the rule as to notice of taxation does not apply unless the defendant has appeared. *Bolton v. Manning*, 5 Dowl. (r. c.) 769.

14. Where the time for entering an appearance had expired, held no objection that the affidavit of no appearance was not made until four days after the search made. *Wagh v. Pry*, 7 Dowl. (r. c.) 376.

15. Where a defendant, more than four months after the issuing the writ against him, gave a *cognovit*, held that it authorized the plaintiff's attorney to enter an appearance, notwithstanding the lapse of time. *Richardson v. Rigglesford*, 4 Mees. & W. (xx.) 384; and 7 Dowl. (r. c.) 25.

16. The affidavit for a *distringas* to compel appearance must state a belief of deponent that the defendant is not out of the country. *Norman v. Winter*, 4 Bing. N. S. (c. r.) 637; 6 Sc. 378; and 7 Dowl. (r. c.) 304.

17. After three calls, and two appointments, although the copy of the process was left at the second instead of the last call, and the defendant sworn to keep out of the way to avoid service, a *distringas* allowed. *Webb v. Jenkins*, 7 Dowl. (r. c.) 135.

18. So, where it was sworn that the defendant had been living in lodgings, and it was not known where he then lived, but a copy of the writ had



been sent to the party acting as attorney for him, and which by a letter appeared to have come to the defendant's hands, and the attorney had stated that he had no intention of appearing, but was prepared to defend when the proper time arrived, held a sufficient ground for a *distringas*; *Moody v. Morgan*, 7 Dowl. (r. c.) 144; and 6 Sc. (c. r.) 842.

[C] DECLARATION—VENUE—STRIKING OUT COUNTS—IRREGULARITY.

1. Where the action was brought under a power of attorney signed in America, and with the initial only of one of the christian names of the plaintiff, the court refused to set aside the declaration for not inserting it. *Lindsay v. Wells*, 3 Bing. N. S. (c. r.) 777; and 5 Dowl. (r. c.) 618.

2. Delivery of declaration a day after it bears date, contrary to the Reg. 1, Hil. 4 Will. 4; held an irregularity, but waived by not applying from the 26th October to the 9th November. *Newnham v. Hanny*, 5 Dowl. (r. c.) 259.

3. Where, in an action on a bill drawn in London, the venue was laid in Surrey, for the purpose of a speedier trial, and the Master had disallowed the costs of going to the assizes, the court, in the absence of any case of oppression suggested, made a rule absolute for reviewing the taxation. *Vare v. Moore*, 3 Bing. N. S. (c. r.) 261; and S. C. 3 Sc. 646.

4. A rule to change the venue and plea may be delivered at the same time, although the issue joined would prevent the plaintiff from giving material evidence in the original county, or from fulfilling it. *Phillips v. Chapman*, 5 Dowl. (r. c.) 250.

5. Where the venue is retained on the usual undertaking, and the plaintiff fails therein, the objection must be taken at the trial, and cannot be made the ground of a subsequent motion for a nonsuit. *How v. Pickard*, 2 Mees. & W. (ex.) 373; and 5 Dowl. (r. c.) 606.

6. The rule to strike out counts must be drawn up on reading the declaration, or on affidavit stating the nature and effect of the different counts. *Roy v. Bristowe*, 2 Mees. & W. (ex.) 241.

7. Where the first count charged the defendant as making false representation as agent, and a second as principal; held that the plaintiff might recover on either. S. C. 5 Dowl. (r. c.) 452.

8. Where the declaration contained one count, on an undertaking by the defendants to be responsible for the proceeds of a sale with the auctioneer, and another by themselves without the auctioneer; held, that the subject-matter of the two counts not appearing to be distinct, one must be struck out, unless a Judge at chambers might allow it to stand conditionally, under Reg. 7, Hil. 4 Will. 4. *Cholmondeley v. Payne*, 3 Bing. N. S. (c. r.) 708; and 5 Dowl. (r. c.) 638.

9. Keeping the declaration until just before the defendant was bound to plead, held not a waiver

of an objection on the ground of variance between the writ and the declaration. *Cumming v. Elwyn*, 3 Bing. N. S. (c. r.) 882.

10. Where the affidavit of the defendant, on motion to set aside the service of declaration, simply stated that he had not been served, without going on to swear that the process never came to his knowledge, rule refused. *Giles v. Hemming*, 6 Dowl. (r. c.) 325.

11. The court allowing notice of declaration to be stuck up in the office, refused to allow the service of future rules and notices to be made in the same way. *Layton v. Mason*, 6 Dowl. (r. c.) 275.

12. Where, in an action on a warranty of a horse, the venue had been changed from M. to W., held, that a letter written by the plaintiff's attorney in M., informing the defendant of the breach of warranty, and that the horse was standing at his expense, the receipt of which letter was admitted by the defendant's agent in M., was a sufficient compliance with the undertaking to give material evidence in M., on bringing back the venue. *Collins v. Jenkins*, 4 Bing. N. S. (c. r.) 225.

13. On an information, under 6 Geo. 4, c. 108, for being concerned in the unshipping of prohibited goods, which were received on board on the high seas, in prosecution of an agreement arranged at R. and in London, and carried strictly into effect, and the goods landed in Ireland; held, that the latter was an unshipping, in which the defendant was concerned, in England, within the meaning of the Act, and the offence properly triable in England. *Attorney-General v. Catt*, 3 Mees. & W. (ex.) 7.

14. Where the venue had been changed, in an action by husband and wife, from Middlesex into another county; held, that the husband having since become a barrister did not give the privilege of bringing it back again, it being confined to the party on whose account the action is brought. *Newton v. Harland*, 4 Bing. N. S. (c. r.) 406.

15. In an action for the non-execution of works on the Bedford level, an affidavit showing that a large proportion of the lands in Cambridgeshire was liable to the rates imposed by the corporation of the level, was not a sufficient ground for changing the venue from Cambridgeshire. *Thornton v. Jennings*, 5 Bing. N. S. (c. r.) 485; and 7 Dowl. (r. c.) 449.

16. The privilege of an attorney to retain the venue is confined to Middlesex; when laid in London, held, that he was not entitled to retain it there, where the action had been removed on the usual affidavit. *Bradshaw v. Burton*, 7 Dowl. (r. c.) 329.

17. Where it appeared clearly that the only question to be tried affected the right to costs, the debt having been tendered and accepted, the Court allowed the venue to be changed, although before issue joined. *Dowler v. Caller*, 7 Dowl. (r. c.) 55; and 4 Mees. & W. (ex.) 531.

18. Where the venue had been changed to the county of G. on the usual affidavit, the court refused to discharge the rule, although sworn that



the cause of action arose partly in that county and partly in Ireland. *Fisher v. Waring*, 1 Sc. (c. r.) 377.

19. There being no more than 20 special jurors within the county, held not a sufficient ground for changing the venue. *Doe v. Williams*, 5 Bing. N. S. (c. r.) 205.

And see *Contract*; *Replevin*; *Writ of Right*.

[D] PLEAS—SEVERAL—ADDING—RULES TO PLEAD  
—TIME FOR—NOTICE OF—DEMAND OF—OYER.

1. A plea commencing with a formal defence, the party objected to allowed to be struck out. *Bacon v. Ashton*, 5 Dowl. (r. c.) 94.

2. The Judge at *nisi prius* has no discretion to refuse or accept a plea, *puis durr. contin.*, if properly verified, although pleaded merely for delay. *Ludlow Corporation v. Tyler*, 7 C. & P. (s. r.) 537.

3. In *assumpsit* on a banker's check, the time for pleading having expired, leave refused to add a plea that it was falsely dated, and drawn at a place more than fifteen miles from the place where payable. *M'Dowall v. Lyster*, 2 Mees. & W. (xx.) 52.

4. In *assumpsit* against an attorney for negligence in taking an insufficient security on behalf of his client, the plaintiff, whereby he sustained a loss, the court allowed a plea, denying the special damage as alleged, to be pleaded with *non assumpsit*; but that with respect to a traverse of the consideration for the retainer, the plea of *non assumpsit* would suffice. *Wright v. Newton*, 3 Sc. (c. r.) 595.

5. No rule to plead several matters is required when the pleas are added under a judge's order. *Monck v. Shenstone*, 3 Sc. (c. r.) 661.

6. After a consent given by the plaintiff to a rule to plead several matters, he cannot apply to set aside any of such pleas. *Howen v. Carr*, 5 Dowl. (r. c.) 305.

7. *Semble*, there is no difference between the effect of a plea of payment into court, and payment under the old rule, with respect to admission of the liability. *Lucy v. Walrond*, 3 Bing. N. S. (c. r.) 841.

8. The summons for further time to plead, returnable at half-past ten, during term, cannot be treated as a nullity, and judgment set aside. *Bebb v. Wales*, 5 Dowl. (r. c.) 458.

9. The rule to plead ought not to be left at the office until after the defendant is served with notice of declaration filed. *Bennett v. Smith*, 3 Bing. N. S. (c. r.) 305; 3 Sc. 673; and 5 Dowl. (r. c.) 353.

10. After a rule *nisi* for leave to plead, coverture *puis durr. cont.* the court afterwards refused, without consent, to introduce, as a term into the rule, the dispensing with the affidavit, that the ground of plea arose within eight days before the

pleading of the plea. *Powell v. Duncan*, 5 Dowl. (r. c.) 550.

11. A demand of oyer, not describing the defendant as executor, held a nullity. *Poole v. Coates*, 3 Sc. (c. r.) 768.

12. A notice to plead requiring no date, an erroneous one held not to vitiate. *Wyatt v. MacDonald*, 3 Sc. (c. r.) 768.

13. A plea of *plene adm.*, held not to require to be signed by counsel. *Reed v. Spurr*, 2 Mees. & W. (xx.) 76; and 5 Dowl. (r. c.) 330.

14. The terms, "pleading issuable," on an order for time to plead, held not to extend beyond the plea, and do not bind the defendant as to the subsequent proceedings. *Woodman v. Goble*, 3 Mees. & W. (xx.) 304; and 6 Dowl. (r. c.) 371.

15. A plea that after the commencement of the suit one of the several plaintiffs became bankrupt, held not an issuable plea within the terms of pleading issuable, and not allowed to be joined with the general issue. *Staples v. Holdsworth*, 4 Bing. N. S. (c. r.) 143; and 6 Dowl. (r. c.) 196.

16. A rule to plead may be entered before actual service of notice of declaration, if on the same day. *Aitman v. Conway*, 6 Dowl. (r. c.) 76; and 3 Mees. & W. (xx.) 71.

17. A rule to plead given before notice of declaration is irregular, but the taking out a summons for time to plead held a waiver of the irregularity; held, also, that where the defendant has not appeared, no notice of taxation of costs is necessary. *Pope v. Mann*, 2 Mees. & W. (xx.) 881.

19. Where, upon the 5th September, the defendant obtained a month's further time for pleading, undertaking to take short notice of trial for the first sittings in term; held, that the time for pleading, nevertheless, did not commence until after the 24th October, and judgment signed for want of plea was irregular. *Le Fevre v. Molineux*, 6 Dowl. (r. c.) 153.

19. Plea, *nunc. indeb.* as to all but part, and tender as to that; held to constitute but one answer, and no rule to plead several matters necessary. *Archer v. Garrard*, 6 Dowl. (r. c.) 132; and 3 Mees. & W. (xx.) 63.

20. Where on the day the time for pleading expired, the defendant delivered pleas, with a summons for leave to plead several matters, returnable in two days, and the plaintiff returned the pleas and signed judgment as for want of plea, the court, on an affidavit of merits, set aside the judgment, without costs; but held, that pending the rule for setting aside the judgment, an order obtained by the defendant to plead several matters was irregular, and set aside. *Wilkes v. Outley*, 2 Nev. & P. (x. s.) 99.

21. Where the *similiter* only is added, held, that the rule requiring the date of the term does not apply, the rule is confined to the case where the party pleading is the party delivering the plea. *Shackel v. Ranger*, 3 Mees. & W. (xx.) 409.



22. In *assumpsit*, for not accepting and paying for railway shares, the court refused to allow several pleas: first, a sale of goods, and no contract in writing or earnest; and, second, that it was a sale of an interest in land. *Sykes v. Reeves*, 6 Dowl. (r. c.) 384.

23. Plea in *assumpsit* by indorsee against acceptor, that the acceptances were for accommodation of a party who gave other bills to the plaintiff, and that the latter agreed to forbear to sue on the first bills until default in payment of the latter; held, that the plea alleging matter in excuse, and not denying the contract, the replication *de injuria* was proper. *Reynolds v. Blackburn*, 2 Nev. & P. (x. s.) 136.

24. Power to the judges to alter forms of pleadings continued by 1 & 2 Vict. c. 100.

25. The effect of the rule of Hil. 4 Will. 4, rule 8, where the last day on which the time for pleading the plea *puis darr. cont.* is on a Sunday, is to extend the time of pleading to nine days. *Dudden v. Priquet*, 7 Dowl. (r. c.) 371; and 4 Mees. & W. (xx.) 676.

26. Where the same facts were differently stated in different pleas, leading to different conclusions in law, and furnishing different grounds of defence, held, that they were not within the rule of Hil. 4 Will. 4, s. 5, and therefore allowed to stand. *Curry v. Arnott*, 7 Dowl. (r. c.) 249.

27. Where the defendant, under an order to plead issuably, pleaded *inter alia*, that the plaintiff had petitioned for his discharge under the Insolvent Act, and the right of action vested in his assignee, held not an issuable plea. *Wettenhall v. Graham*, 4 Bing. N. S. (c. r.) 714; 6 Sc. 603; and 6 Dowl. (r. c.) 746.

28. The court refused to strike out a plea on an affidavit of its falsehood, still less would it set aside a demurrer, where arguable; where to a plea, that the defendant drew and accepted a bill, and that the plaintiff received it in satisfaction of his demand, the plaintiff replied, denying the drawing, accepting, or receiving it, &c. to which the defendant demurred for multifariousness, the court refused to set it aside. *Edwards v. Greenwood*, 5 Bing. N. S. (c. r.) 476.

29. A plea bearing date previous to the date of delivery date, is only an irregularity, and does not entitle the plaintiff to treat it as a nullity and sign judgment. *Hodson v. Pennell*, 4 Mees. & W. (xx.) 373; S. C. 7 Dowl. (r. c.) 208.

30. Where a demurrer, not absolutely frivolous, was clearly intended for delay, the court ordered it to be placed at the head of the paper. *Dawson v. Parry*, 6 Sc. (c. r.) 80.

31. Special demurrers *semb.* are within the rule requiring the points to be stated in the margin, although it may be sufficient to state that the points relied on are those stated in the demurrer. *Verbecke v. Pearse*, 6 Sc. (c. r.) 406.

32. Where after joinder in demurrer, notice of trial of issues in fact was given, held too late to move to set aside the demurrer as frivolous. *Norton v. Mackintosh*, 7 Dowl. (r. c.) 529.

And see *Abatement*.

## [E] DEMURRER.

1. Obtaining time to plead on the terms of pleading issuably, held not to preclude a demurring for good cause. *Barker v. Gleadow*, 5 Dowl. (r. c.) 134.

2. The Reg. Hil. 4 Will. 4, requiring the points to be stated in the margin, applies to special as well as general demurrers. *Lyndhurst v. Pound*, 5 Dowl. (r. c.) 459.

3. A statement in the margin of the causes specially assigned for demurrer, held a sufficient compliance with Reg. Hil. 4 Will. 4. *Berridge v. Priestly*, 5 Dowl. (r. c.) 306; S. P. *Whitmore v. Nicholls*, 5 Dowl. (r. c.) 521.

4. The court will set aside a demurrer, if the matter to be argued is not stated in the margin; but it seems that it would be sufficient to state that the points were those stated in the demurrer itself. *Lindus v. Pound*, 2 Mees. & W. (xi.) 240.

5. Upon demurrer to a replication; held, that the plea could not be attacked upon a point not marked for argument. *Bayley v. Homan*, 3 Sc. (c. r.) 384.

6. Demurrer to several counts for money lent, had and received, and on an account stated, on the ground that no time was stated; held too large, and set aside as frivolous. *Jackson v. Cawley*, 6 Dowl. (r. c.) 388.

7. The delivery of a demurrer is a proceeding in a cause within the rule of Easter, 2 Will. 4; and held, that to a replication delivered on Wednesday before Easter-day, a demurrer delivered on the Wednesday following was in time. *Harrison v. Heathorn*, 4 Bing. N. S. (c. r.) 443.

8. Where the plaintiff obtained judgment on demurrer to several pleas, the court refused leave to withdraw a replication to other pleas supposed to be unsustainable, on the same grounds, and demurrer thereto. *Delegal v. Highley*, 4 Bing. (c. r.) 114; 6 Dowl. (r. c.) 194; and 3 Sc. 394.

## [F] AMENDMENT.

1. The power of amending under 3 & 4 Will. 4, c. 42, s. 23, is not confined to any stage of the proceedings; held, therefore, that the judge might amend the *nisi prius* record, by inserting the date of the writ of summons. *Cox v. Painter*, 1 Nev. & P. (x. s.) 581.

2. Where the defendant may have been prejudiced by the contract not having been properly stated, the judge will not allow the variance to be amended. *Ivey v. Young*, 1 M. & Rob. (x. r.) 545; and 5 Dowl. (r. c.) 450.

3. Where the date of the suing out the writ, the commencement of the action, was not stated on the record, the judge allowed the plaintiff to amend, by annexing the writ thereto at the trial. *Cox v. Painter*, 7 C. & P. (x. r.) 767.

4. Where the record at the trial appeared to be



defective, for want of a *similiter*, amendment allowed by inserting it, but the jury re-sworn. *Dyson v. Warris*, 1 M. & Rob. (N. P.) 474.

5. The Lord Chief Justice refused at the trial to allow an amendment, by striking out several innuendoes, admitted to have no reference to the plaintiff. *Prudhomme v. Fraser*, 1 M. & Rob. (N. P. C.) 435; S. C. 2 Ad. & Ell. (N. B.) 645.

6. In case for a fraudulent misrepresentation, the declaration being substantially proved, the Judge allowed the statement of the terms of the representation to be amended under 3 & 4 Will. 4, c. 42, s. 23. *Mash v. Densham*, 1 M. & Rob. (N. P.) 442.

7. The record allowed to be amended by inserting a count for goods, which was in the declaration, and issue delivered. *Ernest v. Brown*, 2 M. & Rob. (N. P.) 13.

8. A variance between the issue and the writ of trial may be amended at any time. *Farwig v. Cockerton*, 6 Dowl. (P. C.) 337; and 3 Mees. & W. (xx.) 169.

9. It is as much of course to allow amendment in a penal as in other actions, unless there has been unnecessary delay; and the court, in an action for penalties under 18 Geo. 2, c. 20, s. 3, against a magistrate for acting without qualification, allowed the declaration to be amended after a former application, and, although the plaintiff was sworn to be in indigent circumstances, refused to impose the term of security for costs. *Jones v. Edwards*, 3 Mees. & W. (xx.) 218; and 6 Dowl. 369.

10. Amendment allowed at *nisi prius* by indorsing on the *distingas* the execution by the sheriff, and the record re-entered. *Masters v. Lewis*, 2 M. & Rob. (N. P.) 59.

11. Where the judge on the trial had directed the jury that the plaintiff was entitled to nominal damages, as to one count at least, and they gave a verdict of 1s., which was entered generally on the *postea*; held, that the judge might amend the record according to the manifest intention of the jury, by directing the verdict to be entered on one count, with damages, for the plaintiff, and for the defendant on the others. *Ernest v. Brown*, 6 Bing. N. S. (C. P.) 162.

12. Where the particulars showed the exact amount claimed, the judge allowed the declaration to be amended, by increasing the sums stated in each count. *Dew v. Katz*, 8 C. & P. (N. P.) 315.

13. Where in *assumpsit* the declaration stated the undertaking to erect a building, and fit it up according to certain plans, by a day stated, for the sum of £20, plea *non assumpsit*, and that the agreement was rescinded; the contract proved was for the erecting certain seats (for the coronation) to be completed four or five days before, &c., for the sum of £25, and it appeared that no plans were ever agreed upon; held, that the judge properly allowed the record to be amended according to the true contract, it not being material to the merits of the case. *Ward v. Pearson*, 5 Mees. & W. (xx.) 16; and 7 Dowl. (P. C.) 332.

And see *Bill; Covenant*.

## [G] PARTICULARS.

1. Where the particulars were for goods sold in January, and the evidence was of goods sold in May, there appearing no claim for any other goods, the Court refused to set aside the verdict found for the plaintiff. *Flemming v. Crisp*, 5 Dowl. (P. C.) 454.

2. In an action to recover back a deposit, the particular stated it to be, for the defendant not being able to make a good title; and a summons for a better particular having been dismissed on the ground that the objections were matter of law only; a notice was afterwards delivered, that the objections were set forth in the plaintiff's answer to a bill in equity, filed by the defendant, and at the trial it appeared that the objection was matter of fact; the court refused a new trial, the defendant's attorney declining to swear he had been misled. *Correll v. Cattle*, 5 Dowl. (P. C.) 598.

3. In debt by the assignee of a lease against the tenant for breaches of covenant, non-payment of rent and non-repair, the Court refused to compel a particular as to sums and dates. *Sowter v. Hitchcock*, 5 Dowl. (P. C.) 724.

4. A particular of a bill of exchange will not be given where the declaration contains only one count, unless under special circumstances. *Brooks v. Fairlar*, 5 Dowl. (P. C.) 361; 3 Bing. N. S. (C. P.) 291; and 3 Sc. 654.

5. In an action on two bills for 250l. each, with counts on each, and the particulars only stated the action to be brought for 500l., the amount of the bills set out in the declaration, and it appeared that the defendant had been arrested only for 240l., and that the bills were given as a security for money paid by the drawer, the Court (*Alderson, B., diss.*) granted a rule for further and better particulars. *Dawes v. Anstruther*, 5 Dowl. (P. C.) 738.

6. In *assumpsit* to recover damages sustained by the non-performance of an agreement to assign premises, the court refused to compel the plaintiff to furnish a particular of the special damage. *Retallick v. Hawkes*, 1 Mees. & W. (xx.) 573; and 1 Tyr. & Gr. 1134.

7. In order to obtain a particular in the action of trespass, trover or case, an affidavit should be made that the defendant does not know what the plaintiff is going for. *Snelling v. Chennells*, 5 Dowl. (P. C.) 80.

8. In an action against attorneys for negligence in assigning leasehold premises, by the plaintiff, his client, in permitting him to enter into unqualified covenants, stating the grounds *per quod* the plaintiff sustained damages, the court refused to compel a particular of the plaintiff's demand. *Stannard v. Ullithorne*, 3 Bing. N. S. (C. P.) 336; 3 Sc. 771; and 5 Dowl. (P. C.) 370.

9. Where the plaintiff's attorney gives credit in the particulars for a sum set up as a cross-demand, the Court will allow them to be amended. *Preston v. Whiteheart*, 5 Dowl. (P. C.) 720.



10. Particulars of set-off intitled in another court, held immaterial. *Lewis v. Helton*, 5 Dowl. (p. c.) 267.

11. Where the order for particulars of set-off required it to be with dates, and the one delivered stated only from January 1828 to January 1834, the Judge refused to allow evidence to be gone into of the set-off. *Swaine v. Roberts*, 1 M. & Rob. (n. p.) 452.

12. Where the particular delivered was calculated to mislead the defendant as to the real nature of the demand, and to which he might have pleaded specially, the court granted a new trial, with liberty to the plaintiff to amend the particulars, and the defendant to plead *de novo*. *Stevens v. Willingale*, 4 Sc. (c. p.) 255; and 7 C. & P. (n. p.) 702.

13. The refusal of a plaintiff to comply with a judge's order for particulars, is no ground for discharging the defendant out of custody. *Graff v. Willis*, 5 Dowl. (p. c.) 715.

14. In *assumpsit* for money had, &c. to recover back the deposit, on the ground of objection to the title, the court will oblige the plaintiff to give a particular of all objections to the abstract arising upon matters of fact, but not of law, which must find out themselves. *Roberts v. Rowlands*, 3 Mees. & W. (ex.) 543.

15. A defendant cannot be compelled to deliver the particulars, pursuant to a judge's order, the refusal to obey having the effect of preventing his proceeding in the cause. *Cane v. Spinks*, 7 Dowl. (p. c.) 27.

16. After an order for particulars, and before delivery a demand of declaration, with notice at the foot of the order being abandoned, held irregular, and judgment of *non pros.* set aside. *Wickens v. Cox*, 4 Mees. & W. (ex.) 67 & 68 Dowl. (p. c.) 693.

17. Upon a plea of payment of a sum in satisfaction of the plaintiff's demand, the defendant ordered to furnish particulars, as in case of set off. *Ireland v. Thompson*, 4 Bing. N. S. (c. p.) 716, & 6 Sc. 601.

18. In *assumpsit* for money had and received as plaintiff's clerk abroad, and particulars delivered according to an account stated by the defendant, but the suit having been suspended for several years, by the bankruptcy of one of the plaintiffs and absence of the other, the Court allowed the particulars to be amended by inserting items of demand accruing in the interval. *Staples v. Holdsworth*, 4 Bing. N. S. (c. p.) 717; 6 Sc. 605; and 8 Dowl. (p. c.) 715.

19. In debt for 180l. for two years' rent, plea, as to 135l., parcel, &c., payment to a superior landlord, to avoid a distress, which the replication admitted, but alleged to have been allowed and deducted from previous rent due, and that 135l. was still due, over and above the sum so deducted, on which issue was taken; the particulars of demand gave credit for payment of two years' rent, minus 16l. 6s. 2d, and the plaintiff established in evidence that after allowing the defendant all payments, a sum of 106l. 16s. 6d. was due to him;

held, (before Reg. Trin. 1838) that the particulars were not to be taken as embodied in the declaration, but the plea to be taken as pleaded to the balance, and the replication in terms stating the payments set up by the plea, as applicable to the balance, were to be applied to prior rent. *Ferguson v. Mason*, 1 Perr. & Dav. (q. n.) 194.

20. So, on a declaration for goods sold to the amount of 883l. 10s., and admitting 664l. 3s. 6d. to have been paid, claimed a balance remaining unpaid; one plea pleaded generally payment of all the sums in the declaration mentioned, the replication as to 175l. 17s., new assigned that the sum so paid was in respect of other sums than the causes of action stated in the declaration, and denied the payment of the residue; and issues were taken on the general plea of payment, and denial that the causes of action were other and different; held, that the plea to the declaration was not to be taken as pleaded to the balance only, and that the replication did not admit the payment of the sum stated, as part of the balance, so as to enable the defendant, by proof of payments, making up the difference between the sum claimed and the payment admitted, to be entitled to the verdict; and the jury having found that the plaintiff had not paid all that was due, a rule for a nonsuit was refused. *Alston v. Mills*, 1 Perr. & Dav. (q. n.) 197.

And see *Patent; Pleading*, (c. l.)

#### [H] AFFIDAVITS.

1. An affidavit intitled in the name of one defendant only "and others," held bad. *Tomkins v. Geach*, 5 Dowl. (p. c.) 509.

2. Although an affidavit is defective as to one of the deponents, but correct as to the other, the latter may be read. *Edmonds, ex parte*, 5 Dowl. (p. c.) 702.

3. Where it is not made by the defendant, his attorney or agent, it must be by some one who has sufficient knowledge of or connexion with the case, as enables him to speak to the merits. *Rowbotham v. Dupree*, 5 Dowl. (p. c.) 557.

4. Where the deponent described himself as clerk to the attorney whose name and residence were given, held sufficient. *Strike v. Blanchard*, 5 Dowl. (p. c.) 216.

5. Affidavit describing the deponent merely as clerk to the defendant's attorney, held insufficient. *Daniels v. May*, 1 Tyr. & Gr. (ex.) 834; and 5 Dowl. (p. c.) 83.

6. Affidavit to set aside a judgment on a *cognovit*, made by the defendant's attorney only, and not stating that he believed the truth of the representation, not allowed to be read, and the rule discharged. *Preedy v. Lovell*, 1 Tyr. & Gr. (ex.) 847.

7. Where the affidavit was made before a clerk, not of the attorney on the record, but of the landlord seeking to be made a party, held not within 1 Reg. Hil. 2 Will. 4, s. 6. *Doe d. Grant v. Roe*, 5 Dowl. (p. c.) 409.



8. The court of C. P. being the only court in which motions under 3 & 4 Will. 4, c. 74, s. 91, can be heard, it is not essentially necessary that the affidavit should be intitled in that court. *Bates*, in re, 4 Sc. (c. r.) 396.

9. In order to support the objection that an affidavit has been sworn before the attorney in the cause, it must be shown that he was so at the time of the taking the affidavit, and not merely at the time of the objection taken. *Kidd v. Davis*, 5 Dowl. (r. c.) 568.

10. The court allowed affidavits wrongly intitled to be taken off the file and amended, the defendants having leave to file affidavits in reply, with costs of opposing the application. *R. v. Warwick Justices*, 5 Dowl. (r. c.) 382.

11. An affidavit, altered after it is sworn, cannot be used. *Wright v. Skinner*, 5 Dowl. (r. c.) 92.

12. It is too late to object to the intituling affidavits after a motion has been substantially disposed of and stands over to ascertain a fact. *Viner v. Langton*, 5 Dowl. (r. c.) 92.

13. Where the affidavit of service only stated "with a true," but not going on "copy of the rule," but went on to state that the deponent at the same time showed the original; held sufficient. *R. v. Stafford Sheriff*, 5 Dowl. (r. c.) 238.

14. In showing cause against a rule, if no stated time be fixed for filing the affidavits in reply, it is no objection that they are sworn after the day when the rule is due. *Graham v. Beaumont*, 3 Sc. (c. r.) 267; and 5 Dowl. (r. c.) 49.

And see *Hoer v. Hill*, 1 Chitt. Rep. 27.

15. Where the Master reported that matter had been added to an affidavit after it had been sworn, the court refused to treat it as a nullity and discharge the rule, but allowed only the original part to be read. *White v. Skinner*, 1 Tyr. & Gr. (ex.) 597.

16. Affidavits may be read without taking copies, but to be filed the last day of each term, and alphabetically indexed. *Reg. Gen.*, 3 Nev. & P. (q. b.) 2.

17. Affidavits sworn before a country commissioner or a judge of assize, may be read in any of the courts, or a judge at chambers, or any master, and the party filing not obliged to take copies thereof. *Reg. Gen.*, 4 Bing. N. S. (c. r.) 367; and 3 Mees. & W. (xx.) 153.

18. Affidavits read before a judge or a master to be filed with the masters of the said courts, and be alphabetically indexed, and be delivered to the masters, in order to be filed, four times in each year, i. e. on the last day of each term. *Reg. Gen.* 4 Bing. N. S. (c. r.) 367; and 3 Mees. & W. (xx.) 153.

19. An affidavit to hold to bail being made to set process in motion, held to be a business depending in court within the meaning of the 11 Geo. 4 & 1 Will. 4, c. 70, s. 4, and over which all the judges have a common jurisdiction. *Drifill v. Taylor*, 4 Bing. N. S. (c. r.) 369.

20. The time for deciding whether a party will use affidavits, is at the time of filing, and if he does file them, and the opposite party takes copies, he has a right to use them, whether the party filing them does so or not. *Price v. Hayman*, 4 Mees. & W. (xx.) & 7 Dowl. (r. c.) 47.

21. The affidavit made by plaintiff or defendant requires no further addition; and where it described a party as R. J., late of W., victualler, but now of, &c., held, that it was sufficient without adding to the second description of place, that of the party's occupation. *Angell v. Ihler*, 5 Mees. & W. (xx.) 163.

22. An affidavit on a motion to set aside a verdict, &c., stating only the belief that he had a good substantial and available defence to the action; held insufficient. *Page v. South*, 7 Dowl. (r. c.) 412.

23. Where it appeared from the statements of the party applying, that the person before whom the affidavit was sworn was acting as her attorney; held sufficient to prevent the affidavit being read. *Haddock v. Williams*, 7 Dowl. (r. c.) 327.

[I] ORDERS — RULES — MOTIONS — SERVICE OF.

1. The court will not review the decision of a Judge, whether an application to set aside process for irregularity is made in proper time. *Tadman v. Wood*, 4 Ad. & Ell. (x. s.) 1011.

2. So, as to the proper description of the party's attorney; but the Judge having set aside the writ and service, the court amended the order by setting aside the copy of the writ and service. lb.

3. No motion can be made to set aside a Judge's order without producing a copy of the order. *Hoby v. Pritchard*, 5 Dowl. (r. c.) 390.

4. The court will take judicial notice of a Judge's order being in the cause. Where the issue had been delivered in the usual form as for trial at the sittings, and the notice of trial before the secondary, the court refused to set them aside for irregularity. *Atwell v. Baker*, 2 Mees. & W. (xx.) 272; and 5 Dowl. (r. c.) 462.

5. A party cannot move to enlarge a rule which is drawn up with a stay of proceedings. *Wyatt v. Frabble*, 5 Dowl. (r. c.) 268.

6. A defect in a rule by the slip of the officer of the court will be supplied without costs. *Downing v. Jennings*, 5 Dowl. (r. c.) 373.

7. Where the defendant was relieved on motion from arrest, on the terms of bringing no action, and afterwards applied in the outer court to set aside so much of the rule, on the ground that the plaintiff's demand (an attorney's bill) had been reduced on taxation more than half, the court refused the application. *Sheriff v. Greasley*, 6 Nev. & M. (x. s.) 446.

*Semb.* the case of *Stephenton v. Watson*, 1 B. & P. 365, not accurately reported.

8. Before an order of *nisi prius* can be moved



to be amended, the order must be made a rule of court. *Cranch v. Tregoning*, 5 Dowl. (r. c.) 230.

9. A summons for time to plead, returnable at a judge's chambers at an hour when it is known he is not attending there, cannot be treated as a nullity, and operates as a stay of proceedings. *Byles v. Watts*, 5 Dowl. (r. c.) 232.

10. Affidavit of service of the rule to compute, showing a copy left at the defendant's lodgings, which he had quitted and gone it was not known where, and a copy having been stuck up at the office; held sufficient for a rule nisi. *Black v. Cloup*, 5 Dowl. (r. c.) 270.

11. Service of a rule to compute on the landlady of the house at which the defendant lodged, held insufficient. *Salisbury v. Sweetheart*, 5 Dowl. (r. c.) 243.

12. So, on a workman on the defendant's premises. *Hitchcock v. Smith*, 1b. 248.

13. But on a servant at the defendant's residence, held sufficient. *Thomas v. Lord Ranelagh*, 1b. 258.

14. The rule to compute refused in an action for breach of covenant to pay rent and land-tax. *Morris v. Thompson*, 4 Sc. (c. r.) 295.

15. Service of a rule to compute left at the defendant's chambers, and a party residing there stating it to have been sent to the defendant, held sufficient. *Carew v. Winslow*, 5 Dowl. (r. c.) 543.

16. Rules of court delivered out in vacation to state the day of the month and week, but be entitled as of the term preceding. *Reg. Gen.*, 4 Bing. N. S. (c. r.) 367; 3 Mees. & W. (ex.) 154; and 3 Nev. & P. (q. s.) 2.

17. Where a rule had been disposed of, the court refused to re-open the question on a suggestion of new facts not brought before the court, but known before the rule obtained. *Bodfield v. Padmore*, 5 Ad. & Ell. (x. s.) 785, n.

18. The court refused to open a rule obtained before a single judge in the Bail Court, in the term after the judgment pronounced, although with the sanction of the judge. *Todd v. Jeffery*, 2 Nev. & P. (q. s.) 443.

19. Where the party resided so far from town that he could not be served before the day for showing cause, being the day before the term expired; held, that the rule might be revived in the next term. *Rowbottom v. Ralphs*, 6 Dowl. (r. c.) 291.

20. Where the judge directed what costs should be paid upon an order to amend, held, that he had authority so to do. *Collins v. Aron*, 4 Bing. N. S. (c. r.) 233; and 6 Dowl. (r. c.) 423.

21. It is not a matter of right to show cause against a rule in the first instance, although notice may have been given. *Doe v. Smith*, 3 Nev. & P. (q. s.) 335.

22. Service of the rule nisi to compute on two of three joint makers of a note, held sufficient for the rule absolute against all. *Carter v. Southall*, 3 Mees. & W. (ex.) 129.

23. Payment in an action for goods and on a promissory note, "on account of the cause," leaving a balance due less than the amount of the note; held, that a *nolle pros.* must be entered as to the first count, before the plaintiff could have a rule to compute. *Jones v. Shiel*, 3 Mees. & W. (ex.) 433.

24. Judges' orders to return writs, whether of final or mesne process, and to bring in the body, to be drawn up without any affidavit. *Reg. Gen.*, 3 Mees. & W. (ex.) 401.

25. Single judges empowered to dispose of at chambers matters arising out of any court, by 1 & 2 Vict., c. 45.

26. After a case has been disposed of in the Bail Court, the Court will not allow a second application in full court, although on fresh affidavits disclosing new facts. *Russel v. Hartley*, 7 Ad. & Ell. (q. s.) 522, n.

27. Where the rule and copy had been sent by the post, and the original was a few days afterwards received back, indorsed with a receipt of "Copy of the within rule," and signed by the defendants; held sufficient for making the rule absolute. *Smith v. Campbell*, 6 Dowl. (r. c.) 728.

28. The Court refused a rule to compute on a bill, without production of it before the Master in the first instance, leaving it to his discretion. *Sanderson v. Lee*, 7 Dowl. (r. c.) 97.

29. The rule allowed on a banker's check. *Bentham v. Lord Chesterfield*, 5 Sc. (c. r.) 417.

30. Where the rule had been served on one, and the copy on another defendant, and the rule obtained from the former was produced attached to the affidavit, and the defendant had stated he should take no steps in the matter, held sufficient. *Grant v. Stoneham*, 7 Dowl. (r. c.) 126.

31. The rule to enter the issue is by the operation of 15 Reg. Gen. Hil. 4 Will. 4, abolished. *Hodges v. Diley*, 2 Dowl. (r. c.) 555.

#### [K] STAYING PROCEEDINGS.

1. Where in an action for dilapidations the defendant paid money into Court, and the plaintiff replied, further damages, and the defendant afterwards obtained a rule for judgment as in case of nonsuit, the court allowed the plaintiff to accept the money paid in, on payment of the defendant's costs incurred subsequently. *Kelly v. Flint*, 5 Dowl. (r. c.) 293.

2. Where, after the writ of summons issued, the defendant paid the debt surreptitiously to a clerk of the plaintiff, the court stayed proceedings on payment of the costs of the writ. *Wyllie v. Phillips*, 3 Bing. N. S. (c. r.) 776; and 5 Dowl. (r. c.) 644.

3. Where the affidavit of merits, on a motion to stay proceedings on the bail-bond, is made by an attorney, it must state expressly that he is the attorney of the defendant. *Bonnefer v. Russell*, 5 Dowl. (r. c.) 546.



4. A summons to plead several matters, taken out on the day the time for pleading expires, returnable on the following day at 11 o'clock; held that, until disposed of, it operated as a stay of proceedings, although the time for pleading had been enlarged. *Spenceley v. Shouls*, 5 Dowl. (p. c.) 562.

5. Where the plaintiffs, two officers of a banking company, were joined, the statute 7 Geo. 4, c. 46, s. 9, requiring one only to be sued, the court allowed the plaintiffs to set aside the proceedings, on payment of costs, even after issue delivered. *Holmes v. Binney*, 4 Bing. N. S. (c. r.) 454.

6. A stay of proceedings cannot be incorporated in the rule nisi for costs of the day, for not proceeding to trial. *Eagar v. Cuthill*, 6 Dowl. (p. c.) 125, and 3 Mees. & W. (xx.) 60.

7. Where the cause was in such a state that issue might be joined before the rule was disposed of, the court allowed a rule for taking out money deposited in lieu of bail, with a stay of proceedings. *Bloor v. Cox*, 6 Dowl. (p. c.) 268.

8. On motion for costs of the day, for not proceeding to trial, the proceedings cannot be stayed until payment of those costs. *Gibbs v. Gales*, 7 Dowl. (p. c.) 325.

9. Where a proceeding is irregular the party has a right to have it set aside, and if it be not made a term at the time of disposing of the rule, the Court has no power afterwards to restrain the defendant from bringing an action. *Abbott v. Greenwood*, 7 Dowl. (p. c.) 534.

#### [L] ATTACHMENTS.

1. In order to bring the party into contempt for non-payment of costs, pursuant to the *allocatur*, a copy of the rule must be left. *Dalton v. Tucker*, 5 Dowl. (p. c.) 550.

2. On a motion for an attachment for not obeying a Judge's order, held that the rule of court having been served was sufficient, without service of the order. *Greenwood v. Dyer*, 5 Dowl. (p. c.) 255.

3. An attachment is to be considered as granted, when the rule has been obtained, and after which the proceedings, being on the Crown side, are properly intituled *Rex, &c.* *R. v. Sheriff of Middlesex*, 2 Mees. & W. (xx.) 107.

4. Where the affidavit of service of a rule nisi for an attachment, stated the delivering it to the son, who refused to say where his father was, and an appointment made to call on another day; held insufficient to dispense with personal service. *libbertson*, in re, 5 Dowl. (p. c.) 160.

5. An attachment for non-payment of costs on the *allocatur* may be grounded on a demand by the attorney in the cause, to whom they would be payable. *Cox v. Salmon*, 2 Mees. & W. (xx.) 127.

6. Where the defendant had been examined before the master, who had reported that the de-

fendant had cleared himself of the contempt, the court refused to discuss the correctness of the report, unless it appeared from the interrogatories and answers that he had been mistaken; and *semb.*, it is not a sufficient ground for reviewing it, that it is against the opinion of the judge who granted the attachment. *R. v. Morley*, 4 Ad. & Ell. (x. b.) 849.

7. To found an attachment for non-payment of costs, it is not sufficient that the demand is made by the party authorized by the attorney. *Clark v. Dignum*, 3 Mees. & W. (xx.) 319.

8. Where the affidavit for an attachment for non payment of money, pursuant to a rule of court, described it throughout as an "order," held insufficient. *Turner*, in re, 6 Dowl. (p. c.) 6.

9. The party being an attorney is no ground for dispensing with the rule for personal service, to found an attachment. *Wilkinson v. Pennington*, 6 Dowl. (p. c.) 183; and 3 Sc. (c. r.) 401.

10. A motion to set aside proceedings for irregularity, on the ground of variance between the process and declaration, must be made promptly and in vacation, to a Judge at chambers; and where he refused to interfere, held, that to prevent judgment being signed, a plea should be delivered under a protest. *Tory v. Stevens*, 6 Dowl. (p. c.) 275.

11. Where the date of the writ of summons was omitted in the issue, although supplied in the writ of trial, held irregular, and not waived by appearance at the trial and allowing the cause to proceed under protest. *Blissett v. Tenant*, 6 Dowl. (p. c.) 436.

12. Where the plaintiff, without consent or authority, inserted in the writ of trial the date of the writ of summons, which was not in the issue delivered, and at the trial the defendant objected to the variance, which the sheriff over-ruled, and the trial proceeded under protest by the defendant; held, that such objection was fatal, and that the defendant defending under protest was not to be taken as a waiver of it. *Lycett v. Tenant*, 4 Bing. N. S. (c. r.) 168; supporting *Worthington v. Wigley*, 5 Dowl. 209.

13. A judgment on demurrer, held not an *order* within the rule of Mich., 1 Will 4, and the omission to comply with it no ground for setting aside the judgment and execution. *Taylor v. Murray*, 6 Dowl. (p. c.) 80; and 3 Mees. & W. (xx.) 141.

14. Application to set aside the service of a writ of summons must be made within the time limited for appearance. *Child v. Marsh*, 3 Mees. & W. (xx.) 433.

15. The rule requiring a term's notice before taking any step in a cause after the lapse of four terms, applies only to proceedings towards judgment, and not to a motion to set aside proceedings for irregularity. *Lumley v. Thompson*, 3 Mees. & W. (xx.) 632.

16. To bring the party into contempt for non-payment of money, pursuant to rule of Court, if the demand is made by power of attorney, a copy



of the power must be left at the time of demand. *Doe v. Johnson*, 7 Dowl. (r. c.) 550.

[M] EXAMINATION OF WITNESSES—COMMISSION FOR—PRODUCTION OF PAPERS—ADMISSIONS.

1. It is sufficient to obtain a commission, that the witnesses are out of the jurisdiction; and it is immaterial that the action is of a criminal nature. *Norton v. Lord Melbourne*, 3 Bing. N. S. (c. p.) 67; 3 Sc. 398; and 5 Dowl. (r. c.) 181.

2. An order for a commission to examine witnesses abroad allowed to be extended to liberty to cross-examine *vis à voce*, such examinations to be reduced into writing, and returned with the commission. *Poll v. Rodgers*, 3 Bing. N. S. (c. p.) 780; and 5 Dowl. (r. c.) 632.

3. Where the note on which the action was brought was misdescribed as to its date in the notice to admit the handwriting, but the defendant could not be misled; the verdict having been found for the plaintiff, the court refused to set it aside. *Field v. Flemming*, 5 Dowl. (r. c.) 450.

4. To authorize the judge to impound documents offered in evidence on the trial, the application must be made during the progress of the cause, and it is too late afterwards to do so. *Boston v. Ockford*, 7 C. & P. (n. p.) 547.

5. Where the delay had been occasioned by the refusal of the defendant to accept the amended issue, and the object appeared to be to delay the plaintiff, the Court, in granting a commission abroad to examine the defendant's witnesses, ordered the money to be brought into court, and limited the time for the return of the commission. *Sparkes v. Barrett*, 3 Sc. (c. p.) 402.

6. Where the answer returned by the commissioners under 1 Will. 4, c. 22, is inadmissible as evidence, it will be struck out, and so of illegal questions; but the party putting a question must take the answer. *Hutchinson v. Bernard*, 2 M. & Rob. (n. p.) 1.

7. Rule for examining a witness going abroad, on interrogatories, not discharged merely on the ground of the plaintiff not having proceeded promptly. *Weekes v. Pall*, 6 Dowl. (r. c.) 462.

8. Where lessee for lives occupied and paid the rent up to the expiration of the lease, when he obtained the lease from third parties, and delivered it to the lessor, from whose custody it was produced at the trial; held to have come from the proper custody. *Rees v. Walters*, 3 Mees. & W. (ex.) 527.

9. Where the attorney of a devisee of lands, his client, held the will, held that being part of the muniments of his client he was not bound to produce it, notwithstanding it was suggested to be a will of personality also. *Doe v. James*, 2 M. & Rob. (n. p.) 47.

10. Inspection granted of an agreement on which the action for money had and received was founded. *Charnock v. Lumley*, 5 Sc. (c. p.) 438.

11. In an Action upon a contract for building

a chapel; the Court refused a view. *Newham v. Taite*, 6 Sc. (c. p.) 574.

12. Where the commission required that when the examinations were taken the same should be sent; held, that copies taken by the foreign court of commerce, to whom the commission had been directed, and certified by their officer, and transmitted under the seal of the court, could not be read. *Clay v. Stephenson*, 7 Add. & Ell. (q. s.) 185.

[N] ISSUES.

1. Where in the issue the date of the writ of summons was mis-stated, and the word defendant instead of defendants, and the *venire* directed to the *then* sheriff; held no ground for setting aside the issue, but that plaintiff might apply at chambers to amend it at the plaintiff's costs. *Ikin v. Plevin*, 5 Dowl. (r. c.) 594.

2. Where the plaintiff concludes to the country, although he may now add the *similiter* without rule to rejoin, he is not bound to do so; but if he does not, the defendant is not entitled to judgment as in case of nonsuit. *Brook v. Lloyd*, 1 Mees. & W. (ex.) 552; and 1 Tyr. & Gr. 924.

3. Since the rule 15 of Hil. 4 Will. 4, the plaintiff cannot be ruled to enter the issue. *Wilks v. Dodd*, 3 Sc. (c. p.) 769.

[O] TRIAL—NOTICE OF—COUNSEL—RIGHT TO BEGIN—EXAMINATION OF WITNESSES—WITHDRAWING JUROR—VERDICT—NEW TRIAL.

1. Where notice of trial is countermanded, the record need not be resealed, unless the alteration is made to a day after the return of the writ. *Chandler v. Bezward*, 2 Mees. & W. (ex.) 206.

2. If the plaintiff avails himself of short notice of trial, he has no power of countermand, and must pay the costs of not proceeding to trial up to the time of countermand. *Doncaster v. Cardwell*, 2 Mees. & W. (ex.) 390; and 5 Dowl. (r. c.) 581.

3. Upon a joint plea of not guilty, counsel of each defendant not allowed either to cross-examine or address the jury separately. *Seale v. Evans* and another, 7 C. & P. (n. p.) 593.

4. Where several defendants rely on the same ground of defence, only one counsel can address the jury. *Mason v. Ditchbourne*, 1 M. & Rob. (n. p.) 462.

5. Where the order for trial of an issue directs all witnesses to be examined, and the plaintiff, conceiving his case made out, declines calling some, the judge will do so, and the plaintiff may make observations thereon, and the defendant may reply on such observations. *Groom v. Chambers*, 2 M. & Ayr. (s.) 742.

6. The court will look at the substance of the issue in deciding on which party is to begin. Where, in covenant for not leaving in repair, the plaintiff alleged that the premises were left dilapi-



dated, and the defendant that they were not, the plaintiff was held entitled to begin. *Soward v. Leggatt*, 7 C. & P. (N. P.) 613.

7. In *assumpsit*, for not delivering hay of certain quality; plea, that defendant tendered hay of that quality, and that plaintiff refused to receive it; held, that being a traverse of an allegation in the declaration, the issue lay on the plaintiff. *Crowley v. Page*, 7 C. & P. (N. P.) 790.

8. In *assumpsit*, on breach of promise of marriage, the defendant pleaded only, unchaste, &c. conduct of the plaintiff after the promise, the plaintiff held entitled to begin. *Harrison v. Gould*, 7 C. & P. (N. P.) 580.

9. In *assumpsit*, for breach of contract to do certain work in a workmanlike manner, and issue whether the work was so done, held that the plaintiff was to begin. *Amos v. Hughes*, 1 M. & Rob. (N. P.) 464.

10. The test is whether, if the particular allegation on which the issue arises be struck out of the plea, there will or will not be a defence to the action, and not merely whether the allegation be affirmative or negative. *Id.* n.

And see *Mills v. Barber*, 1 Mees. & W. 427.

11. In ejectment by heir against a party claiming under a will, held that the latter was entitled to begin (having admitted the lessor of plaintiff to be heir), notwithstanding the plaintiff professed to claim under an outstanding term of part of the premises. *Doe v. Smart*, 1 M. & Rob. (N. P.) 476.

12. Where the affirmative of the issue in covenant lay on the defendant, held that he was entitled to begin, although the damages were uncertain. *Reeve v. Underhill*, 1 M. & Rob. (N. P.) 440.

13. So, where in covenant the issue is on the defendant, he is to begin. *Wootton v. Barton*, 1 M. & Rob. (N. P.) 518.

14. The same rule held to prevail in replevin as in other actions, that where any one issue is on the plaintiff, he is entitled to begin. *James v. Salter*, 1 M. & Rob. (N. P.) 501.

15. Either party, at any period of trial, may require witnesses to be ordered out of court. *Southey v. Nash*, 7 C. & P. (N. P.) 632.

16. Where plaintiff's witness had in chief stated the defendant to be the party with whom he contracted on behalf of plaintiff, which was contradicted by the defendant, the defendant having afterwards come into court; held, that the witness could not be re-examined to speak more positively as to identity. *Roe v. Day*, 7 C. & P. (N. P.) 705.

17. After evidence is given implicating all the defendants in trespass, held that, although the defence of one might be complete, the court would not take the acquittal separately, in order to let in the party as a witness. *Leach v. Wilkinson*, 1 M. & Rob. (N. P.) 537.

18. In trespass for taking goods which in one plea the defendants justified on the ground of

their having been fraudulently removed to avoid distress, held that the plaintiff might reserve his answer in reply. *Ashmore v. Hardy*, 7 C. & P. (N. P.) 501.

19. And the plaintiff was not bound to prove title to the goods, it being enough that they were taken out of his possession. *Id.*

20. Where a juror was withdrawn on reference of the accounts to an arbitrator, held, that, as it, under the circumstances, finally determined the action, the award being set aside, the parties could not go on again in the action. *Harris v. Thomas*, 2 Mees. & W. (xx.) 37.

21. Where a verdict was inadvertently taken in an undefended cause for the mortgage principal, without the interest, held that, although the court might set aside the verdict, it could not be increased in the absence of the defendant. *Baker v. Brown*, 2 Mees. & W. (xx.) 199; and 5 Dowl. (P. C.) 313.

22. So, where the verdict was taken by consent on the calculation of counsel, the court could not interfere on the ground of a wrong basis of calculation having been taken. *Hilton v. Fowler*, 5 Dowl. (P. C.) 312.

23. In debt for goods, &c.; plea, as to part, a set-off; as to other part, goods returned, and, as to the residue, payment into court, and the defendant proved sufficient to cover the amount claimed in the particulars, but less than he had alleged in his set-off; held, that the plaintiff was entitled to a verdict for that deficiency. *Green v. March*, 5 Dowl. (P. C.) 669.

24. Where, in ejectment for forfeitures by breach of covenant, the Judge directed the jury, that if they were of opinion that a nuisance, created by an erection on the premises, had been increased, they should find for the plaintiff, and, upon their retiring to deliberate, the Judge and counsel quitted the court, and the associate, upon the return of the jury finding in the affirmative, entered the verdict for the plaintiff, although several expressed their dissent from this construction; held, not to amount to a special verdict, and that the verdict was properly entered. *Doe v. Baster*, 1 Nev. & M. (x. n.) 541; and 5 Ad. & Ell. 129.

25. Where a plea of justification of libel alleged three several distinct facts, and the jury were told by the Judge that, in order to find for the defendant, they must be satisfied that all the allegations had been proved in substance, and the jury, after great deliberation, found for the defendant; the court refused to interfere upon the suggestion that the jury had, in answer to a question, expressed an opinion the other way as to one of the facts. *Napier v. Daniel*, 3 Bing. N. S. (c. r.) 77; and 3 Sc. 417.

26. Where, on a question of seaworthiness, a new trial had been granted on the ground of the verdict for the plaintiff being against the weight of evidence, and the jury again on the same evidence, found for the plaintiff, the court were equally divided on an application for a third trial, and the rule therefore discharged. *Foster v. Steele*, 3 Bing. N. S. (c. r.) 892.



27. And afterwards refused an application to open the consolidation rule, in order to try the same question against another underwriter. (Vaughan, J., diss.) *Foster v. Alvarez*, 1b. 896.

28. Where the cause was tried in the absence of the defendant's attorney before the hour stated on the notice of trial, the court set aside the verdict without an affidavit of merits. *Hanslow v. s. Wilks*, 5 Dowl. (p. c.) 295.

29. Where the plaintiff was nonsuited for the nonproduction of a document out of the jurisdiction, and which had been sent for, but did not arrive in time, the court set aside the nonsuit upon payment of costs. *Atkins v. Owen*, 6 Nev. & M. (x. s.) 229; and 4 Ad. & Ell 819.

30. Where the plaintiff was nonsuited in consequence of the defendant's refusal to admit documents which had been agreed to be admitted by the defendant's attorney's agent, a new trial granted, with costs to be paid by the defendant; but the court would not visit them on his attorney, who was not present at the trial, and had not instructed counsel to object. *Doe d. Tindal v. Roe*, 5 Dowl. (p. c.) 420.

31. In trespass and false imprisonment against the marshal; plea, first, leave and licence (to which the *similiter* had been omitted); secondly, pleas justifying the detention until payment of certain fees, on which the issues were regularly made up, and the plaintiff obtained a verdict and damages; the court refused an application for a new trial on the ground of the defect in the record, the question having in fact been involved in the other issues and been tried. *Stockdale v. Chapman*, 6 Nev. & M. (x. s.) 711; and 4 Ad. & Ell. 419.

32. Where time for pleading was obtained on terms *inter alia* of taking short notice of trial, "if necessary;" held, that in the case of trial before the sheriff, the plaintiff is bound to give a short notice for the first sittings after the date of the order obtained. *Dignam v. Ibbotson*, 3 Mees. & W. (xx.) 431.

33. Where a second notice of trial is treated as a continuance of one in the same term, it cannot be afterwards treated as an original notice, so as to evade the rule that not more than one continuance shall be allowed in one term. *Wyatt v. Stocken*, 6 Ad. & Ell. (x. s.) 803.

34. Where in an action on a contract for the purchase of goods, to be paid for by approved bills, and after issue joined the defendant became bankrupt, and the plaintiff having proved under the commission for the price of the goods, forbore to proceed in the action; held that the proof not being strictly of the claim in respect of which the action was brought, the defendant was not precluded from taking the cause down by proviso; but a *stet. processus* allowed on payment of costs of the demurrer. *Whittaker v. Mason*, 4 Bing. N. S. (c. p.) 303; and 6 Dowl. (p. c.) 429.

35. Where the witnesses had not arrived when the cause came on in its turn; held, that the plaintiff must either proceed or withdraw the record, and having done the latter, and his witnesses arrived during the trial of the next cause, the judge

allowed it to be re-entered, unless an affidavit were produced that the defendant had sent away some of his witnesses. *Lean v. Smith*, 2 M. & Rob. (n. p.) 126.

36. Where the defendant struck the special jury, but took no steps to summon them, and the plaintiff, to insure the trial, did so; held, that it was nevertheless the defendant's jury, and he was liable to pay them. *Wilson v. Butler*, 2 M. & Rob. (n. p.) 78.

37. No rule for a special jury to be granted on behalf of a defendant, or plaintiff in replevin, except on affidavit, stating that no notice of trial, or for what day, given, and in the latter case unless the application made six days before that day; but a judge may order a rule for a special jury to be drawn up at any time. Reg. Gen., 4 Bing. N. S. (c. p.) 367; and 3 Mees. & W. (xx.) 154.

38. Where only a part of the special jury appear, the plaintiff is entitled to pray a *tales*, without the defendant's consent. *Gatliffe v. Bourne*, 2 M. & Rob. (n. p.) 100.

39. Where different defendants appear by separate counsel, the issues raised by their respective pleas being the same, only one counsel will be allowed to address the jury. *Sparkes v. Barrett* and another, 8 C. & P. (n. p.) 442.

40. The right to begin is not so entirely for the disposal of the judge at *nisi prius* but that if his decision were clearly wrong, the court would interfere. *Huckman v. Fernie*, 3 Mees. & W. (xx.) 512.

41. In an action on a life insurance policy, upon the issue that the party was in good health at the time of effecting the policy; held, that it lying on the plaintiff to establish the condition of the insurance, he was entitled to begin; in such a claim, only one counsel can be heard on a side. *Rawlins v. Desborough*, 2 M. & Rob. (n. p.) 70; and 8 C. & P. 321.

42. Where a declamation for false imprisonment consisted only of one count, part of which the jury negatived, the Judge refused to have so much of the issue found for the defendant entered for him. *Myers v. Goodchild*, 8 C. & P. (n. p.) 313.

43. Where the cause had been brought on according to the notice of trial, and been announced in the marshal's list as to be taken as an undefended cause, and no notice was given to the plaintiff, or counsel instructed that it was to be defended, the court refused to set aside the verdict for irregularity; but on an affidavit of merits, granted a new trial, on payment of costs; on such a term imposed, the court will not fix a day for the payment. *Bland v. Warren*, 2 Nev. & P. (x. s.) 97; and 6 Dowl. (p. c.) 21.

44. A rule *nisi* for a new trial, held not a nullity because obtained by a different attorney from the one on record, without any order for changing. *Doe v. Branson*, 6 Dowl. (p. c.) 490.

45. Where the under-sheriff on executing a writ of inquiry in an action of slander, had, in answer to a question of the jury as to what damages would entitle the plaintiff to costs, told



them that the smallest sum would be sufficient; held, that being merely an intimation on a subject over which the jury had no power, it was not such a misdirection to justify a second inquiry. *Grater v. Collard*, 6 Dowl. (r. c.) 503.

46. Where the clerk of the plaintiff's attorney, before the adjournment was fixed, was informed at the office that it would be on the 8th, but it was afterwards fixed for the 6th, and the plaintiff not appearing on the 7th, when the cause was called on, was nonsuited, the judge refused to allow the cause to be restored. *Hall v. Milligan*, 8 C. & P. (n. r.) 314.

47. Where notice of trial was given for the sittings after Easter term, which began on 12 May, being only an adjournment day to the 16th; held, that notice of countermand on the 14th was too late. *Cooper v. Whitmarsh*, 4 Mees. & W. (xx.) 73; and 6 Dowl. (r. c.) 696.

48. Upon issues in fact, and of law raised upon pleas to the same count, where the entry of *venire* was only *ad triandum*, and not also of *ad inquirendum*, the court set aside the issue, with costs. *Codrington v. Lloyd*, 1 Ferr. & D. (q. n.) 157.

49. The court refused to discharge a rule for a special jury, merely on the suggestion that it had been obtained for delay. *Bull v. Pinkus*, 5 Sc. (c. r.) 617.

50. Where the action involved a question of great local interest in a small county, the court granted a suggestion for removing the trial to the adjoining county, and the defendants not entitled to the costs of the motion. *Jones v. Price*, (r. c.) 103.

51. Where in trover the jury found for the plaintiff, but accompanied their verdict with a statement in writing, that whether the goods were delivered to the defendant as a loan or gift, they ought to have been returned, which the associate refused to receive; held that he was right, it amounting to a mere expression of the private opinion. *Whittett v. Bradford*, 5 Sc. (c. r.) 711.

52. Where an I O U instrument had, whilst counsel were engaged, been inadvertently read, held that it was too late afterwards to object to the want of a stamp, and withdraw it from the jury. *Foss v. Wagner*, 6 Ad. & Ell. (q. n.) 116.

53. Where the jury found only 20s. damages in a case of slander, although very gross, the court refused a new trial on the ground of the smallness of the damages. *Rendall v. Hayward*, 5 Bing. N. S. (c. r.) 424.

54. Where one of the defendants was in court when the cause was called on in its turn and tried as an undefended cause, being eighth on the list, no briefs having been delivered, and the verdict being for 7l., a new trial refused on any terms. *Watson v. Reeve*, 5 Bing. N. S. (c. r.) 112; 6 Sc. 783; and 7 Dowl. (r. c.) 127.

55. Where, from the pressure of business, the intended motions for new trials are put into the usual list to be made after the first four days, it is necessary to give notice to the other side, or judgment signed on the fifth day before the motion is made will be regular. *Doe v. Edwards*, 7 Dowl. (r. c.) 547.

56. Where there was a misjoinder of counts against the defendant in his own right, and also as executor, held that a *venire de novo* could not be awarded, but the judgment be arrested, and that the application having been made for the former on a subsequent day in the same term in which a rule for the latter was moved for and obtained, was not too late. *Corner v. Shew*, 4 Mees. & W. (xx.) 163; and 6 Dowl. (r. c.) 688.

And see *Leach v. Thomas*, 2 Mees. & W. 497.

57. Where, at the trial, a verdict was taken and the cause referred, but from the neglect in delivering the order of *nisi prius* to the arbitrator in time, the defendant refused to proceed; held, that until the verdict was got rid of, the cause could not be tried again, and that the cross-examination of a witness upon interrogatories under an order under 1 Will. 4, c. 22, s. 4, did not amount to a waiver of the irregularity of the second trial, as it might have taken place on a supposition that proceedings would be taken to try the cause regularly. *Hall v. Rouse*, 4 Mees. & W. (xx.) 24; and 6 Dowl. (r. c.) 656.

58. Assizes may be held in adjoining counties; 2 & 3 Vict. c. 72.

And see *Action on the Case*.

#### [P] JUDGMENT.

1. Under rule 3, Hil. 4 Will. 4, the court or a Judge can only direct judgment to be entered *nunc pro tunc* in cases as before, where the delay is by the act of the court. *Lanman v. Lord Audley*, 2 Mees. & W. (xx.) 535; 8 C. 5 Dowl. (r. c.) 596.

2. The Judge in the Bail Court may review the decisions at chambers. *King v. Myers*, 5 Dowl. (r. c.) 687.

3. Where the plaintiff signed judgment on the 23d, and the defendant took out a summons to set it aside on the 25th, which was dismissed on the 26th; held, that he was not too late in applying to the court on the 29th. *Id.*

4. A party seeking to set aside an interlocutory judgment is bound to come promptly, and the time begins to run from his receiving notice of judgment being signed. *Grant v. Flower*, 5 Dowl. (r. c.) 419.

5. Judgment signed before an appearance entered, held irregular, and not cured by a *cognovit* having been given to the plaintiff's attorney to enter it, who entered it *nunc pro tunc*. *Watson v. Dore*, 2 Mees. & W. (xx.) 386; and 5 Dowl. (r. c.) 583.

6. After leave given at the trial to move to reduce the damages, the court, upon the plaintiff's consenting to forego the sum disputed, allowed judgment and execution for the residue. *Hellings v. Young*, 3 Sc. (c. r.) 770.

7. After declaration delivered on 28th October, with notice to plead in four days, a summons was taken out for further time to plead, and on the 29th, by a Judge's order, it was granted on terms,



to have four days' time to plead; held, that the time was to be computed from the date of the order, and that judgment signed on the 3d Nov. was regular. *Lane v. Parsons*, 3 Bing. N. S. (c. r.) 264; 3 Sc. 652; and 5 Dowl. (r. c.) 359.

8. Where the declaration in an action against the sheriff was for an escape, and the evidence was of omitting to arrest, having opportunity, which was found specially by the jury, and indorsed upon the record; held, to be within the 4 Will. 4, c. 42, s. 24, and that the court might give judgment according to such finding, and that they could not impose terms on the party in whose favor it was given. *Geast v. Elwes*, 6 Nev. & M. (x. s.) 433; and 5 Ad. & Ell. 118.

9. Where the plaintiff, having signed judgment too soon, gave notice of his intention to abandon it, but did not strike it out of the book, the court discharged the rule on the part of the defendant, to set it aside as unnecessary. *Robinson v. Stoddart*, 5 Dowl. (r. c.) 266.

10. Where the declaration in *assumpsit*, for 10*l.*, for instruction, in one count, and for 10*l.* on an account stated; and the defendant pleaded, 1st, *non assumpsit*, 2dly, payment of 10*l.* in satisfaction of the promises, &c., the plaintiff entered a *nolle pros.* as to the second count and the defendant had a verdict on the plea of payment; held, that the record was to be looked at as it stood at the trial, and the issue being only as to the first count, the plaintiff was not entitled to judgment *non obst. rered.* *Wright v. Acres*, 1 Nev. & P. (x. s.) 761.

11. Where the plaintiff had obtained a verdict, and the defendant a rule *nisi* for a new trial, which after the lapse of a year was discharged, and the defendant in the interval died; judgment ordered to be entered *nunc pro tunc*, although more than two terms had elapsed after discharging the rule, the delay arising from the taxation of the costs, and no fault in the plaintiff. *Blewett v. Tregonning*, 4 Ad. & Ell. (x. s.) 1002; and 5 Dowl. (r. c.) 404.

12. A defendant cannot sign judgment of *non pros.* after notice of trial; and where he had done so for not entering the issue pursuant to a rule, held that it was an answer to a motion for a judgment as in case of nonsuit, that the time for proceeding to trial expired pending a rule for setting aside the judgment of *non pros.* *Howell v. Jacobs*, 5 Dowl. (r. c.) 334.

13. Pleas in trespass, the general issue and a justification; replication and new assignment, and demurrer thereto, and on the trial the plaintiff obtained a verdict and damages on the first issue; held, that he could not enter a *nolle pros.* as to the new assignment only. *Strother v. Randerson*, 5 Dowl. (r. c.) 280.

14. Where a *nolle pros.* was entered as to certain of the pleas, and money taken out of court; held, that the defendant being entitled to some costs, the court would not afterwards allow the fee propriety of the pleas to be contested. *Williams v. Sharwood*, 3 Bing. N. S. (c. r.) 331; 3 Sc. 761; and 5 Dowl. (r. c.) 371.

15. Declaration delivered on the 9th, indorsed

to plead in four days, and plea demanded on the same day, and judgment signed for want of plea at one o'clock on the 14th, held regular. *Blundell v. Hanson*, 2 Mees. & W. (ex.) 243; and 5 Dowl. (r. c.) 457. Overruling *Kemp v. Tyson*, 3 Dowl. (r. c.) 265.

16. The plaintiff cannot sign judgment as for want of plea until the time for pleading has expired, although irregular pleas delivered. *Smith v. Rathbone*, 5 Dowl. (r. c.) 401.

17. Where after obtaining a week's further time to plead, the defendant took out several summonses for further time, the last returnable on the day after the week's time expired, but no order taken on either; held, that the plaintiff was entitled to sign judgment on that day. *Baas v. Cooper*, 2 Mees. & W. (ex.) 310.

18. Where imparlance is abolished, a notice to plead is still necessary before judgment for want of plea can be signed. *Fenton v. Austin*, 5 Dowl. (r. c.) 113.

19. Where in *assumpsit* for goods; plea, *non assumpsit*, except as to £—, and as to £—, part thereof, payment before action brought; as to other part of that sum, payment into court, and as to the residue, a set-off; the plaintiff accepted the sum paid into court, but took no notice of the other pleas; the court directed that the plaintiff should amend, or, if he would not consent to allow the defendant to tax his costs as if a *nolle pros.* had been entered as to the other pleas, that the defendant might sign judgment as for want of a sufficient replication. *Topham v. Kidmore*, 5 Dowl. (r. c.) 676.

20. After the defendant has once demanded a declaration, if the plaintiff obtains further time, no fresh demand is necessary to entitle the defendant to sign judgment of *non pros.* on the expiration of the last order. *Fenton v. Grant*, 5 Dowl. (r. c.) 153.

21. Where the *similiter* was intitled in a wrong court, and so no issue, no rule for judgment as in case of nonsuit allowed. *Ray v. Good*, 5 Dowl. (r. c.) 225.

22. Where issue was joined in a town cause in Hil. vacation, and an order obtained to try before the sheriff; held, that application for judgment as in case of nonsuit in the following Easter Term was too early, although several sheriff's court days had passed since the order. *Stacey v. Jeffrys*, 5 Dowl. (r. c.) 324.

23. So, where issue in a town cause joined in Trin. vacation, with the like order, and no notice of trial given, the motion in Hil. Term following was too early. *Fox v. M'Culloch*, 5 Dowl. (r. c.) 526.

24. The rule, to make a judge's order for judgment as in case of nonsuit a rule of court, is absolute in the first instance; but it cannot be made part of the same rule for entering up judgment and issuing execution. *Doe v. Savage*, 5 Dowl. (r. c.) 507.

25. Where the plaintiff had once taken down



the cause, and a new trial had been granted, and notice of trial given, but not proceeded in; held, that the defendant could not move for judgment, but must take down the cause by proviso. *Hawley v. Sherley*, 5 Dowl. (r. c.) 393.

26. Where issue was joined in vacation and no notice of trial given, it not being shown to be a country cause; held too early to apply, in the next term but one after issue joined, for judgment as in case of nonsuit. *Heale v. Curtis*, 2 Mees. & W. (xx.) 76; and 5 Dowl. (r. c.) 294.

27. Where the motion was made in the same term as the default made, held too early. *Gripper v. Lord Templemore*, 5 Dowl. (r. c.) 403.

28. Judgment cannot be moved for until two actual terms have elapsed after issue is joined. *Gough v. White*, 2 Mees. & W. (xx.) 363.

29. Where the plaintiff is not bound to go to trial until the sittings after term, and he gave a notice for the sittings in term, but did not proceed thereon or countermand, but gave notice for the sittings after; held, that the defendant was not entitled to judgment as in case of nonsuit. *Ranger v. Bligh*, 5 Dowl. (r. c.) 235. *S. P. Fell v. Tyne*, lb. 246.

30. Notice of trial before the sheriff being given for a day in term, the plaintiff cannot move for judgment for not proceeding to trial in that term. So, *semb.* in town causes; but costs of the day incurred may be moved for by distinct motion in such term. *Linley v. Poulden*, 5 Tyrw. (xx.) 819.

31. The defendant having since the commencement of the action taken the benefit of the Insolvent Act, is a sufficient answer to a motion for judgment as in a case of nonsuit, and the court will discharge it with costs, unless a *stat processus* is consented to. *Smith v. Babcock*, 5 Dowl. (r. c.) 91.

32. Where the plaintiff's right of action became by his bankruptcy vested in his assignees, who refused to proceed in the suit, the court refused to discharge the rule for judgment as in case of nonsuit, unless security were given for costs. *Taylor v. Montague*, 2 Mees. & W. (xx.) 315.

33. It is no answer to an application for judgment, after a peremptory undertaking, that the cause was made a *remanet* through the illness of the judge, as the party ought to have applied to the court to relieve him from it. *Ward v. Turner*, 5 Dowl. (r. c.) 22.

34. Upon an application to enlarge a peremptory undertaking, after several defaults, the Court will make the plaintiff pay the costs of the last application. *De Rutzen v. Jehn*, 5 Dowl. (r. c.) 400.

35. It is no answer to the application that the plaintiff swears the action commenced without his knowledge or authority. *Barber v. Wilkins*, 5 Dowl. (r. c.) 305.

36. Where the plaintiff, after default made, on the 14th gave a fresh notice of trial for the 18th, when the plaintiff obtained a verdict, but the defendant obtained a rule for judgment as in case of

nonsuit on the 15th; the court set aside the verdict and discharged the rule for judgment, on a peremptory undertaking, and payment of costs of the day on the first default, and of the rule. *Semb.* since the rule of Hil. 2 Will. 4, s. 68, one day's notice of the motion for judgment does not operate as a stay of proceedings. *Jones v. Howe*, 2 Mees. & W. (xx.) 379; and 5 Dowl. (r. c.) 600.

37. Plea after that of set-off, that the plaintiff ought not further to maintain, &c., alleging that he was willing and offered to tender, but that the plaintiff dispensed with an actual tender, and the defendant brings the money into court, &c.; held to amount to an informal plea of tender, and not a payment into court; and the plaintiff having taken out the money, and entered a *nolle pros.*, the defendant having succeeded on the other issues, was entitled to judgment on the whole record. *Turner v. Crossley*, 3 Mees. & W. (xx.) 43.

38. A plea of payment of money into court under a judge's order, although stating, unnecessarily, that it had been done before declaration, held not bad, nor the plaintiff entitled to judgment *non obst. vered.* *Edwards v. Price*, 6 Dowl. (r. c.) 487.

39. Judgment may be signed on the morning of the day after time for pleading has expired. 4 Bing. N. S. (c. r.) 366.

40. Where the service of declaration was on Saturday, held, that Sunday was to be reckoned in computing the time for signing judgment for want of plea. *Shoebridge v. Irwin*, 6 Dowl. (r. c.) 126.

41. In debt for £75 on five counts for £15 each, and giving credit for £10, concluded for a balance of £65, the particulars giving credit also for £10, and stating a balance of £12 11s. 6d. as due, to which the defendant pleaded, first, *nung. indeb.*, except as to £10 13s., parcel, &c.; secondly, as to £10, other parcel, payment before action brought; and, thirdly, payment of that sum into court, in discharge of the cause of action in the declaration mentioned: replication, that plaintiff accepted the said sum of £10 13s. in satisfaction of the causes of action, and taxed his costs: held, that the defendant was entitled to sign judgment of *non pros.* as to the other pleas. *Emmott v. Standen*, 3 Mees. & W. (xx.) 495.

42. The 14 Geo. 2, c. 17, entitling defendant to judgment as in case of nonsuit, extends to ejectments. *Doe v. Docker*, 6 Dowl. (r. c.) 478.

43. The affidavit in support of the motion, stating notice of trial given, is sufficient without alleging that the cause was at issue. *Corbyn v. Heyworth*, 6 Dowl. (r. c.) 181; and 3 Sc. (c. r.) 335.

44. The rule for judgment after a peremptory undertaking, to be absolute in the first instance. *Reg. Gen.*, 4 Bing. N. S. (c. r.) 365.

45. Where in a country cause no notice of trial has been given, held, that the motion cannot be made until after the second assize has passed. *Smith v. Miller*, 6 Dowl. (r. c.) 154; and 3 Mees. & W. (xx.) 60.



46. The new rules make no difference as to the time of moving for judgment, as in case of nonsuit; where therefore issue is joined in a country cause in a term next preceding the assizes, the motion cannot be made until after two assizes have elapsed; but if it be joined before or in a non-issuable term, and no notice of trial is given, the motion may be made in the term next after the assizes. *Evans v. Bernard*, 3 Mees. & W. (xx.) 276; and 6 Dowl. (r. c.) 367.

47. The new rule of Hil. 2 Will. 4, s. 65, as to applications for arrest of judgment on a *venire de novo*, being made within the first four days of the term occurring next after the trial, held to apply to trials out of term as well as in term. *Thomas v. Jones*, 4 Mees. & W. (xx.) 23; and 6 Dowl. (r. c.) 663.

48. A judgment signed whilst the parties were attending the judge at chambers, on a summons for further time to plead, although the time for pleading had expired; held irregular, and set aside, with costs. *Abernethy v. Paton*, 6 Sc. (c. r.) 566.

49. A rule to enter and docket the judgment must be addressed to the plaintiff, and not to his attorney. *Engler v. Twisden*, 4 Bing N. S. (c. r.) 714; and 6 Sc. 580.

50. The 3 & 4 Will. 4, c. 42, s. 43, having passed after the rule 8 Hil., 2 Will. 4, is to be considered as a qualification of it; where a declaration was filed on 24 Dec., with notice to plead in four days, and judgment was signed on the 29th, held irregular. *Wheeler v. Green*, 7 Dowl. (r. c.) 194.

51. Where, after the time for delivery of plea had expired, and the plaintiff's attorney's clerk had left an order to proceed to sign judgment, the defendant's attorney called with the plea, but judgment was signed in ignorance of it, the court refused to set aside the judgment, but on terms of payment of costs. *Stafford v. Nichols*, 4 Bing. N. S. (c. r.) 693; and 6 Sc. 577.

52. Where a *nolle prosequi* is entered on a plea going to the whole cause of action; held that the defendant is entitled to judgment on the whole record. *Peters v. Croft*, 6 Sc. (c. r.) 897.

53. Where a rule for judgment has been obtained, the defendant having become insolvent since the action commenced, the rule will be discharged with costs, unless a *stet processus* be accepted. *Holland v. Henderson*, 4 Mees. & W. (xx.) 587.

54. Where the defendant was sworn to be insolvent, and it did not appear that the plaintiff was aware of it when he brought the action, the court would discharge the rule, unless a *stet processus* consented to. *Leman v. Hopson*, 6 Dowl. (r. c.) 795.

55. An affidavit by the plaintiff that he had been unable to proceed to trial for want of funds, but that he expected to be able to proceed at any time after 1st July; held a sufficient ground for discharging the rule on a peremptory undertaking to try in Mich. Term. *Radford v. Smith*, 4 Mees. & W. (xx.) 100; and 7 Dowl. (r. c.) 26.

56. Where issue had only been joined in time as to one defendant, to enable him to move, but not duly as to other defendants, the rule refused. *Crowther v. Duke*, 7 Dowl. (r. c.) 409.

57. Where issue was joined in Michaelmas vacation in a country cause, and no notice of trial for the Spring Assizes, held that it was too early to move for judgment in Easter Term. *Harrison v. Williams*, 6 Dowl. (r. c.) 772.

58. Where issue was joined in Easter, and notice of trial given for the second sitting in Trinity Term; held, that the rule could not be moved for until Michaelmas. *Phillips v. Yardley*, 6 Sc. (c. r.) 602.

59. Where issue was joined in June, but no notice of trial for the assizes given; held, that the motion could not be made until after two assizes, and that the motion in Hil. was too early. *Williams v. Davis*, 5 Bing. N. S. (c. r.) 227; and 7 Dowl. (r. c.) 246.

60. Where issue was joined in a country cause in Michaelmas Term, the motion for judgment as in case of nonsuit, held properly made in the following Easter. *Apperley v. Morse*, 6 Dowl. (r. c.) 505.

61. So in a town cause, although no notice of trial given. *Pierson v. Chessum*, lb. 507.

62. Where issue is joined in Easter Term, the defendant is entitled to move for judgment in the Michaelmas Term, and held that the filing the *simuliter* is a joining of issue, although the issue is not made up and delivered. *Heath v. Boxall*, 7 Dowl. (r. c.) 19.

63. Where the defendant had refused to accept the notice of trial, held that he could not resort to it in support of his motion for judgment as in case of nonsuit. *Clarke v. Goldsmid*, 5 Bing. N. S. (c. r.) 120; 7 Dowl. (r. c.) 161; and 6 Sc. 694.

64. Where the cause was referred, and the record withdrawn, held that the defendant could not move for judgment as in case of nonsuit, although the plaintiff afterwards refused to proceed with the reference. *Hansby v. Evans*, 7 Dowl. (r. c.) 198; and 4 Mees. & W. (xx.) 565.

65. Whether obtaining a rule for a special jury after a peremptory undertaking is a default within the statute depends upon whether it is a proper cause to be tried by a special jury. *Twysden v. Stultz*, 6 Sc. (c. r.) 434.

66. Where the peremptory undertaking was to try at the next Sheriff's court, the rule absolute for judgment allowed on default. *Willis v. Oakley*, 6 Dowl. (r. c.) 766.

67. Where, after a peremptory undertaking, the plaintiff not having proceeded to trial, both parties agreed to a reference; held to put an end to the undertaking. *Spurr v. Rayner*, 7 Dowl. (r. c.) 467.

68. Where one of two defendants suffers judgment by default, the other is still entitled to move for judgment as in case of nonsuit. *Stewart v. Rogers*, 7 Dowl. (r. c.) 185; and 4 Mees. & W. (xx.) 640.



[Q] COSTS—TAXATION OF.

1. Where cause is shown in the first instance, the party is not entitled to costs. *Read v. Speer*, 5 Dowl. (r. c.) 330.

2. Under special circumstances, the court interfered with the discretion of the master as to the number of counsel allowed on taxation. *Grindall v. Godman*, 5 Dowl. (r. c.) 378.

3. Under Reg. 93, Hil. 2 Will. 4, interlocutory costs on one side may be set off against final costs, without being subject to the lien of the attorney. *Holliday v. Lawes*, 3 Bing. N. S. (c. r.) 774; and 5 Dowl. (r. c.) 485, 636.

4. A judge's order for time, by consent of the parties, being tantamount to an appearance by the defendant; held, that he was entitled to notice of taxation. *Lloyd v. Kent*, 5 Dowl. (r. c.) 125.

5. Upon a reference of a rule as to matter of fact, moved without costs, the court will not afterwards entertain a substantive application for costs of inquiry before the officer. *Holmes v. Edwards*, 6 Dowl. (r. c.) 51.

6. Where parties are improperly served with notice of a motion of course, they are entitled to the costs of appearing. *Grimwood, ex parte*, 3 M. & Ayr. (s.) 291; and 2 Deac. 468.

7. Where in covenant on a lease for two quarters' rent, ending on — the defendant pleaded that no quarter's rent ending on — was due, upon which judgment on demurrer was given for the plaintiff, and he afterwards obtained a rule to amend the declaration, by withdrawing his claim as to that quarter, on payment of costs of the amendment, and the defendant obtained time to plead to the amended declaration; held, that he was not entitled to the costs of the plea and demurrer. *Baden v. Flight*, 4 Bing. N. S. (c. r.) 35; 6 Dowl. (r. c.) 177; and 3 Sc. 273.

8. Where the party has not appeared, and there is no recognised attorney, an appearance having been entered for him pursuant to the statute; held, that as no notice of taxation need now be given, it is not necessary to deliver a copy of the bill of costs. *Burch v. Pointer*, 3 Mees. & W. (ex.) 310; and 6 Dowl. (r. c.) 387.

9. In an action for not delivering goods from the ship, held, that upon an express issue whether or not there was an actual tender of the freight, as the custom of delivery of goods could not come in question, the court would not interfere with the discretion of the Master, who had disallowed the costs of witnesses subpoenaed to establish the custom; but that the plaintiff was properly allowed the costs of a special jury struck by the plaintiff, and no certificate necessary. *Jones v. Tobin*, 4 Bing. N. S. (c. r.) 123; and 6 Dowl. (r. c.) 251.

10. Where a verdict was taken on an attorney's bill by consent, to be taxed within the first five days of term, and the defendant took no step for that purpose within the time; held, that the plaintiff was entitled to sign judgment, and tax his costs. *Tucker v. Neok*, 4 Bing. N. S. (c. r.) 113; 2 Sc. 393; and 6 Dowl. (r. c.) 231.

11. Where proceedings were stayed on payment of 11*l.* 15*s.* and payment of costs, held that the plaintiff was only entitled to have them taxed on the lower scale. *Cook v. Hunt*, 7 Dowl. (r. c.) 397.

12. Costs of motion for trifling irregularities which might be disposed of at chambers, only allowed to be costs in the cause. *Roberts v. Lemon*, 6 Sc. (c. r.) 576.

13. Under Reg. Trin. 1 Will. 4, r. 12, a notice of taxation may be given any time before nine o'clock in the evening of one day for the following. *Edmunds v. Cates*, 4 Mees. & W. (ex.) 66; and 6 Dowl. (r. c.) 667.

14. Where the defendant, on being arrested on a bill of exchange, paid the amount, with 10*l.* for costs, into the sheriff's hands, and the plaintiff obtained a rule absolute for taking it out of court, but did not enter an appearance for the defendant, and a rule obtained by the latter for such payment (being deemed equivalent to bail) was afterwards discharged, no mention as to the costs being made in either of the rules; held, that the plaintiff was not entitled to the costs of either rule: the defendant afterwards obtained a rule for delivering up of the bill on payment of costs; held that the plaintiff was entitled to the costs of the latter rule. *Hannah v. Willis*, 5 Bing. N. S. (c. r.) 335.

15. Upon a new trial granted without mention of costs in the rule, the rule that the costs of the first trial shall not be allowed, although the party succeed again on the second trial, applies to issues in prohibition since 1 Will. 4, c. 21, s. 1. *Craven v. Saunderson*, 8 Ad. & Ell. (q. n.) 697.

PRACTICE (IN EQUITY).

[A] PROCESS—JURISDICTION.

[B] BILL—SUPPLEMENTAL.

[C] AMENDMENT.

[D] ANSWER—DEMURRER—PLEA.

[E] CONTEMPT—COMMITMENT.

[F] PETITION—RULES—ORDERS.

[G] MASTER.

[H] PRODUCTION OF PAPERS—EXAMINATION OF WITNESSES—PUBLICATION.

[I] BILL TAKEN PRO CONFESSO—DISMISSED.

[L] HEARING—REHEARING—DECREE.

[M] STAYING PROCEEDINGS—APPEAL.

[N] COSTS.

[A] PROCESS—JURISDICTION.

1. The Court of Equity has no jurisdiction to inquire into the validity of process of a court of law; the court therefore refused to interfere in a case where the defendant, having been taken under a *ne exeat*, which was ordered to be discharged, was detained upon a writ at common law for the same debt. *Walker v. Christian*, 7 Sim. (ch.) 367.



2. Where, after a *distringas* taken out, the plaintiff instituted proceedings in chancery, the court discharged them with costs. *Williams v. Bank of England*, 2 Younge (xx. eq.) 265.

3. Where the defendant, being abroad, had been served with the subpoena, and an appearance entered under the 4 Will. 4, c. 82; held, that the plaintiff might proceed to take the bill *pro confesso*, in the same manner as if the service had been within the jurisdiction. *Godson v. Cook*, 7 Sim. (c. n.) 519.

4. Where the defendant, taken on an attachment for want of answer, was rescued; held, to amount to a return of *non est inventus*, and the serjeant-at-arms ordered to go. *Lewis v. John*, 7 Sim. (c.n.) 426.

5. The 17th Order of 1831, as to service of a *subpoena* to rejoin, applies only to cases in which the plaintiff requires a commission. *Smith v. Oliver*, 3 Myl. & Cr. (c.n.) 165.

6. So, as to serving a *subpoena* to hear judgment. *Crooke v. Trery*, 1b. 168.

7. Before appearance, a service of motion on a defendant, held irregular; the Court will only be justified in immediate interference upon a special case made out. *Hill v. Rimell*, 2 Myl. & Cr. (c.n.) 641.

8. A motion is necessary for entering an appearance for the defendant under Reg. 13, 11 Geo. 4 & 1 Will. 4, c. 36. *Pitman v. Lockyer*, 7 Sim. (c.n.) 528.

9. All writs to be issued and made returnable immediately, as well out of term as in term, but no bill to be taken *pro confesso* unless 10 days intervene between the *teste* of such writ, where defendant resides within 20 miles of town, and 15 days in all other cases. Reg. Gen., 3 Younge & Cr. (xx. eq.) App. iii.

10. Every *subpoena* to contain three names where required, and only certain fees allowed thereon. Reg. Gen., 3 Younge & Cr. (xx. eq.) App. iii.

11. Where the party is out of the jurisdiction, service of a *subpoena* for payment of costs, held irregular; so where he is illegally arrested and detained. *Hawkins v. Hall*, 1 Beav. (c.n.) 73.

12. Where the *subpoena* was served at the residence in London of a peeress alleging herself to be domiciled in Scotland, and notice of the order *nisi* was served upon her in Scotland; held, that the order for a sequestration was regularly obtained. *Davison v. Marchioness of Hastings*, 2 Keene, (c.n.) 509.

13. Order for service of a *subpoena* abroad, under 4 & 5 Will. 4, c. 82, is not a motion of course in vacation; (see form of and affidavits to ground.) *De Sauley v. De Sauley*, 1 Coop. (c.n. c.) 116.

14. Where the defendant being in custody for want of appearance, was not brought to the bar of the court within 30 days; held, that after that period, being no longer in custody, the court had no authority to direct an appearance to be entered by the junior Six Clerk. *Williams v. Jones*, 8 Sim. (c.n.) 471.

15. Where the defendant's first and only residence in this country before he quitted was for two days at an hotel; held, that the order for appearance, under 11 Geo. 4, and 1 Will. 4, c. 36, s. 3, ought to be published in the church of the parish in which such hotel was situate. *Grant v. Hibbert*, 8 Sim. (c.n.) 320.

#### [B] BILL—SUPPLEMENTAL.

1. Where A. claiming as legatee and representative of her mother, also a legatee of B. her son, and in right of each to certain charges upon the estate of B., upon a suit to carry into execution B.'s will, obtained a decree for sale of lands comprised in a term created by the will to satisfy the charges, and the same were satisfied; after A.'s death, a second suit being instituted against the trustees of the inheritance, claiming that the fee simple might be sold instead of the term, which was directed, and steps taken towards a sale; a motion by the administrator *de bonis non* of the mother to go before the master and prove demands omitted by the daughter, since proved, or for leave to file a supplemental bill, refused, and appeal dismissed with costs. *Monck v. Paget*, 9 Bli. N. S. (p.) 506.

2. Where one of the defendants after decree became insolvent, and his assignee, without notice to the plaintiff, filed a supplemental bill against all parties to the suit, and the plaintiff subsequently filed his supplemental bill against the assignee alone, who obtained the common order for the time, the court refused a motion for taking off the file the latter bill as irregular. *Phillips v. Clark*, 7 Sim. (c.n.) 231.

#### [C] AMENDMENT.

1. An order to amend by adding parties, or show why the plaintiffs were unable to bring all the proper parties before the court; held to be complied with by words amounting to an allegation, that they sued on behalf of themselves and others filling a certain character, who were so numerous, that, if made parties, the suit could not be effectually prosecuted. *Milligan v. Mitchell*, 1 Myl. & Cr. (c.n.) 511.

2. After an order at the hearing for the cause to stand over, with leave to amend, by adding parties, which the plaintiff did by adding some; held, that he could afterwards add others on application only for further leave, and made to the court and not a master. *Bierderman v. Seymour*, 2 Myl. & Cr. (c.n.) 117.

3. The 13th section of 3 & 4 Will. 4, c. 94, held not to apply to orders of course to amend the bill, nor to cases where the court is at the time enabled to exercise a discretion on the subject of amendment, and if the justice of the case requires it. Where the plaintiff required something more than an order to amend, and which the master could not give, held that the court was not precluded by the Act from exercising the jurisdiction to amend. *Rees v. Edwards*, 1 K. (c.n.) 465.



4. Upon an appeal on matter of form, dismissed, leave to amend refused. *Attorney-General v. Norwich Mayor, &c.*, 2 *Myl. & Cr.* (ch.) 430.

5. An application for leave to amend by striking out the name of a plaintiff, altering the defendant's security for costs held not within the jurisdiction of the Master under 3 & 4 Will 4, c. 94, but was an application to be made to the Court. *Read v. Thatcher*, 2 *Keene*, (ch.) 317.

6. Where before the filing a bill of discovery facts were sufficiently disclosed to have put the plaintiff on directing inquiries thereto, and put the matters in issue, the Court refused, on the coming in of the answer, to allow the plaintiff to amend the bill by adding charges as to such matters. *Mills v. Campbell*, 2 *Younge & C.* (ex. eq.) 338.

7. Under the 13th Order after a bill has been once amended after answer, further leave to amend can only be given upon an application supported in the manner prescribed by that order; held, also, that an amendment, by adding parties, is within it. *Attorney-General v. Nethercoal*, 2 *Myl. & Cr.* (ch.) 604; *semb.*, over-ruling *Evans v. Hughes*, 5 *Sim.* 666.

8. Where, after the answer put in, the plaintiff amended his bill, contradicting several of the allegations of the answer, and afterwards tendered affidavits in support of the amendments; held, that as tending to contradict the answer they were not receivable. *Boddington v. Woodley*, 8 *Sim.* (ch.) 167.

9. Where the plaintiff amended without requiring further answer, and omitted to call for the defendant's office copy; held, that the acceptance by the defendant's clerk of the 20s. costs of amendment, was a waiver of the plaintiff's irregularity, and a motion for leave to answer, notwithstanding the replication, refused, but without costs. *Boswell v. Tucker*, 2 *Keene*, (ch.) 188.

10. After motion to dismiss for want of prosecution, the plaintiff seeking to amend the bill must show special cause for amendment against the order for dismissal, and give two days' notice of the cause intended to be shown. *Harbett v. Buckingham*, 2 *Younge & C.* (ex. eq.) 571.

11. After plea allowed and replied to, a motion to withdraw the replication and amend, with the view of varying the case originally made, refused. *Barnett v. Grafton*, 8 *Sim.* (ch.) 72.

12. The masters, on application made to them under the 3 & 4 Will. 4, c. 94, s. 13, for leave to amend, have the same power to dispense with the strict letter of the General Orders of the court, as the court itself has. *Millbanke v. Stevens*, 8 *Sim.* (ch.) 160.

13. Where the plaintiff, on a motion to dismiss for want of prosecution, obtained special leave to amend, with an undertaking to file his replication; held, that he could not afterwards obtain as of course an order to re-amend his bill, although necessary from the answer to the former amendments. *Dixon v. Snowball*, 3 *Younge & C.* (ex. eq.) 445.

14. Where it appeared that a party had advanced

money towards carrying on the suit, upon an agreement to share the benefits, the court considering that he should be before the court, gave leave to amend, by making him a party. *Chameau v. Riley*, 1 *Coop.* (ch. c.) 336.

15. Where after notice of motion for an injunction and receiver, the bill was amended; held, that the notice of motion not applying to the existing record, the motion was irregular. *Gouthwaite v. Rippon*, 1 *Beav.* (ch.) 54.

16. Orders, as of course, to amend, to contain an undertaking to do so within three weeks from the time of the order obtained, or on default to stand discharged, unless, &c. *Reg. Gen.*, Trin. 1859, 3 *Younge & C.* (ex. eq.) 597.

17. After replication filed, party not to withdraw it and amend without special motion upon affidavit. *Reg. Gen.*, 3 *Younge & C.* (ex. eq.) App. ii.

And see *Information*.

[D] ANSWER—DEMURRER—PLEA.

1. Domicile depends not merely on the fact of residence, but coupled with acts manifesting a selection as the place of permanent abode; in case of misapprehension of the fact, leave was given to add a supplemental answer to a bill by a next of kin for distribution. *Tidswell v. Bowyer*, 7 *Sim.* (ch.) 64.

2. The order for referring an answer for sufficiency must be served, as well as obtained, before the expiration of the six days under 5th of Lord Lyndhurst's orders. *Peace v. Hodgson*, 7 *Sim.* (ch.) 347.

3. Where inconsistent allegations (on the ground of which a demurrer was allowed) appeared to have crept in by accident, amendment allowed; held also, that the defendant was entitled, upon demurrer, to adopt the statement most against the plaintiff's interest. *Vernon v. Vernon*, 2 *Myl. & Cr.* (ch.) 145.

4. Where, therefore, the bill stated a recovery suffered by father, tenant for life, and son, the plaintiff, tenant in tail, in September 1794, of a colonial plantation and slaves, and a re-settlement thereof; and that in the year 1794, not stating in what month, a lessee removed slaves from the estates to one of his own, which he afterwards sold, and prevailed upon the son to indemnify him against his claim to the slaves upon the settled estate on the ground of difficulty in identifying them from those on his estate so sold, the bill stating that the son was ignorant of the sale and circumstances alleged by such lessee; held, that the defendant, for the purposes of demurrer, was entitled to infer that the removal took place before the recovery suffered, and that the son was cognizant of the removal at the time. *Vernon v. Vernon*, 2 *Myl. & Cr.* (ch.) 145.

5. And the bill having, in stating the limitations, shown the father (still living) to be tenant for life, and, in other parts, spoke of him as tenant in tail, the defendant, for the purposes of de-



murrer might consider the plaintiff to be tenant in tail, in which character he would have no right to institute the suit. 1b.

6. Where a demurrer was allowed for want of parties and of equity, and the plaintiff appealed, but admitted at the bar that the bill was defective for want of parties, and so admitting the only question to be, whether the plaintiff should file a new bill or amend, the Lord Chancellor, refusing to give any opinion on the merits, dismissed the appeal with costs. 1b.

7. Where the demurrer on the record is disallowed, but a demurrer *ore tenus* is allowed, the defendant is liable to pay the costs of the former, unless a special order to the contrary is made. *Mortimer v. Frazer*, 2 Myl. & Cr. (cn.) 173.

8. Where the defendant demurred after the common injunction obtained, but within the 12 days allowed by 10 Lord Brougham's orders, held regular, as upon the demurrer being allowed, the injunction would fall to the ground. *Poole v. Marsh*, 7 Sim. (cn.) 521.

9. Where the plaintiffs sued as a corporation, but it did not appear whether they were incorporated by any English or Scotch charter, and the defendants pleaded that they never were incorporated, and were disabled from suing by the corporate name; held, that the plea ought to have been filed on oath. *Bank of Scotland v. Ker*, 8 Sim. (cn.) 246.

10. An order for referring an answer for insufficiency must be served as well as obtained before the expiration of the six days allowed by the 5th of Lord Lyndhurst's Orders. *Taylor v. Harrison*, 8 Sim. (cn.) 21.

11. To a bill for discovery only, a demurrer, in bar of relief, held bad; and that a bill for a commission to examine witnesses abroad, in aid of an action at law, is not a bill of relief. *Mills v. Campbell*, 2 Younge & C. (ex. eq.) 389.

12. Where a plea, purporting to be the joint and several plea of several defendants, was sworn only by one, the court refused to order it to be taken off the file. *Attorney-general v. Craddock*, 8 Sim. (cn.) 466.

#### [E] CONTEMPTS—COMMITMENTS FOR.

1. Writing a letter to the master, by a petitioner also attending as counsel in support of the petition, expressed in threatening terms, with the view of obtaining a rehearing, and tending to induce a different decision, held a contempt, and the party committed during pleasure. *Lechmere Charlton's case*, 2 Myl. & Cr. (cn.) 316.

2. Where the father of wards of court had clandestinely removed them from the custody appointed by the court, which upon examination he admitted, but he refused to state where they were; held to be a contempt of a criminal nature, although he was no party to the suit relating to their custody, and that privilege of Parliament was no protection against an attachment for the contempt. *Wellesley v. Duke of Beaufort*, 2 Russ. & M. (cn.) 639; and see 2 Russ. 1.

3. The distinction said to be, that against all civil process privilege protects, but that against punishment for contempt for not obeying civil process, it protects not. 1b.

4. A defendant in contempt, living within the rules of the King's Bench, ordered to be committed to the Fleet. *Anon.*, 2 Younge & C. (ex. eq.) 144.

5. Where an attachment had issued for want of answer, held, that the defendant could not file an answer and demurrer, on the ground that the answer was *bona fide* to the merits, and that the demurrer did not go to the relief, but only to part of the discovery. *Vigers v. Lord Audley*, 2 Myl. & Cr. (cn.) 49.

6. It is no objection to the cause being heard, that the plaintiff is in contempt, the rule being imperative that he shall bring his cause to a hearing at a certain time. *Ricketts v. Mornington*, 7 Sim. (cn.) 200.

7. A motion for commitment cannot be made, except on a seal day. *Saxby v. Saxby*, 7 Sim. (cn.) 140.

8. Where the defendant filed his answer after the order for the serjeant-at-arms and return of *non est inventus*, the common order for clearing the contempt obtained, and the answer successfully excepted to for insufficiency; held, that the plaintiff might take up and proceed with the old contempt, and that a sequestration for want of answer to the exception sued out on the submission and answer then, and a subsequent order to take the bill *pro confesso* was regular; but, under circumstances, the defendant allowed, upon payment of costs of all the prior proceedings, to put in an answer and have the cause re-heard. *Taylor v. Salmon*, 3 Myl. & Cr. (cn.) 109.

9. A party in contempt is entitled to be heard to show that proceedings subsequent were irregular, and, under a decree to have the bill taken *pro confesso*, an order absolute in the first instance to confirm the report made under it, is irregular; held, also, that he is entitled to be served with warrants to attend the master. *King v. Bryant*, 3 Myl. & Cr. (cn.) 191.

10. A plaintiff, although himself in contempt for non-payment of costs, held entitled to sue out an attachment for want of answer. *Wilson v. Bates*, 3 Myl. & Cr. (cn.) 197.

11. The affidavit in support of a motion for a serjeant-at-arms must not only state the acts done by the officer, but also the belief of the solicitor or town agent, that due diligence has been used in order to apprehend the defendant. *Neithorpe v. Wright*, 2 Keene, (cn.) 263.

12. Contempt held to be waived by filing a cross bill against the party; and, by clearing the contempt in the cross suit, the contempt cleared in both suits. *Best v. Gompertz*, 2 Younge & C. (ex. eq.) 582.

13. Where the contempt for want of answer arose through the mistake of the warden in refusing to take it, the court ordered the costs of the contempt to be costs in the cause, and the plaintiff entitled to time to take exceptions to the an-



answer; but on his failing to do so within a limited time, the defendant to be discharged. *Reymer v. Gunstone*, 2 Younge & C. (xx. xq.) 584.

14. Where a party was in contempt for want of answer of himself and wife, held that he could not clear it by putting in his own answer only, and that his being reported a fit object to be discharged under 1 Will. 4, c. 36, would not induce the court to interfere in his behalf where the interests of the plaintiff would be prejudiced thereby. *Gee v. Cottle*, 3 Myl. & Cr. (ch.) 180.

15. Commissioners named in the writ of rebellion possess the same powers in every county as the sheriff, and have a right at their discretion, to require the assistance of any of the liege subjects of the Crown to aid and assist in the execution of the writ: secondly, they may, upon reasonable apprehension of resistance, exercise such right, although no resistance has in fact taken place: thirdly, they have a right to call upon persons appointed under 3 Geo. 4, c. 103 (Irish Constabulary Act), and the duty of such persons is not limited or affected by regulations for their conduct issued by the lord lieutenant: and lastly, strangers to the proceedings in the cause in which such writ issues, being called upon to aid and assist the commissioners, are liable to attachment for contempt. (Dissent: *Littledale and Bosanquet, J. J.*) *Miller v. Knox*, 4 Bing. N. S. (c. r.) 574.

16. Where the serjeant-at-arms had permitted the defendant to escape, a second order for a serjeant-at-arms directed. *Morris v. Smith*, 8 Sim. (ch.) 33.

17. Upon a reference of the bill for scandal and impertinence, until the report, there is no bill which the defendant is compellable to answer; held, therefore, that it was competent for him, within seven days after the report, to file a demurrer for want of parties, although the 12 days allowed for demurring had expired. *Nedby v. Nedby*, 8 Sim. (ch.) 334.

18. Upon a joint attachment against husband and wife, for not putting in a joint answer; held, that the attachment must remain, unless circumstances were stated to show that she ought to be permitted to put in a separate answer, in the absence of which she could not be ordered to do so, as long as she remained in contempt for not putting in the joint answer. *Hardy v. Sharpe*, 3 Younge & C. (xx. xq.) 377.

19. Where the defendant was in contempt for want of answer; held, that he could not file a demurrer and answer, although the latter was confined to an allegation, which by answer he might have insisted he was not bound to answer. *Vigers v. Lord Audley*, 8 Sim. (ch.) 333.

20. Where a party had been detained in custody 30 days, without being brought to the bar of the court; held, that the plaintiff could not, under 11 Geo. 4 & 1 Will. 4, c. 36, enter an appearance for the defendant. *Williams v. Jones*, 1 Coop. (ch. c.) 346; and see the cases upon the statute there collected.

21. Where a party was committed to the Fleet,  
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in contempt for not answering, but after the expiration of the time limited by Rule 5 of 11 Geo. 4 & 1 Will. 4, c. 36, s. 15, held, that he was entitled to be discharged, and that the plaintiff who had caused the application should pay the costs. *Greening v. Greening*, 1 Beav. (ch.) 121.

22. A defendant does not clear his contempt by putting in his answer and paying costs, unless the answer is sufficient, and if not so, the court will order it to be taken off the file. *Taylor v. Salmon*, 8 Sim. (ch.) 449; and 3 Myl. & Cr. 109.

23. On an injunction against ploughing up meadow and committing waste, until the defendant should fully answer, and the court make order; and an answer was put in, and pending the suit, the plaintiff commenced an action for the injury by waste, and the defendant broke up the land a second time; the defendant ordered to stand committed to the Fleet until further order. *Erpe v. Smith*, 1 Coop. (ch. c.) 113.

24. Writs of attachment for non-payment of costs or money to be issued without order, upon affidavits of due service, &c. Reg. Gen., 3 Younge & Cr. (xx. xq.) App. ii.

25. Orders to take accounts and make inquiries, to be made upon motion with notice, after appearance to the bill, without prejudice, where appearing beneficial or consented to. Reg. Gen., 3 Younge & Cr. (xx. xq.) App. ii.

26. All orders to refer answers, &c., to contain a direction for the master to expunge scandalous or impertinent matter, and to tax the costs of such reference, &c., without further order, to be paid in such case by the party against whom obtained, but if certified, not to be so, then to be recoverable as other costs; such matter not to be expunged nor costs taxed until four days after the filing of the certificate. Reg. Gen., 3 Younge & Cr. (xx. xq.) App. iv.

And see *Injunction*, 11.

# [F] PETITIONS—RULES—ORDERS.

1. The 4 & 5 Will. 4, c. 29, s. 3, directing loans on real securities, in Ireland, to be under the direction of the English Courts of Equity, held to be read "in any cause, or by petition in a summary way," and a reference upon a petition allowed. French, ex parte, 7 Sim. (ch.) 510.

2. Causes in the Exchequer may be set down for hearing, and the *subpena ad aud.* be served and made returnable on any day in term and out of term, but to be served 14 days in a country cause, and 7 days in a town cause, before the same is made returnable; and service of the *subpena* on the clerk in court to be good service. Gen. Ord. Eq. June 1837, 2 Younge (xx. xq.) 125.

3. Office of the King's Remembrancer, times of opening further regulated. 1b.

4. Service of notices of motions and petitions, time of filing affidavits, signing answers, copies of answers of illiterate defendants, and delivery of copies of bill, &c., further regulated. 1b.



5. Decree by Vice-Chancellor, and order on petition in the cause afterwards made by the Master of the Rolls, reserving the costs of the petitioners; held that, notwithstanding such reservation, the petition must, in conformity with the New Orders, be decided by the same judge who made the decree. *Senior v. Wilks*, 2 Keene, (CH.) 210.

6. Where upon an application to the court by motion on petition, the party does not appear, no order can be made, unless the affidavit of service of notice of motion be made at the latest, before the rising of the court, or the day on which the application is made. *Miltown, Lord, v. Stuart*, 8 Sim. (CH.) 34.

7. Where after an order made upon three petitions, for a reference, one of the parties being dissatisfied with the order, refused to leave his petition with the clerk of the reports, the court directed the order to be varied, with costs of the application by the party refusing. *Sanderson v. Walker*, 1 Coop. (CH. C.) 357.

8. Orders of course, obtained from the Master of the Rolls, and set down to be heard before the Lord Chancellor, pursuant to the Gen. Ord., May 1837, if irregularly obtained, application to discharge the same to be made in the first instance to the Master of the Rolls, subject nevertheless to all the regulations of the General Order. *Reg. Gen.*, 6 May 1839, 1 Beav. (CH.) App. xi.

9. Notice of a motion to be made by special leave, must mention that it is so to be made, or the other party is at liberty to disregard it. *Hill v. Rimell*, 3 Sim. (CH.) 632.

10. On notice of motion for payment of money into court, but silent as to its investment, the court, in the absence of one defendant, refused to make any order as to the investing when paid in. *Robinson v. Wood*, 1 Beav. (CH.) 206.

11. The notice of a motion by a pauper need not be signed by his Six Clerk. *Perry v. Walker*, 2 Keene, (CH.) 663.

#### [G] MASTER.

1. Where persons, not parties, obtained leave to attend in the master's office; held, that they could only obtain leave to except to the report upon petition, stating their objections. *Taylor v. D'Egville*, 7 Sim. (CH.) 445.

2. Where, in a creditor's suit, the master, without the authority of the court, stated special circumstances (not supported by evidence), raising a doubt as to the apportionment of the plaintiff's claim on the estate, the court refused to take notice of such special circumstances, and held the finding of the debt, appearing to be due, conclusive between the parties. *Gayler v. Fitzjohn*, 1 K. (CH.) 469.

3. The masters have no power to relax or dispense with the general orders of the court. *Smith v. Webster*, 3 Myl. & Cr. (CH.) 244.

4. Where a reference of title is made to the master under 51st order, 1826 (*Lord Lyndhurst*), he has the same power to examine witnesses as if the reference were by decree. *Woodroffe v. Titterton*, 8 Sim. (CH.) 238.

5. Where the defendant filed an affidavit in support of a motion, and the plaintiff filed one in opposition, which was referred for impertinence, the defendant then filed further affidavits in support of his motion, in no way referring to the matters in the plaintiff's affidavit so referred; held not to be a waiver of the reference. *Bickford v. Skewes*, 8 Sim. (CH.) 206.

6. In the Exchequer it is necessary that the master's certificate of impertinence should be confirmed on motion with notice. *Campbell v. Dickens*, 3 Younge & C. (EX. EQ.) 68.

7. So upon a certificate of the examination put in before him by a party to the suit, being insufficient. *Rabbits v. Rabbits*, 3 Younge & C. (EX. EQ.) 69.

8. Upon a bill filed in the Exchequer by creditors for the administration of a deceased debtor to the crown, intestate and without heirs; held that under a decree for account, the reference, since 1 Geo. 4, c. 35, should be to the Master and not to the Remembrancer; the effect of the act is to exclude the whole jurisdiction of the latter on all matters of equity, except entering decrees and orders, and to transfer it to the masters on the equity side of the court. *Rogers v. Maule*, 3 Younge & C. (EX. EQ.) 74.

9. Where two cotemporaneous warrants were taken out, one as to insufficiency, the other as to impertinence, held that as no solicitor could be misled as to which should be taken first, a motion to discharge them be dismissed with costs. *Rowley v. Adams*, 8 Sim. (CH.) 205.

10. The report of the master approving of a contract for sale being carried into effect, can only be confirmed by a special petition stating the facts, and not of course by consent of the clerks in court of all parties. *Bailey v. Todd*, 1 Beav. (CH.) 95.

11. Upon a reference to take an account, and exceptions to the master's report, as to the amount found due, allowed, and it is referred back to him to review his report, he is at liberty to receive further evidence; and where the exception was that he ought to have found either that nothing was due, or not exceeding a certain sum, held, that by an order referring it back in general terms, the master was precluded from entering into any other inquiry than whether any thing, or a sum not exceeding —*L.*, was due. *Trail v. Twyford*, 3 Myl. & Cr. (CH.) 345.

12. Where the parties proceeded on affidavits before the master, and the bill was dismissed as to one defendant, held that his answer could not be used by the way of affidavit as evidence against a co-defendant. *Hoare v. Johnstone*, 2 Keene, (CH.) 553.

And see *Account*.



## [H] PRODUCTION OF PAPERS—EXAMINATION OF WITNESSES—PUBLICATION.

1. Papers produced for inspection of the plaintiff ordered, upon motion before hearing, to be redelivered to the defendant, to enable him to produce them before a commission to examine witnesses, he undertaking to return them on the return of the commission. *Jones v. Thomas*, 2 Younge, (ex. eq.) 312.

2 Where a judgment creditor's execution was defeated by a party claiming title under bills of sale, alleged to be fraudulent, the possession not going with the title; held, that the latter was bound to produce the instruments of assignment. *Neate v. Latimer*, 2 Young (ex. eq.) 257.

3. A plaintiff, although he may not require a commission, cannot give a rule to pass publication until the expiration of three weeks from the service of the *subpoena* to rejoin. *Flight v. Jones*, 7 Sim. (ch.) 256.

4 The words, "enlarging publication," in 3 & 4 Will. 4, c. 94, s. 3, held to be understood in the strict sense of enlarging the time at which publication is to pass, and that after the time expired and depositions delivered out on one side, the master has no jurisdiction to allow witnesses to be examined, for which purpose publication was sought to be enlarged. *Carr v. Appleyard*, 1 K. (ch.) 725; and affirmed on appeal, 1 Myl. & Cr. 476.

5. The object of the order of 1692 being to prevent any order being made or any proceeding taken upon a report or certificate before it has been filed; held, that the four-day order, obtained before the certificate of default in putting in the examination filed, was irregular. *Frisby v. Stafford*, 7 Sim. (ch.) 365.

6. In the Exchequer, commissioners appointed to examine witnesses, in aid of the master, after a decree, are not sworn to secrecy. *Hall v. Clee*, 2 Younge & C. (ex. eq.) 725.

7. The 32d Order of Lord Brougham does not compel a party to use the new interrogatory, but merely directs that if a general interrogatory be used, it shall not be framed so as to elicit evidence for one party only. *Gover v. Lucas*, 8 Sim. (ch.) 200.

8. Where the bill of discovery by underwriters was to ascertain whether the assured was an agent or the seller; held, that a demurrer could not be supported, although the bill alleged that he had been paid and satisfied the full value of the goods; held, also, that the bill being by underwriters at Lloyd's, and by the London Assurance Company, was not multifarious on the ground that the policies of the latter are under seal, and the others not. *Mills v. Campbell*, 2 Younge & C. (ex. eq.) 391.

9. On an order for production of documents and papers, held that a case laid before counsel, as privileged, was to be excepted. *Nias v. North & East Railway Company*, 2 Keene, (ch.) 76. (*Heslinter*.)

And see *Bolton v. Corporation of Liverpool*, 1 Myl. & K. 88.

10. Where the papers and documents are numerous, the court will qualify the order for production and inspection, &c. to be at the office of the party's attorney. *Crease v. Penprase*, 2 Younge & C. (ex. eq.) 527.

11. Where a power is to be exercised by deed attested, the deed cannot be proved *viva voce*, at the hearing. *Brace v. Black*, 7 Sim. (ch.) 618.

12. Where the master's certificate of default by one defendant, in the production of papers shown to be in his possession by the answer of another defendant, was denied by the party himself, held a valid objection, and that the proper course was by motion to discharge the four-day order, and take the certificate off the file, and not by exceptions thereto. *Hemp v. Wade*, 2 Keene, (ch.) 686.

13. A bill cannot be supported against a mere stranger for the production of documents, but the plaintiff must show such a connexion between him and the defendant, as entitles him to see the documents: where the defendant was retained as the solicitor of a third party acting under a power of attorney from the plaintiff, but the defendant denied the plaintiff's interest, and that he was not accountable to him, held, that so long as that stood upon the record, it excluded the plaintiff from instituting his suit, or to see the documents. *Adams v. Fisher*, 3 Myl. & Cr. (ch.) 526; and 2 Keene, 754.

14. On a bill seeking for an account against the defendant, the plaintiff having offered to deposit the report of an accountant, required explanation, and the defendant being willing to inspect when deposited, the court ordered that he should have a month's time to answer from the time of the plaintiff depositing the report with the clerk in court; *sembl.*, a plaintiff cannot deposit a document and compel the defendant to inspect it before answering. *Shepherd v. Morris*, 1 Beav. (ch.) 175.

15. Where a scheduled document was left with the defendant's clerk in court, under the usual order, and it having been proved in the cause, and that it came out of the clerk's custody, held that it might be read without reading that part of the answer which admitted it to be in the defendant's possession. *Taylor v. Salmon*, 3 Myl. & Cr. (ch.) 422.

16. Upon admission in the answer of the possession of certain documents relating to the matters in question, held, that the defendant might, on motion, read affidavits to show that some were privileged. *Parsons v. Robertson*, 2 Keene, (ch.) 605.

17. On a direction to produce documents before the master, as he should think proper, an appeal must be by way of exception, and not of motion, and the court will direct him to certify so as to raise exceptions thereto. *Toulmin v. Copeland*, 3 Younge & C. (ex. eq.) 332.

18. After great delay, and the time for publication passed, the attorney made to pay the costs of the application to enlarge publication. *White v. Hillacre*, 3 Younge & C. (ex. eq.) 278.

19. The court will detain documents, with a



view to criminal proceedings being taken on them. *Walker v. Corke*, 3 Younge & C (ex. eq.) 277.

20. The judgment of the Master of the Rolls in *Nias v. North and East Railway Company*, 3 Myl. & Cr. (ch.) 355, confirmed.

21. Depositions taken before commissioners in the country, may be read, although taken in the third person, the 3 & 4 Will. 4, c. 94, s. 27, referring only to such as are taken before the examiners. *Dryden v. Frost*, 8 Sim. (ch.) 380.

22. The re-examination of witnesses who have been examined in chief, is not a mere motion of course, but the court, to guide its discretion, will require affidavits as to the grounds of the intended examination, and why, if material in the cause, it was not entered into in the course of the proceedings before the decree. *Jones v. Thomas*, 3 Younge & Cr. (ex. eq.) 455.

23. So, where the witnesses had been examined generally as to the occupation and perception of titheable matters, upon sufficient affidavits, the Court ordered the witness to be re-examined as to the produce of the farm, and quantities of titheable matters taken. *Maton v. Hayter*, 3 Younge & Cr. (ex. eq.) 457.

24. After witnesses have been examined, *viva voce*, under the 69th Order, held irregular for the Master to receive affidavits to supply defects in proof. *Hopkinson v. Roe*, 1 Beav. (ch.) 182.

25. Where a mistake was made in stating the nature of the commission as to examining witnesses, instead of one defendant, but the plaintiff could not have been misled by the notice; held, that the execution was good, and that the commissioners might take the answer of one defendant only. *Hall v. Connell*, 3 Younge & Cr. (ex. eq.) 528.

26. Where a witness has been examined in a cause, he cannot be examined again before the master without an order; but the party applying must state the names of the witnesses he wishes to have re-examined. *Jones v. Thomas*, 3 Younge & Cr. (ex. eq.) 227.

27. Where the defendants, under an impression that the commissioners under the Tithe Commutation Act, would determine the matters at issue in the cause, had omitted to examine their witnesses in sufficient time, the court allowed a new commission on payment of costs. *Wetherell v. Bellwood*, 3 Younge & Cr. (ex. eq.) 319.

28. A witness already examined may nevertheless prove an exhibit at the hearing. *Neep v. Abbot*, 1 Coop. (ch. c.) 191.

29. A witness examined before the hearing, may be examined before the Master for the other side, without leave of the court. *Mitford v. Peters*, 8 Sim. (ch.) 630.

30. A witness examined before the decree, allowed, under special circumstances, to be examined before the Master as to collateral facts, but connected with the points to which he had been before examined. *Barker v. Greenwood*, 3 Younge & Cr. (ex. eq.) 393.

31. An order to enlarge publication founded on a false allegation of there being other witnesses to examine, discharged for irregularity. *Brunt v. Wardle*, 3 Younge & Cr. (ex. eq.) 503.

And see *Evidence; Partner*.

# [I] BILL TAKEN PRO CONFESSO—DISMISSED.

1. The court refused a motion to discharge an order to take the bill *pro confesso*, and to be at liberty to put in an answer, although the defendant did not intend to enter into evidence. *Carr v. Paulett*, 7 Sim (ch.) 142.

2. The order for taking a bill *pro confesso*, takes effect from the time when pronounced; and the court will not discharge it, although the answer is filed before the rising of the court on the day when the order made. *James v. Cresswicke*, 7 Sim. (ch.) 143.

3. Where one defendant refuses to allow it, the court will not order the cause to be heard as a short cause. *Ker v. Cusac*, 7 Sim. (ch.) 520.

4. Where the defendant was brought up for contempt under 6th rule, 11 Geo. 4 & 1 Will. 4, c. 36, and did not put in his answer; held, that he ought to be remanded, and the bill taken *pro confesso* under the second rule. *Barnewell v. Cooke*, 7 Sim. (ch.) 320.

5. Where, after a motion to dismiss and undertaking to speed, the plaintiff filed a replication and served a *subpoena* to rejoin, but did not require a commission to examine witnesses; held, that a motion to dismiss was irregular, as the defendant might proceed in the cause. *Carden v. Manning*, 1 K. (ch.) 380.

6. Where the defendant omitted to take advantage of the plaintiff's default until after a *subpoena* to rejoin served and commission sued out, but afterwards moved to dismiss on an affidavit that the plaintiff had not set down the cause, nor entered rules to produce witnesses and pass publication; held, that the defendant was, under the 17th order, 1831, entitled to dismiss, but not to the costs of the application. *White v. Smith*, 1 K. (ch.) 381.

7. Where before replication the defendant served notice of motion to dismiss, but, the replication being filed on the next day, the motion was not made, and the plaintiff did not undertake to speed, and no *subpoena* was given to rejoin; held, that the new 16th and 17th orders did not apply, and that, three clear terms not having elapsed since the last proceedings, a motion to dismiss was irregular. *Earl Ferrers v. Shirley*, 7 Sim. (ch.) 484.

8. Where a sole plaintiff dies, the defendant is not entitled to move that his representatives may revive within a given time, or the bill be dismissed. *Canham v. Vincent*, 8 Sim. (ch.) 277.

9. Where the bill had been dismissed in the absence of the plaintiff's solicitor, allowed under the circumstances to be set down again to be heard, upon payment of costs by the plaintiff. *Hale v. Lewis*, 2 Keene, (ch.) 318.



10. Under the 4th and 16th of the New Orders, four months must elapse after the filing, before the bill can be dismissed for want of prosecution, and the 19th Order applies to the two months mentioned in the 4th Order, and in computing the two months mentioned in the 16th Order the plaintiff is not entitled to the benefit of the 19th Order. *Marriott v. Tarpley*, 8 Sim. (ch.) 18.

11. Where some defendants had answered, and others not, and eight months after their answer the defendants served notice of motion to dismiss, and the plaintiff on the following day obtained as of course and served an order to amend, held, regular, and the order to dismiss refused. *Attorney-General v. Kemp*, 8 Sim. (ch.) 208.

12. On a bill against a company, and also against the directors, notice of motion to take the bill *pro confesso*, served on the directors only, held irregular, although by the Act, service on a director was declared to be good service. *Brickwood v. Harvey*, 8 Sim. (ch.) 201.

13. Where the undertaking to speed under the 16th Order has not been complied with, the court will not relieve from the consequences, unless the failure has arisen from some inevitable cause; but although the compliance has become impossible, the defendant cannot give notice of motion to dismiss until the time for performance has expired. *Whalley v. Pepper*, 8 Sim. (ch.) 203.

14. Under the 16th amended Order, the plaintiff need not serve a *subpana* to rejoin within three weeks from the date of the undertaking to speed, unless he requires a commission to examine witnesses. *Daniel v. Austen*, 8 Sim. (ch.) 19.

15. A party consenting to dispense with some of the requisitions of the 17th Order, 1831, held not to be considered as giving up the benefit of it altogether, but entitled to enforce such of its requisitions as he has not dispensed with. *Webber v. Bolitho*, 8 Sim. (ch.) 240.

16. Where the plaintiff had filed his bill with knowledge of the defendant being in embarrassed circumstances, and notice of his bankruptcy, the court refused to allow him to dismiss his bill without costs, although showing considerable merits as to the case. *Suckling v. Maddocks*, 3 Younge & C. (xx. xq.) 232.

17. Where a sole plaintiff, after the answers were put in, became bankrupt, the defendant allowed to move that unless the assignees, within a given time should file a supplemental bill, the suit should be dismissed. *Holt v. Hardcastle*, 3 Younge & C. (xx. xq.) 236.

18. Although a party has become bankrupt pending the suit, he has still an interest in sustaining the suit, and is therefore entitled to be served with notice of the motion to dismiss. *Vestris v. Hooper*, 8 Sim. (ch.) 570.

19. Rule for a plaintiff prosecuting several suits for the same matter, to elect. *Reg. Gen.* 1 May, 1839, 3 Younge & C. (xx. xq.) 597; and 1 Beav. (ch.) 209, App. ix.

[L] HEARING—REHEARING—DECREE.

1. The court may advance a cause at its discretion; and *semb.* the chancellor has no authority to discharge or vary the order of the master of the rolls for that purpose. *Hutchinson v. Stephens*, 2 Myl. & Cr. (ch.) 452.

2. And the practice is now to advance and hear as a short cause, unless the defendant's counsel will say it is one not proper to be so heard. *S. C.* 1 K. (ch.) 659.

3. New orders regulating the practice of the court for hearing causes, arguing demurrers, exceptions; addressing petitions, motions; applications for orders, &c. 2 Myl. & Cr. i.

4. Where the *subpana* to hear judgment was made returnable on a day out of term, and the cause set down to be heard in the cause-book for the same term in which publication passed; held, since the 8th new order, 1831, to be regular. *Turner v. Hitchon*, 1 K. (ch.) 514.

5. Where the parties had each presented a petition for setting down a demurrer to be heard before the Master of the Rolls and Vice-Chancellor, and by the course of the former court the order is drawn up immediately, but, of the latter, not until the following day; held, that the court could not deprive the plaintiff of the priority obtained. *Marr v. Williams*, 1 K. (ch.) 5e2.

6. The court will, upon the certificate of plaintiff's counsel, that it is a fit case to be set down as a short cause, direct it to be set down without the consent of the defendant, where the opposition appears merely for delay. *Mountford v. Cooper*, 1 K. (ch.) 464.

7. A private hearing allowed, although one party withheld consent. *Ogle v. Brandling*, 2 Russ. & M. (ch.) 638.

8. Where a party is not named in the record, the court cannot, without consent of all parties, allow him to appear at the hearing, and consent to be bound by the decree. *Attorney-General v. Pearson*, 7 Sim. (ch.) 303.

9. Where the party against whom a decree is made omitted to present a petition of rehearing within the proper time, and he subsequently presented a petition complaining of omissions in the decree, an order for supplying them held irregular, the course being by bill of review. *Charnernowne v. Brooke*, 3 Cl. & Fi. (r.) 4; and 9 Bli. N. S. 199.

10. Although the rule *semb.* is not absolute and inflexible, yet where a case has been heard in the court below, and upon appeal in the court above, the court will not, in ordinary cases, permit a rehearing before the Lord Chancellor. *Deerhurst v. Duke of St. Albans*, 2 Russ. & M. (ch.) 701.

11. The practice of the court is established against rehearing of appeals on merits; and the ground of the question being new, and the decision erroneous, held insufficient to justify a departure from the practice; and *semb.*, where the case respected a charity, it would be contrary to the policy of the 59 Geo. 3, c. 91, to permit it.



*Quare*, if that act intended actually to prohibit such proceeding? *Attorney-General v. Ward*, 1 Myl. & Cr. (ch.) 449.

12. Where a plaintiff takes a decree in the absence of the defendant, he must abide by it; and the court will not afterwards interpose to insert a declaration, as that the defendant had notice of a bond admitted by the answer. *Jennings v. Simpson*, 1 K. (ch.) 404.

13. It is not a sufficient ground for vacating the enrolment, merely that it was obtained with improper speed. *Hughes v. Garner*, 2 Younge (ex. xq.) 335.

14. The general rule stated to be, that evidence which might have been given at the hearing, and no other, may be given at the rehearing: when particular documents were not included in the order to prove them *visa voce* at the hearing, and the production at their hearing would be new evidence; held that they could only be then produced under a special order. *Lovell v. Hicks*, 2 Younge & C. (ex. xq.) 472.

15. Where plaintiff has given notice of showing cause against dissolving the common injunction on the merits, he is not precluded from showing exceptions, if filed before cause actually shown. *Wilkinson v. L'Eaugier*, 2 Younge (ex. xq.) 363.

16. Facts which have occurred since the decree, and not comprehended in the pleadings, held to be a ground for a rehearing, where they show error in the decree; and after leave given for a rehearing, it is not necessary for the petitioner to state in his petition in what the decree is erroneous, or what the nature of the decree sought. *Story v. Johnson*, 2 Younge & C. (ex. xq.) 586.

17. Where at the time of the suit commenced for a specific performance of assignment of a lease, and for an account of rents, the lease was subsisting, but by the lapse of time expired, and he was deprived of that part of the relief; held, that he was nevertheless entitled to the account, that part of the substantial relief not being gone by his acts or the lapse of time. *Wilkinson v. Torkington*, 2 Younge & C. (ex. xq.) 726.

18. Where a decree *nisi* was taken against some defendants who did not appear at the hearing, and judgment was afterwards pronounced, with consent of the other defendants, by the Lord Chancellor, who had been subsequently elevated; held, that the parties not appearing could not petition to stay proceedings on the ground of their want of consent, but could only show cause against the decree by setting it down to be heard against them. *Moore v. Frowd*, 2 Keene, (ch.) 242.

19. On a motion for a new trial, either party may refer to evidence given in the cause, although not offered at the trial. *Slaney v. Wade*, 7 Sim. (ch.) 618.

20. Where the bill had been filed previous to the orders of 1837, held, that they did not give the plaintiff such a right of electing in which court the cause should be heard, as to prevent the defendant filing a demurrer, and setting it down at the Rolls. *Cane v. Martin*, 2 Keene, (ch.) 607.

21. It is a sufficient answer to an application on the certificate of the plaintiff's counsel to hear a cause as a short cause, that the defendant's counsel certifies that it is not a proper to be heard as a short cause; and such a motion before the *subpena* to hear judgment is returnable, is premature. *Reeves v. Gill*, 2 Keene, (ch.) 671.

22. Where the error is apparent on the face of a decree, or such as would be a clear ground of reversal on appeal, the court will grant a rehearing, although the six months have expired, and in each case the subsequent conduct of the parties will not be taken into consideration. *Ackland v. Braddick*, 3 Younge & C. (ex. xq.) 237.

23. Where the plaintiff, on the defendant making default in appearing at the hearing, took such decree as he could abide by, but it turned out that the affidavit of the *subpena* to hear judgment was irregular; the course held to be, to set down the cause at the bottom of the list, and bring it on in the usual way. *Evans v. Evans*, 2 Keene, (ch.) 604.

24. The rule in future to be strictly abided by, that a cause cannot be brought before the Lord Chancellor for a second rehearing, unless leave previously granted upon special application for that purpose. *Byfield v. Provis*, 3 Myl. & Cr. (ch.) 437.

25. Upon an undertaking to speed, and to set down the cause for hearing, and serve the *subpena* to hear judgment in Easter Term; held, that the plaintiff was bound to set it down for hearing on such a day as to allow time to return the *subpena* to hear judgment in that term. *Burgess v. Thompson*, 2 Keene, (ch.) 762.

26. Where on the defendant's non-appearance a decree *nisi* was taken, which he was to show cause against on payment of costs, held, that whilst he was in contempt he was not entitled to an order for setting down the cause again for hearing, unless served by the plaintiff with a *subpena* to make the decree absolute; and an order for setting down the cause obtained after the expiration of the time mentioned in the *subpena* to show cause, is irregular, although served before any order for making the decree absolute. *Erpe v. Smith*, 1 Coop. (ch. c.) 110.

#### [M] STAYING PROCEEDINGS—APPEAL.

1. Where a suit in Chancery was pending for general administration of the estate, the court of Exchequer stayed proceedings by an annuitant against the executors, although no decree drawn up, as the plaintiff might obtain all the relief sought. *Moore v. Prior*, 2 Younge & C. (ex. xq.) 375.

2. The court will only under special circumstances stay the proceedings under a decree, pending an appeal to the House of Lords. *Thorpe v. Martingley*, 3 Younge & C. (ex. xq.) 254.

3. Upon appeal by one defendant only, and order made thereon of dismissal of the bill upon grounds equally applicable to the other defendants; held, that the latter were not entitled to



the benefit of such order, although rendering the decree less effectual. *Tasker v. Small*, 1 Coop. (ch. c.) 255.

4. Upon an order made by the Master, under the 3 & 4 Will. 4, c. 94, s. 13, in a cause set down at the Rolls, the party aggrieved has no right of appeal to the Lord Chancellor against such order. *Hill v. Gomme*, 3 Myl. & Cr. (ch.) 503.

5. Where the plaintiff did not appear when the cause was called on for hearing, and the defendant produced an affidavit of service of *subpoena* to hear judgment, merely stating the service, but not that the *subpoena* was endorsed, as required by the third Order of 21<sup>st</sup> December 1833, held insufficient. *Rigg v. Wall*, 3 Myl. & Cr. (ch.) 505.

6. Upon an application to the court below to stay execution pending the appeal, the party applying must pay the costs of the motion; but if before such motion the judgment is reversed, the costs will be costs in the cause. *Richardson v. Bank of England*, 1 Beav. (ch.) 153.

[N] Costs.

1. Where a defendant, claiming as heir in gavelkind of lands alleged to have been devised, in his answer to a bill alleged that he was the testator's heir-at-law and customary heir, and the suit was compromised by payment of a sum to him, and, upon a supplemental bill to set aside such arrangement, he admitted in his answer that he knew that his elder brother had left children, although he believed himself to be sole heir; held, that he was not entitled to his costs, either in law or equity. *Roberts v. Scoones*, 7 Sim. (ch.) 418.

2. Where a defendant disclaimed as to a fund before claimed, and stated facts why he should not pay costs; held, that those facts might be falsified, and, being so, he was ordered to pay the costs of the suit. *Deacon v. Deacon*, 7 Sim. (ch.) 378.

3. Where inquiry was rendered necessary by the mistake of the testatrix in the name of a devisee; held that the general residuary estate was liable to the costs, although the devisee, by the inquiry, derived the benefit of having the estate exonerated from a charge void by the Mortmain Act. *Ripley v. Moysey*, 1 K. (ch.) 578.

4. Where, in a creditor's suit, the plaintiff had realized assets more than sufficient for payment of the debts, the costs of the plaintiff, as between party and party, ordered to be paid out of the general fund, and the extra costs to be paid *pro rata* by the creditors partaking in the benefit of the suit. *Stanton v. Hatfield*, 1 K. (ch.) 358.

5. Costs as between solicitor and client, allowed to the plaintiff in a creditor's suit, where the fund is deficient. *Hood v. Wilson*, 2 Russ. & M. (ch.) 687.

6. Where the plaintiff was ordered to pay the costs of one defendant, and to have them repaid by another, who was to pay the plaintiff's costs; held, that the plaintiff could only issue one *sub-*

*pœna* and one attachment for both sets of costs. *Chute v. Ross*, 7 Sim. (ch.) 255.

7. Upon a motion to have a bill by the plaintiff, claiming to sue in a corporate character, taken off the file, the court, directing an issue as to whether there was such corporation, if negatived would order the costs to be paid by the town-agent of the plaintiff's solicitor. *Ruthin Corp. v. Adams*, 7 Sim. (ch.) 345.

8. Costs of a motion for an injunction to restrain payments being made pending an appeal, held to be a matter connected with and growing out of the appeal, and the costs to follow the same fate. *Attorney General v. Norwich Mayor, &c.*, 2 Myl. & Cr. (ch.) 431.

9. Where application was unnecessarily made to a party, not a party to the appeal, for his consent to the appeal being advanced; held, that it did not entitle him to the costs of attending the hearing of the appeal. *Crawshay v. Thornton*, 2 Myl. & Cr. (ch.) 24.

10. Where, after the taxation of costs postponed by agreement, and that the plaintiff should not be prejudiced by the delay, the plaintiff died; held, that the executors might revive the suit for costs. *Tucker v. Wilkins*, 7 Sim. (ch.) 349.

11. Order regulating the fees to be taken by registrars and their clerks. 1 K. (ch.) i.

12. Where after the trial of issues found for the plaintiff, the defendants obtained an order for a new trial on payment of costs to be taxed; held that they were not compellable to pay them, unless the defendants thought fit to proceed to the new trial. *Lambert v. Fisher*, 7 Sim. (ch.) 525.

13. Where the master reported passages in depositions taken for the defendant to be scandalous, but made no report as to the frame of the interrogatories, held that they were not liable to the costs of the reference. *Gude v. Mumford*, 2 Younge & C. (ex. xq.) 445.

14. But where the attorney for the defendant having in his examination made such statements, the court ordered him to pay the costs of expunging them, and it would only visit the examiner in an extreme case. *Ib.*

15. Where the plea and answer were ordered at the hearing to stand for answer, with liberty to except, but nothing said as to costs, the court refused to open the question of costs on a subsequent application, as it could only be done on a re-hearing of the case. *Yarnall v. Rose*, 2 Keene, (ch.) 326.

16. Where, by defect of parties, it was necessary to amend the record, although not suggested by the answer or urged at the hearing, the defendants held entitled to the costs of the day. *Attorney-General v. Hill*, 3 Myl. & Cr. (ch.) 247.

17. Where a bill was filed against the representatives of a trustee for alleged breach of trust, and the plaintiff afterwards joined in a creditor's suit against the same defendants; held, that he was entitled to rank as specialty creditor against the assets of the deceased trustee, and to recover payment in the second suit; the costs of the plaintiff in the first suit, and of all parties to the petition,



to be paid out of the funds in the second suit; and the plaintiff also entitled to the benefit of the securities upon which the trust funds had been invested. *Costerton v. Costerton*, 1 Keene, (ch.) 776.

18. Where trustees put in separate answers, and appeared by different solicitors, the court gave them all costs as between solicitor and client. *Kampf v. Jones*, 1 Coop. (ch. c.) 13.

19. Where an order was made for payment of costs by a day stated, no previous demand having been made by a party duly authorized to make it, held irregular, although such want of authority was not assigned as the reason of refusing to pay. *Isaac*, in re, 3 Myl. & Cr. (ch.) 319.

20. Upon costs ordered to be taxed as between solicitor and client, the rule is to allow only two counsel, or three under special circumstances. *Downing College Case*, 3 Myl. & Cr. (ch.) 474.

21. On a petition, by two or more, dismissed with costs, the party entitled has the option of taking out process either against them jointly, or against either separately; but held, that before an application to commit in default within four days, there must be previously an order fixing a time for payment; and it is unusual to give costs of the applications for the four-day order, or for that fixing the time. *Sangar v. Gardiner*, 1 Coop. (ch. c.) 262.

22. Where in a suit by a residuary legatee against the executor and co-residuary legatees, the costs of all parties were directed as between solicitor and client, the court refused to vary the order on the ground of non-consent by the residuary legatees. *Blenkinsop v. Foster*, 3 Younge & C. (ex. eq.) 207.

23. Where the answer contains clear admissions, and the evidence does not carry them farther, the plaintiff will be liable to the costs of proving such facts, although he succeeds in the suit. *Booth v. Booth*, 1 Beav. (ch.) 130.

24. Where upon an appeal upon a decree against the defendant, with costs, the Lord Chancellor was clearly of opinion that the decree ought not to stand, and that the bill ought to have been dismissed with costs; held, that the defendants were entitled to the costs of the suit, inclusive of the hearing, but not of setting the decree right. *Oldham v. Stonehouse*, 3 Myl. & Cr. (ch.) 317.

25. Where the House of Lords reversed a decree with costs, held to entitle the party only to the costs of the suit up to the time of the decree, and not those subsequently arising out of the error of the Judge. *Small v. Atwood*, 3 Younge & Cr. (ex. eq.) 501.

And see *Accumulation; Injunction*, [D] 5.

### PREScription.

1. The 2 & 3 Will. 4, c. 21, requires a 20 years' continuous enjoyment of the easement as such,

and an unity of possession need not be replied. *Orley v. Gardiner*, 4 Mees. & W. (ex.) 496.

And see *Bright v. Walker*, 1 Cr. M. & R. (ex.) 211; *Monmouth Canal Company v. Hartford*, 1 Cr. M. & R. 631; *Tickle v. Brown*, 4 Ad. & Ell. 382; and *Beasley v. Clarke*, 2 Bing. N. S. 708.

2. Where, in trespass for taking and imponding cattle, the defendant pleaded an immemorial right to a *profit a prendre*, in B., and his ancestors, commencing before time of legal memory; held, that it was not supported by proof of a grant to the ancestor of defendant in 1755, for a valuable consideration; and that, as pleaded, the claim was not aided by 2 & 3 Will. 4, c. 71; and *quere*, if sect 5 applies to such a right, and if it does, it should be pleaded for the periods therein stated. *Welcome v. Upton*, 7 Dowl. (r. c.) 475.

And see *Bridges; Trespass*.

### PRESUMPTION.

1. A mother and daughter being seised of land, by deed of settlement on the marriage of the latter, in consideration of the marriage, they and each did grant, bargain, sell, alien, enfeoff and confirm, and did undertake and agree to convey and assure unto trustees, to the use of the marriage; livery of seisin was indorsed on the deed, but no names were subscribed; held, that the deed operated as a covenant to stand seised, and that a good use passed to the husband; but that possession for less than 25 years was not sufficient to raise the presumption of livery having been made. *Doe d. Lewis v. Davies*, 2 Mees. & W. (ex.) 503.

2. On a bequest of one-fifth of the testator's residue to W., E., and I., and all other the children of R., and the issue of such of his children as should have deceased, such issue to take the portion of the fifth as their parents would have taken if living; R. had two other children besides those named in the will, one of whom went abroad in 1815, 20 years before the testator's death, and had not been heard of for above 20 years, although every means of inquiry had been resorted to; held, that he must be presumed to have died before the date of the will, but that his children were entitled to the portion he would have taken if he had survived the testator. *Rust v. Baker*, 8 Sim. (ch.) 443.

And see *Administration; Manor*.

### PRISONER.

1. Where a prisoner is in custody of the sheriff on criminal process, it is sufficient to lodge a detainer on civil process, without any order from the court. *Grainger v. Moore*, 5 Dowl. (r. c.) 456.

2. Where final judgment in debt was signed in Michaelmas vacation, and judgment completed, and the defendant charged in execution on 7th



May, in Easter following; held not a mere irregularity, of which the prisoner was barred, by lapse of time, from objecting thereto in the Michaelmas term following; and that, as against a prisoner, final judgment was complete at the time of signing, without carrying in the roll; and that the rule of Hilary, 4 Will. 4, shut out all relation to the term preceding the vacation in which the judgment was signed. *Colbron v. Hall*, 5 Dowl. (r. c.) 534. *S. P. Wyatt v. Howell*, lb. 585.

3. Where, upon removal of a prisoner from the warden of the Fleet to the marshal of the King's Bench, at the instance of the defendant, he had paid a fee claimed by the warden; held that, having improperly paid it, he could not compel the plaintiff to reimburse him. *Burt v. Bryant*, 5 Dowl. (r. c.) 727.

4. Where, after the arrest, the removal was delayed for a week, during which the defendant remained in custody at a friend's house, and no excuse of illness or other cause was suggested for the delay; held, that the commencement of the imprisonment was to be reckoned, not from the day of the arrest, but of the period of actually being within the walls of the prison. *Yapp v. Hartington*, 3 Bing. N. S. (c. r.) 907.

5. A rule nisi for a *supersedeas*, the plaintiff not having declared in the action in due time, *semble*, is not a stay of proceedings; but the plaintiff may proceed, after service of the rule, to charge the defendant in execution. *Robinson v. Cresswell*, 2 Mees. and W. (xx.) 410; and 5 Dowl. (r. c.) 601.

6. A party in execution, issued above a year and a day, on a judgment without a *scire facias*, held entitled take the objection, and not to have waived the right by delay. *Mortimer v. Piggott*, 4 Ad. & Ell. (x. s.) 363, s.

7. A party who had been in prison for twelve months, on judgment in ejectment, for damages 1*s.*, costs 40*s.*, and increased costs above 20*s.*; held entitled to be discharged under 48 Geo. 3, c. 123; the words of which are, "any debt or damages, *exclusive* of the costs incurred." *Doe v. Sinclair*, 3 Bing. N. S. (c. r.) 778; and 5 Dowl. (c. r.) 615. *S. P. Doe d. Threlfall v. Ward*, 2 Mees. & W. (xx.) 65; and 5 Dowl. 290.

8. The marshal cannot, of his own authority, grant the rules to a prisoner in custody for a contempt, which is for punishment, but there must be a special application to the court for that purpose. *Gompertz*, in re, 1 Nev. & P. (x. s.) 618.

9. The 48 Geo. 3, c. 123, held to extend to the case of a prisoner in execution for damages in an action of *crim. con.* *Goodfellow v. Robings*, 3 Bing. N. S. (c. r.) 1; 3 Sc. 319; and 5 Dowl. (r. c.) 148.

And see *Winter v. Elliott*, 1 Ad. & Ell. 24.

10. To entitle a prisoner to his discharge under 48 Geo. 3, c. 123, s. 1, he must have been actually confined within the walls, and not merely within the rules, for twelve months. *Sumption v.*

*Monzani*, 4 Ad. & Ell. (x. s.) 1007. *S. P. Barnard v. Simmonds*, 5 Dowl. (r. c.) 520; *Gilbert v. Pope*, 2 Mees. & W. (xx.) 311; and 5 Dowl. 449.

11. Notice of the defendant's application for his discharge, under 48 Geo. 3, c. 123, must be served personally on the plaintiff; and held, that appearing on the notice did not amount to a waiver of the objection. *Biddulph v. Gray*, 5 Dowl. (r. c.) 406.

12. The notice of the application must be served on the plaintiff himself, and not on the attorney. *Johnson v. Rutledge*, 5 Dowl. (r. c.) 579.

13. Where the party had become of unsound mind, held, that an application by his wife might, for the purposes of the Act, be treated as that of the husband. *Clay v. Bowler*, 5 Ad. & Ell. (x. s.) 400.

14. Where there was reasonable ground for supposing that money found on a prisoner was the produce of the alleged offence, the Judge refused to order more than the surplus to be restored. *R. v. Burgess*, 7 C. & P. (x. p.) 488.

15. The mode of charging a prisoner in execution held not altered by the 2 Will. 4, c. 39, s. 8. *Stocken v. Wedderburne*, 4 Sc. (c. r.) 570; and *Whetmore v. Binns*, lb. 571.

16. Where the party was taken on an attachment on 3d February, and did not apply to be discharged, on the ground of irregularity, until the 10th day of Easter term, held too late. *R. v. Burgess*, 3 Nev. & P. (q. s.) 366.

17. Where the trial is in term, and the surrender in discharge of bail is in a subsequent vacation, held, that it relates back to the previous term, in order to entitle the defendant to his *supersedeas* for want of being charged in execution; held, also, that the affidavit of notice of render may be made at any time before he is so charged. *Thorn v. Leslie*, 3 Nev. & P. (q. s.) 305.

18. The warden is not bound to discharge prisoners *supersedeable* for the space of one month without a Judge's order. *Fleet*, warden of, in re, 5 Sc. (c. r.) 150.

19. A surrender in vacation has reference to the preceding term for the purpose of discharging a prisoner under Reg. Trin. 26 & 27 Geo. 2. *Baxter v. Bailey*, 3 Mees. & W. (xx.) 415.

20. Where the action against a prisoner was tried in vacation, held that the plaintiff was bound to charge him in execution in the next following term. *Foulkes v. Burgess*, 6 Dowl. (r. c.) 109; and 2 Mees. & W. (xx.) 849.

21. The rule of Hill. 2 Will. 4, s. 72, as to warrants executed by prisoners, held not to apply to the case of a plaintiff, not the one at whose suit the party is in custody; and held that on an application for discharge, it is sufficient if it appears that he is in custody on *meane* process, without alleging it in express terms. *Weatherall v. Long*, 6 Dowl. (r. c.) 267.

22. Where the twenty days' notice had not expired before the first day of term, held, that an



application made in that term was too early.  
*Ralph v. Jacobs*, 6 Dowl. (r. c.) 279.

23. Where the original debt was under 20*l.*, although the defendant had given a *cognovit* for the debt and costs exceeding that sum, held nevertheless entitled to his discharge under 48 Geo. 3, c. 123. *Rathbone v. Fowler*, 6 Dowl. (r. c.) 81; and 3 Mees. & W. xx. 137.

24. Where the plaintiff was prevented from proceeding, by an injunction obtained by the defendant, held not to be a case within 1 Reg. Hil. 2 Will. 4, s. 87, requiring a notice to be given to the marshal, in order to deprive the party of his *supersedeas*. *Lewis v. Gompertz*, 6 Dowl. (r. c.) 124.

25. Rules or orders for discharging a party upon special bail put in and perfected, to direct a *supersedeas* also to issue. Reg. Gen. 4 Bing. N. S. (c. r.) 366.

26. Where the party was taken in execution on the 27th November, and the motion for his discharge at the end of 12 months was made on the 26th November; held, that as he could not be discharged until the following day, the motion was not premature. *Parkers v. Wilkins*, 7 Dowl. (r. c.) 152; and 6 Sc. (c. r.) 803.

27. Where the party has remained in execution 12 months for a debt not exceeding 20*l.*, held not to be precluded from his discharge under 48 Geo. 3, c. 123, although he has been brought up under the Lords' Act, and claimed his 60 days, which have not expired. *Venner v. Oxenham*, 6 Dowl. (r. c.) 766.

28. The 12 months lying in prison must be immediately preceding the application to be discharged under 48 Geo. 3, c. 123. *Stubbing v. M'Grath*, 7 Dowl. (r. c.) 328.

29. A Judge's order, under 1 & 2 Vict. c. 110, s. 7, for detention of a prisoner until he should give bail, "or until further order," held bad. *Boddington v. Woodley*, 1 Perr. & D. (q. n.) 159.

30. Regulation of prisons, by 2 & 3 Vict. c. 56.

And see *Bail*; *Indictment*; *Insolvent*; *Sheriff*.

### PROCEDENDO.

Where the cause had been removed from an inferior jurisdiction, and the demand laid in the declaration was 20*l.*; held, that it was not within 19 Geo. 3, c. 70, s. 6, and 7 & 8 Geo. 4, c. 71, s. 6, and no recognizances need be entered into, although it was sworn that the plaintiff did not seek to recover so much. *Brady v. Veeres*, 5 Dowl. (r. c.) 416.

And see *Certiorari*.

### PROFIT A PRENDRE.

See *Prescription*, 2.

### PROHIBITION.

1. Where the Ecclesiastical Court was proceeding to examine into the truth of an inventory, and of the reply to exceptions made thereto, a prohibition granted; and there is no distinction between the case of a creditor and legatee. *Griffiths v. Anthony*, 1 Nev. & P. (x. n.) 72; and 5 Dowl. (r. c.) 223.

And see *Henderson v. French*, 5 M. & S. 406.

2. Where some of the articles of a libel in the Ecclesiastical Court were only conusable at law, but were not objected to, and the sentence declared the articles for the most part sufficiently proved and substantiated, a prohibition was refused; and *semb.*, if the application had been made before sentence, the writ would only have removed the articles conusable at law. *Hart v. Marsh*, 1 Nev. & P. (x. n.) 62; and 5 Dowl. (r. c.) 424.

3. Where a rule *nisi* for a prohibition had been discharged, the court refused to allow it to be opened, upon fresh affidavits stating facts existing at the time of the previous application. *Bo-denham v. Rickets*, 6 Nev. & M. (x. n.) 337.

4. Where, in prohibition, the plaintiff complained of a church-rate laid on three only out of four townships of the parish, and the defendant claimed exemption in a plea alleging that it had a separate chapel, and a custom to perform all rites there, and for the repair by its own inhabitants exclusively, traversing the liability of all the four townships to repair the parish church, on which traverse issue was joined; held, that the plaintiff, by joining issue on this traverse, was not to be taken to have admitted the previous matter of inducement, but that the defendant was bound to prove the matters making up the fact traversed, as the traverse, though it might be too general, was not immaterial; and it was to be taken that the parties intended to put the liability in issue: held also, that the mere fact of a district repairing its own chapel, without coming on the parish rates, and no proof of rates levied on the particular township, did not establish the custom alleged in the plea. *Craven v. Sanderson*, 1 Nev. & P. (x. n.) 666.

5. Upon an appeal to the judicial committee of the Privy Council against a judgment of the court of Arches, reversing a decision of the court below as to the validity of a church rate, the court refused a rule for a prohibition before any proceedings taken, as the committee, having jurisdiction, the court would intend that it would act rightly, until it appeared that it was about to decide some matter only conusable at common law. Reg. v. Privy Council Judicial Committee, 3 Nev. & P. (q. n.) 15.

6. Where in prohibition the plaintiff declared that he had excepted to the libel below, on one ground, as to the construction of an Act of Parliament; held, that as it did not appear the court were proceeding to decide on the act, or contrary to common law, no ground was laid for prohibition. *Hall v. Maule*, 3 Nev. & P. (q. n.) 459.



7. Where a suit for non-payment of church-rates, instituted in the Ecclesiastical Court, had been appealed against, and referred to the Judicial Committee, no erroneous proceeding being shown there, the court would not assume that it would act incorrectly, and refused a motion for a prohibition, on the ground that the rate was bad. *Chesterton v. Farlar*, 7 Ad. & Ell. (q. s.) 713.

8. The Court refused to grant a prohibition to the quarter sessions, to prevent them from allowing the accounts of trustees, under a Church Building Act, before they had been audited, pursuant to the Act, as the court could not presume it would follow a course contrary to law. *St. Pancras Auditors, ex parte*, 6 Dowl. (p. c.) 534.

And see *Church ; Practice*, (c. L.)

### QUARE IMPEDIT.

Declaration in *quare impedit*, alleging that the plaintiffs being a majority of parties entitled to present, nominated W. ; plea, that the defendants were the majority, and nominated P., traversing that the plaintiffs were the majority ; replication, that the defendants did not duly nominate P. ; held bad, on demurrer. *Harrington, Earl of, v. Bishop of Litchfield*, 4 Bing. N. S. (c. r.) 77 ; and 3 Sc. 371.

And see *Evidences*.

### QUO WARRANTO.

1. The ss. 28 & 52 of 5 & 6 Will. 4, c. 76 (Municipal Corporation Act), disqualifying a party who becomes bankrupt, applies only where he becomes so after his election as a councillor ; where he was an uncertificated bankrupt at the time of his election, held that the Act did not apply. *R. v. Chitty*, 1 Nev. & P. (x. s.) 78.

2. It was no objection to granting the writ against individual members of a corporate body, at the instance of a private relator, that the objection made to the party holding the office, may be made to every member of the corporation, and tends to dissolve it altogether. *R. v. White*, 1 Nev. & P. (x. s.) 84.

3. Where no civil right of any kind was in question, but of mere title to compensation to the town-clerk of a borough, under the Municipal Corporation Act, the court refused a rule for a *quo warranto*. *R. v. Harris*, 1 Nev. & P. (x. s.) 576.

4. The writ does not lie for exercising the office of a guardian of the poor under the new act. *R. v. Carpenter*, 1 Nev. & P. (x. s.) 773.

5. It is no objection to an affidavit in support of an application for the writ, that it is made by a party who cannot himself be a relator, there being otherwise a sufficient one. *R. v. Brame*, 1 Nev. & P. (x. s.) 664.

6. Where the election of the defendant to the office of alderman, who had a majority of votes,

was questioned, on the ground that the full number of aldermen had not been elected, and which was alleged to make void the defendant's election, but by the subsequent statute of 1 Vict. c. 78, s. 2, the objection was cured, the court gave judgment for him on demurrer to the plaintiff's replication, setting forth the facts on which the objection was founded ; and held, that the prosecutor not having applied to discontinue the proceedings commenced before the latter Act, was not entitled to his costs under s. 20 ; the Act of itself did not discontinue the proceedings. *R. v. Roberts*, 3 Nev. & P. (q. s.) 395.

7. Where the offices of town-clerk and clerk of the peace of a borough had always been exercised by the same person, and at an entire salary, but by the Municipal Corporation Act the borough sessions and office of clerk of the peace were abolished, a grant of court of quarter sessions and revival of the office of clerk of the peace subsequently took place ; but prior to the Act taking effect, S. had been appointed to the office of town-clerk, the resolution however for appointing him was afterwards rescinded and the defendant, T., appointed. Upon a motion for a *quo warranto*, held, that S., if even appointed, was legally displaced, and that he could not enter into the question of the meetings of the council not having been duly convened, those grounds not being stated in the rule or affidavits, and that T. having acted in the office of clerk of the peace prior to its revival, was not a ground for the motion ; he having afterwards a legal title, and the rule not seeking to make him responsible for acts during the intermediate period. *R. v. Thomas*, 3 Nev. & P. (q. s.) 288.

8. A party subject as an inhabitant to the government of the councillors, has a sufficient interest to be a relator, and where he is acting with others not qualified, yet unless he is so far identified with them as to disqualify himself, the court will ascertain the real relator, and see if he be sufficient ; held, also, that it is not an objection to the interference of the court that the objection applies to all the existing burgesses, and that the effect may be to dissolve the corporation ; in every case the court will look to all the circumstances and motives, and exercise its discretion ; where there had been great irregularity, the application was discharged, without costs. *R. v. Parry*, 6 Ad. & Ell. (x. s.) 810.

9. In a borough divided into wards, under 5 & 6 W. 4, c. 76, assessors must be chosen for the mayor's ward under s. 43, not for the whole borough under s. 37. lb.

10. The court refused to compel the relators and defendants in several informations, to submit to be bound by the result of one, although the objections were the same. *R. v. Cozens*, 6 Dowl. (p. c.) 3 ; and 2 Nev. & P. (x. s.) 164.

11. Where the franchise of granting alehouse licences had been always exercised without opposition by the vice-chancellor of the university, and been recognised in ancient statutes, the court refused a *quo warranto* to try its validity ; and, *quere*, if such was the subject of *quo warranto* ? *R. v. Archdall*, 3 Nev. & P. (q. s.) 696.



12. The exemption of costs to parties who discontinued upon the passing of 7 Will. 4. & 1 Vict. c. 78, s. 20, held to be limited to the case of those discontinuing at the time of the passing of the Act, and not where the application to discontinue was delayed until after the decision of the court obtained in another case. *Reg. v. Roberts*, 3 Nev. & P. (q. b.) 592; and 7 Ad. & Ell. 441.

13. Where the election of assessor had been held before a party claiming to be mayor, whose title to the office was bad, and a rule nisi for a *quo warranto* been obtained before the passing of 7 Will. 4. & 1 Vict., c. 78, the defendant not having paid the costs up to that time, the rule was made absolute: s. 20 providing for the discontinuance of proceedings only being conditional on payment of costs. *R. v. Jones*, 7 Ad. & Ell. (q. b.) 430; and 2 Nev. & P. 577.

And see *Charter; Corporation; Mandamus; Officer*.

### RAILWAY ACTS.

1. Where a navigation company were empowered to take lands for the purposes of the intended line of improved navigation, within five years, and to complete the works within 15 years, and they had proceeded according to the prescribed plan up to a certain point, from whence they had continued the works over their own private property, being a deviation beyond that allowed by the Act; in assessing the value of lands taken, the juries were authorized to assess as well the value of the lands, and also what recompense for damage before sustained, or for future temporary or continuing of any recurring damages occasioned by the undertaking; and held, that "recurring damages" were to be taken *ejusdem generis*, with those which had already arisen, and that the jury could not include in their verdict contingent damages, which might never occur at all, and as to such, their verdict was a nullity; when a new description of damage ensued, it would be open to the party to have a new remedy, either by action or by a jury; held also, that unless the Parliamentary line had been finally abandoned, the company had a right at any time within the 15 years, to take the lands required, on payment or tender of its assessed value, and might go on simultaneously with the navigation, and also with a tramroad to communicate therewith. *Lee v. Milner*, 2 Mees. & W. (ex.) 824.

2. Where the act expressly declared, that the shares should be personal property to all intents and purposes, held, that a sale was not within the Statute of Frauds, as of an interest in land, and would be good, although by verbal contract; and so, even without such clause. *Bradley v. Holdsworth*, 3 Mees. & W. (ex.) 422.

3. Where by a railroad act, parties in possession of lands taken by the company were to be deemed lawfully entitled, until the contrary shown to the satisfaction of the court, and that where the party could not make out a good title, the company should pay in the amount, subject

to the disposition of the court; held, that the party on his own affidavit of title, was entitled to an order for the payment of money to him for his absolute use. *Grainge, ex parte*, 3 Younge & C. (ex. ex.) 62.

4. Where by a railway Act the company were liable to pay the costs of obtaining orders for payment of dividends of purchase-money invested; held, not to extend to the costs of payment of the dividends. *Athorpe, ex parte*, 3 Younge & C. (ex. ex.) 396.

5. Where the act declared that no action should be brought against any person for anything done in pursuance of it, without 21 days' notice given to the intended defendant, held to include the company, and that they were entitled to notice of an action for obstructing a road which the plaintiff claimed to use. *Boyd v. Croydon Railway Company*, 4 Bing. N. S. (c. r.) 669; 6 Sc. 461; and 6 Dowl. (r. c.) 721.

6. Where after one railway company had entered into an engagement for the purchase of 16 acres of land of the plaintiff, a rival company started, and both lines being before Parliament, it was agreed that the merits should be referred to certain members of the committee, and that the company adopted should take the engagements of the other, which the plaintiff, the owner of the land, assented to; the adopted company, being incorporated, requiring 16 acres of the plaintiff's land, in a different situation, he filed a bill for enforcing the performance of the agreement, and to restrain the company from entering into any lands of his until the instalments due were paid, and from proceeding when future instalments became due until they should be paid; held, that there being on the face of the bill a case entitling the plaintiff to relief, the demurrer overruled. *Stanley v. Chester and Birkenhead Railway Company*, 3 Myl. & Cr. (ch.) 773.

7. Where there was nothing in the Act rendering it compulsory on the company to carry goods, and if they were liable as common carriers it might be enforced by action, a *mandamus* refused. *Robins, ex parte*, 7 Dowl. (r. c.) 568.

And see *Carrier; Certiorari; Contract; Inquisition; Pleading* (c. L.)

### RECEIVER.

1. The court has no jurisdiction to compel, in a summary way, the executor of a receiver to pass his accounts, and pay over the balance. *Jenkins v. Briant*, 7 Sim. (ch.) 171.

2. The court granted a receiver, at the instance of an executor, pending a suit in the Ecclesiastical Court for annulling probate, the defendant, who was impeaching it, having prevented him from getting in the assets. *Marr v. Littlewood*, 2 Myl. & Cr. (ch.) 454.

3. Where a party entitled to a share in the proceeds of estates directed to be sold and divided, subject to a previous life-estate, got into possession of part during the life of the tenant for



life; the court, having appointed a receiver, refused by an interlocutory order to fix such party with an occupation-rent prior to the date of the order fixing the rent and appointing the receiver. *Lloyd v. Mason*, 2 Myl. & Cr. (cn.) 487.

4. Where several of parties interested declined joining in the application for a receiver before answer; held, that the circumstance of the party having the administration being an uncertificated bankrupt, and not appointed to the office by the testator, were not sufficient reasons for inducing the court to appoint one. It must be a strong case to induce the court to dispossess a party who is interested, and has the legal title, unless the other parties consent. *Smith v. Smith*, 2 Younge (zx. xq.) 353.

5. A receiver is bound to retain a control over, and cannot in any way pledge the property by way of indemnifying his sureties; and held, therefore, that he was liable to interest on the losses of sums received by his sureties at bankers who had failed. But where an order has been made to pay over funds to a party who dies before payment, he is only bound to retain the custody until by proceedings in court he is enabled to pay them over. *White v. Baugh*, 3 Cl. & F. (r.) 44; and 9 Bli. N. S. 181.

6. On a devise by A. of copyholds and leaseholds, on trust to pay the rents and profits to C. for life, to her separate use, without power of anticipation, and a devise by B. of freeholds on the like trusts for C., who was a feme sole, on the death of A., but married on the death of B., and who had joined with her husband in granting annuities charged on both estates: the husband having become insolvent, an injunction and receiver granted on a suit by the annuitant, for payment of the annuities out of the estates, as to the former, but refused as to the latter, as the rents and profits were not capable of being secured pending the cause, and the question not being such as could be decided on an interlocutory motion. *Tullett v. Armstrong*, 1 K. (cn.) 428.

7. Although the court will appoint a receiver *pendente lite* in the Ecclesiastical Court, as to the validity of the will, it will not on that ground alone order the executor to pay into court money in his hands of the testator. *Reed v. Harris*, 7 Sim. (cn.) 639.

8. Not allowed for expenses and remuneration for journeys into a foreign country, for the prosecution of suits there in recovering the outstanding estate of a testator. *Malcolm v. O'Callaghan*, 3 Myl. & Cr. (cn.) 52.

9. Where, pending disputes, the rents were fallen into arrear, and a suit had been instituted by the party entitled to the rents for life, against the trustees, the court appointed a receiver, with costs, to be paid by the defendants. *Wilson v. Wilson*, 2 Keene, (cn.) 249.

10. In a clear case of equitable mortgage, the court will appoint a receiver, if by delay in doing so the mortgagee will be placed in a worse situation. *Aberdeen v. Chitty*, 3 Young & C. (zx. xq.) 379.

11. The decree for sale of an equitable security not being within the 7 Geo. 2, c. 29, the Court will exercise its general jurisdiction in ordering the defendant to pay costs. 1b.

12. Where a party indebted to the estate for which a receiver had been appointed, was willing to pay a sum due into court, in order to save poundage, the Court permitted him to do so. *Haigh v. Grattan*, 1 Beav. (cn.) 201.

13. Where it was the duty of the trustee to raise a sum by sale of the devised estates, and by the omission infant legatees might be deprived of the intended advancement; held, a sufficient ground for the appointment of a receiver. *Richards v. Perkins*, 3 Younge & C. (zx. xq.) 299.

And see *Trustee*.

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## RECITAL.

See *Deed*.

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## RECOGNIZANCE.

1. A recognizance refused to be discharged without notice to the Attorney-General, although the forfeiture accrued to the city of London. *Morris, ex parte*, 1 Mees. & W. (zx.) 510; and 1 Tyr. & Gr. 805.

2. In *sci. fa.* upon a recognizance for payment of costs, occasioned by a claim to goods seized, in case they should be adjudged forfeited; held to be immaterial for whose benefit the recognizance was entered into; and it was for the defendant to show the condition to have been performed. *R. v. Bullock*, 1 Mees. & W. (zx.) 726; and 1 Tyr. & Gr. 998.

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## RECOVERY.

1. Application to amend the warrant of attorney, only by transposing the names, refused. *Lamont, vouchee*, 3 Bing. N. S. (c. r.) 297; and 3 Sc. 666.

2. Amendment, by inserting "right of free warren," allowed under 3 & 4 Will. 4, c. 74, s. 8; the right having always gone with the property, and the deed to lead the uses containing the word *hereditaments*. *Twisden, in re*, 4 Bing. N. S. (c. r.) 253.

And see *Fines*.

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## RELEASE.

Upon the sale of a policy of insurance, one of the conditions being for payment of interest on the purchase-money, if the completion of the purchase-money should be delayed; held, that being in the nature of an additional price, a release executed by the plaintiff, whereby he exonerated the



defendant from the purchase-money and every part thereof, was a bar to an action for interest; so, on the purchase-money. *Harding v. Ambler, 3 Mees. & W. (ex.) 279.*

And see *Bond; Injunction.*

### REMAINDER.

1. Where lands settled were sold by the tenant for life to a company, under an act directing the money to be laid out in lands, to be settled to the same uses, and he purchased lands of very nearly the same amount, but died before they were settled, and they descended to his heir-at-law, being also the first tenant in tail; the court, presuming that he had purchased with reference to his obligation, dismissed a bill by the remainder-man against the company and the executors for the purchase money. *Tubbs v. Broadwood, 2 Russ. & M. (ex.) 487; and confirmed on appeal.*

2. Where the testator having devised lands to his wife during widowhood, remainder to his nephew for life, remainder to the children of the nephew as tenants in common, and if no child of his nephew at the death or marriage of his widow, then over, by a codicil he directed that neither his nephew nor any of his children should take a vested interest, unless they should attain 21, and in case any of them should die under that age, their shares should go to the survivors on attaining that age; held, that the interests of the children were contingent on their attaining that age. *Russell v. Buchanan, 7 Sim. (ex.) 628; approving the certificate of the Court of Exchequer, q. v. 2 Cr. & Mees. 561.*

3. Where the devise after limitations for life, with remainder in tail, was, that "in default of such issue, to such person as shall be the nearest in blood;" held, that no particular time being expressed when the remainder was to vest, the general rule was to prevail, and that it therefore vested in interest upon the death of the testatrix. *Start v. Platel, 5 Bing. N. S. (c. r.) 434.*

4. Where A., the father, was seised of one moiety of a copyhold for life, remainder to his daughter B. in tail, remainder to A. in fee; B. being unmarried, and having issue five children, became seised also of the other moiety in fee on her mother's death, who had covenanted to settle it in the same way as the other, but had died without doing so, B. afterwards, in pursuance of such covenant, surrendered her moiety, and thereby both moieties became settled in A. for life, remainder to B. in tail, remainder to A. in fee; and on the same day, A. and B. surrendered the entirety, for the purpose of suffering a recovery, which was done, and the uses declared to be to A. for life, remainder to B. for life, remainder to the heirs of the survivor; on the same day, A., in pursuance of his covenant in his daughter's marriage-settlement, surrendered a moiety to trustees in trust for the husband of B. for life, remainder to B. for life, remainder to B.'s children in tail successively, remainder to the heirs of B., with powers to sell, exchange, and vary the uses, &c.; in 1778, A., B., and her husband,

surrendered one moiety to L., and the trustees, at the instance of B. and her husband, surrendered the other moiety to L. in fee, who ever since continued in possession; A. died in 1802, and B. in 1835, when the lessor of plaintiff claimed as heir: held, 1st, that claiming the contingent remainder as heir, he might bring ejectment before admittance; 2dly, that the uses of the recovery in 1778, creating such contingent remainder as voluntary, were void under 27 Eliz., c. 4, against a purchaser for a valuable consideration, the plain intention of such surrender being to make an effectual sale to L. *Doe v. Rolfe, 3 Nev. & P. (q. n.) 648.*

And see *Copyhold.*

### RENEWAL.

See *Lease.*

### REPLEVIN.

1. Replevin lies for the wrongful detainer of goods taken under a lawful distress; and a plea, that after the taking for a rent-service and before impounding, the rent and costs were tendered, held good. *Evans v. Elliott, 6 Nev. & M. (x. n.) 606; and 5 Ad. & Ell. 142.*

2. Where, the declaration being dated before the first day of Easter 1834, the defendant was not precluded from avowing doubly, and the jury found a less rent due than was claimed by the avowry, and the defendant did not apply to amend, the contest being, in fact, as to what was the rent, the court refused an application for a new trial, and to amend the avowry. *Serjeant v. Chafy, 5 Ad. & Ell. (x. n.) 354.*

3. The court refused to hear the summing up of the judge from a shorthand-writer's notes. *1b.*

4. In case for irregular proceedings on a distress; one count alleging that the defendant had sold the goods distrained, after the sheriff had granted a replevin; plea, alleging that the right to grant replevins belonged to the lord of the manor of C., who had made no default in granting the deliverance, and that the sheriff had not requested him to replevy, but had granted it out of his county court; held, that the sheriff had no concurrent jurisdiction, but that the declaration ought to have averred that the defendant knew of the goods having been replevied. *Mounsey v. Dawson, 1 Nev. & P. (x. n.) 763.*

5. Plea to an avowry for rent, that the avowant demised and transferred the premises to the plaintiff for the residue of the term, and had no interest in the reversion, held good; and a replication, that, upon a reference, the arbitrator had by his award given a power of distraining, without averring that such power was a matter in difference, or that he had power to confer it, held ill. *Pascoe v. Pascoe, 3 Bing. N. S. (c. r.) 896.*

6. Where the plaintiff in replevin, a married woman, her husband living abroad, took the



premises of A., who afterwards sold them to F., and both claimed the rent coming due; she paid to A., and replevied the distress by F.; held, that the court could not, without the defendant's consent, amend the proceedings by inserting the husband's name, unless the defendant would withdraw his plea and avow, the plaintiff being restrained from pleading her coverture. *Eribanke v. Owen*, 5 Ad. & Ell. (x. s.) 238.

7. The court stayed proceedings on the bond, upon payment into court of the value of the goods ascertained by the Master. *Gingell v. Turnbull*, 3 Bing. N. S. (c. p.) 881.

8. Where the owner of the premises in respect of which the distress was made, executed a lease to C. in his own name, and the latter occupied a part only under W., on whose behalf the lease was obtained, from whom the landlord had received the rent; held, that W. might distrain in respect of the part so occupied by C., and that the latter was precluded from disputing his title. *Clarke v. Waterton*, 2 M. & Rob. (x. p.) 87; and 8 C. & P. 315.

9. Where the issue at the trial was as to the amount of the rent, which was found according to the avowry, but the jury found a different holding; held, that the case was within the spirit of 3 & 4 Will. 4, c. 42, s. 24, and that it was too late for the plaintiff to take advantage of the latter variance, and that the defendant might amend the avowry on record, although the plaintiff had given notice that he should rely on the variance, and no application to amend had been made at the trial. *Gayler v. Farrant*, 4 Bing. N. S. (c. p.) 286; and 6 Dowl. (r. c.) 426.

10. Avowries, alleging that a certain unknown person or persons held as tenant or tenants to the defendant for a term, at a certain rent under a demise from A. to B., the said unknown person being a person, &c. to whom all the estate and interest of B. became legally vested by assignment, and the rent in arrear and due to the defendant; held bad on demurrer, and not sustainable either on 21 Hen. 8, c. 19, which requires that the avowry should allege that the defendant was seised of the lands in which, &c. or on 11 Geo. 2, c. 19, which requires the defendant to show a privity between himself and the tenant of the land; held, also, that a defect in the declaration for not specifying the goods, &c. taken, or the place where taken, was cured by the avowry justifying the taking of the said goods, &c. in the said place, although the avowry itself was a bad plea. *Banks v. Angell*, 3 Nev. & P. (q. s.) 94.

11. An avowry for taking cattle damage *feasant*, in the *locus* the soil of A., and another laying it as the soil of B., held allowable under Reg. 5 Hil. 4 Will. 4. *Evans v. Lucas*, 3 Nev. & P. (q. s.) 464.

12. No rule for a special jury to be granted in replevin, unless there be an affidavit of no notice of trial having been given, or if given, the day for which given; and in the latter case, unless the application be made six days before that day; but a Judge may on summons order the rule to be drawn up at any time. *Reg. Gen.*, 3 Nev. & P. (q. s.) 1.

13. Where in replevin a verdict was taken for the plaintiff, and the facts stated as a special case, but the avowant died before the case was argued, the court allowed the plaintiff to enter judgment. *Greene v. Cobden*, 4 Sc. (c. p.) 486.

14. In debt by the assignee of a replevin bond, held, that the action might be brought in another court than that in which the *re, fa. lo.* is returnable. *Wilson v. Hartley*, 7 Dowl. (r. c.) 461; overruling the *dictum* in *Sellon's Pr.* 367.

15. In replevin upon the issue, no rent in arrear, the plaintiff is entitled to begin. *Cooper v. Egginton*, 8 C. & P. (x. p.) 748.

And see *Sheriff*.

## REQUESTS, COURT OF.

1. Under the Middlesex Act, held that the plaintiff was liable to be deprived of costs, although the verdict was reduced by the plea of the statute of limitations; but where the action was for work, &c., and part of the demand was as a broker, for levying a distress in Surrey; held, that the action could not be brought in the county court, which requires both that the defendant should reside, and the cause of action arise within the county. *Bailey v. Chitty*, 2 Mees. & W. (xx.) 28; and 5 Dowl. (r. c.) 307.

2. Where the defendant, a builder, residing without the jurisdiction of B., made bricks for sale, which he occasionally sent to B., and the market of which he attended; held not to be a party "using or frequenting the market, or trading or dealing there," and liable to be sued only within the inferior jurisdiction; those words, *semblable*, require that the party's livelihood should be substantially obtained by such acts. *Jones v. Taylor*, 1 Mees. & W. (xx.) 578; and 1 Tyr. & Gr. 940.

3. But such local Act held equally to apply to a case where there is on the record a plea of payment into court, or where tried before the sheriff. *Bernard v. Turner*, 1 Mees. & W. (xx.) 584; 1 Tyr. & Gr. 942; and 5 Dowl. (r. c.) 170.

4. Where the final judgment is signed in vacation, it is not too late to apply for a suggestion in the following term; but the rule will be qualified with the condition of payment of costs incurred by the plaintiff since the judgment. *Heale v. Erle*, 2 Mees. & W. (xx.) 383.

5. Where the local act expressly prohibited the commissioners from deciding on any debt being the balance of an account originally exceeding 5*l.* held, that the plaintiff, although recovering less than that amount on a claim exceeding 5*l.*, but reduced by payments, was not liable to costs. *Green v. Bolton*, 4 Bing. N. S. (c. p.) 308; and 6 Dowl. (r. c.) 434.

6. Where the Westminster act (pleaded by the defendant) was repealed after plea and before trial, and the new act contained no provision as to suits pending, the verdict having been found for the defendant upon the issue whether the debt



amounted to 40s.; held, that the plaintiff was entitled to judgment *non obstante*. *Warne v. Beresford*, 6 Dowl. (P. C.) 157; and 2 Mees. & W. (Ex.) 848.

7. The Bath Act, 45 Geo. 3, c. 57, held not to give jurisdiction as to compensation for attending before the Court of Revising Barristers, and that the want of jurisdiction appearing on the face of the proceedings, the objection might be made upon motion for prohibition, after the judgment and execution, where the party had not acquiesced in the proceedings below. *Roberts v. Humby*, 6 Dowl. (P. C.) 82; and 3 Mees. & W. (Ex.) 120.

8. Where the defendant stated in his affidavit for costs under a court of Requests Act (Blackheath Hundred) that at the time of the issuing of the writ, he was of the Mitre Tavern at G., in the Hundred of B., and wholly resident there, and by the indorsement on the copy of the writ of summons annexed to the affidavit the amount of the debt appeared to be under 5*l.*, held sufficient to entitle the defendant to costs, the plaintiff only swearing to his being informed that the defendant was resident elsewhere. *Burton v. Campbell*, 6 Dowl. (P. C.) 451.

9. Where by the local Act, sums recovered were to be paid by instalments, and under such terms and conditions as the court should think reasonable, and the steward of the manor was authorised to appoint a deputy steward, to whom sums were from time to time ordered to be paid on account of suitors, and a large sum accumulated in his hands at the time of the death of the steward; held, that having received the money, not by virtue of his office, but as directed by the court, he received them to the use of the creditors, and was liable to them until his authority was revoked; and a *mandamus*, directing him to pay them over to the succeeding steward, refused. *R. v. Watson*, 2 Nev. & P. (Q. B.) 595.

And see *Costs; Pleading*, (C. L.)

### RESULTING TRUST.

Where the settlor conveyed *leaseholds*, stocks, funds, and securities in trust for himself and wife for life, and after the death of the wife, "of the whole of the stocks, funds, and securities," for the children; the wife having died in his lifetime, held that, as to the leaseholds, there was a resulting trust for the settlor. *Wilson v. Paul*, 7 Sim. (Ch.) 620.

### RIGHT, PETITION OF.

Where the petition of right was indorsed "*soit droit fait*," but not specially referring it to the Court; held, that it could not adjudicate thereon. *Pering, ex parte*, 6 Dowl. (P. C.) 750.

### SAVINGS BANK.

Where an accumulation arose from an increase and surplus of deposits in a savings bank, previous to 9 Geo. 4, c. 92, and was then applicable by the trustees only for the benefit of the depositors, and the trustees were by the rules of the society prohibited from applying such surplus to any purpose which might be directly or indirectly beneficial to the managers: and by the 22d sect. of the act, the application of deposits previous to the passing of the act, was to be made pursuant to the rules of the society; held, that an application to the purpose of widening a bridge for which some of the trustees, as owners and occupiers of lands within the district were liable to its repair, and might be liable to be rated, however minute the benefit to the trustees, rendered such application illegal, and the trustees liable personally for the misapplication of the fund, as a breach of trust, and to be charged with the costs of suit. *Holmes v. Henty*, 10 Bli. N. S. (P.) 257.

### SCAVENGER.

Under the 57 Geo. 3, c. 29 (Metropolitan Paving), the scavenger is entitled only to take away cinders, &c., considered by the owner as rubbish, and where coal, used in his trade, was only partially burned, and he removed it to other premises to be used for other purposes, held entitled so to do. *Filbey v. Combe*, 2 Mees. & W. (Ex.) 677.

### SCIRE FACIAS.

1. Proceedings in *sci. fa.* on a judgment are within the new rule of pleading, and must be intitled as of a day certain instead of a term. *Collins v. Beaumont*, 5 Dowl. (P. C.) 700.

2. The writ cannot be tested in vacation, notwithstanding the provisions of s. 12 of the Uniformity of Process Act, not being one of the writs mentioned therein. *Seaton v. Heap*, 5 Dowl. (P. C.) 247.

3. Plea to a *sci. fa.*, a writ of error pending, held clearly bad. *Snook v. Mallock*, 5 Ad. & Ell. (X. B.) 239.

4. Judgment allowed to be signed on a *sci. fa.* where something appeared to have been done to convey notice to the defendant of the proceeding against him. *Weatherhead v. Landles*, 3 Sc. (C. P.) 406; and 5 Dowl. (P. C.) 189.

5. *Quare*, if a *sci. fa.* can be sued out on an interlocutory judgment, signed more than a year before; the court would not determine such a question on motion, but leave the party to his writ of error. *Benn v. Greatwood*, 6 S. C. (C. P.) 891.

### SESSIONS.

1. Where notice of appeal against an order of



two justices, under 53 Geo. 3, c. 127, had been served upon one only, held sufficient; and the Act being silent as to notice, the justices at sessions could not engraft the requirement of notice upon the Act of Parliament. *R. v. Staffordshire Justices*, 6 Nev. & M. (x. s.) 477; and 4 Ad. & Ell. 842.

2. Where a railway Act, in case of dispute as to the value of lands to be taken for the purposes of the Act, directed it to be settled by a jury, and, in the event of their giving greater compensation than offered by the company, that the costs of summoning the jury and expenses of witnesses should be paid by them, but if less, then a moiety of the said costs and expenses was to be paid by the party, and who, by a subsequent clause, was to enter into a bond to pay his proportion "of the costs and expenses of summoning the jury and taking such verdict, and expenses of witnesses," in case any part should fall on him; held, that fees of counsel and costs of the attorney were properly disallowed. *R. v. Gardiner*, 1 Nev. & P. (x. s.) 308.

3. Courts of quarter-sessions in corporate cities, &c., may be divided into two courts. 7 Will. 4 & 1 Vict. c. 19.

4. The court cannot direct the sessions to rehear an appeal on the ground of the rejection of evidence. *Pratt, ex parte*, 2 Nev. & P. (x. s.) 102.

5. Where a party entered into a recognizance to keep the peace before a single justice, and was subsequently convicted of an assault before a petty sessions, and paid a fine; held, that the forfeiture of the recognizance not having taken place at the quarter sessions, that court had no power to estreat it, the course being by removal into the superior court, and proceeding by *sci. fa.*; held, also, that although the order of the quarter sessions might be a nullity, yet that the party was entitled to remove it by *certiorari*, in order to its being quashed: held, also, that since the 3 Geo. 4, c. 46, the Court of Exchequer no longer retains jurisdiction over recognizances forfeited, taken either before justices out of sessions or at the quarter sessions; and as to the latter, it is the duty of the clerk of the peace to put the law in motion in order to levy the latter. *Reg. v. West R. Yorks. Justices*, 8 Nev. & P. (q. s.) 457.

6. Where, on an appeal against a county rate, the sessions confirmed the rate, subject to the opinion of the Court of K. B. on a case, and the court declared the rate bad, and quashed the order of sessions, but the rate not having been removed, upon application to quash the rate, the sessions refused on the ground that the appeal was no longer before the court; a *mandamus* to compel them was refused, as having no right to direct the session as to what judgment they ought to give, and as exposing the parties to actions who had acted on the rate: and the objection being made by the local act a specific ground of appeal, the court refused, on removal by *certiorari* of a second rate, against which no appeal had been made, and which was good on the face of it, to quash it. *Reg. v. Middlesex Justices*, 1 Perr. & Dav. (q. s.) 402.

7. Where, on an appeal against a borough rate, **Vor. IV.**

the original rate was produced and inspected by the recorder upon an objection as to the time when made, and the appeal was then adjourned at the request of the respondents at two successive sessions, when the rate was abandoned; held, that the rate was sufficiently before the court to give it jurisdiction to confirm the appeal with costs. *R. v. Stamford Corporation*, 1 Perr. & D. (q. s.) 72.

8. Where, upon an appeal in petty sessions against a poor rate under 6 & 7 Will. 4, c. 96, s. 6, a notice of appeal from their decision was given, and within five days after, recognizance taken and entered in the minute book by the clerk of the petty sessions, but the recognizances, when produced, appeared not to have been signed by any justice; held, not to invalidate the recognizances, and a *mandamus* granted to the sessions to enter continuances and hear the appeal. *R. v. St. Alban's Justices*, 1 Perr. & D. (q. s.) 148.

9. Where the notice of application to the sessions for an order of maintenance on the putative father of a bastard child was signed only by the overseers and not by either churchwarden, held bad, and that the sessions properly dismissed the application. *Reg. v. Cambridgeshire Justices*, 1 Perr. & Dav. (q. s.) 249.

10. Where, upon an appeal against an order of removal, the court upon objection decided that the notice was invalid, but afterwards, upon looking at the order, decided that it was itself a nullity, and they thereupon quashed it; held, that the sessions, not being ousted of their jurisdiction by reason of the invalidity of the notice, and having decided, although, as it appeared, erroneously, on the merits of the order, the court would not disturb their decision. *R. v. Cheshire Justices*, 1 Perr. & Dav. (q. s.) 88.

11. Where the appeal was, by press of business, made a *remanet*, and before the next sessions a fresh and varying statement of the grounds of appeal given; held, that the sessions were bound to hear the appeal on the latter statement. *R. v. Derbyshire Justices*, 3 Nev. & P. (q. s.) 591.

12. The finding of a grand jury of forgery at the quarter sessions being a nullity, ordered by the Judge at the assizes to be quashed, and a new bill preferred. *R. v. Rigby*, 8 C. & P. (n. s.) 770.

And see *Bastard; Jury; Poor*.

## SET-OFF.

1. A debt due from a testator cannot be set off in an action by the executor for money had and received to his use as executor. *Schofield v. Corbett*, 6 Nev. & M. (x. s.) 527.

2. Where the defendant in his set-off sought to avail himself of overcharges paid by a third party, who settled previous bills; held that he being dead, the accounts could not be opened. *Lawes v. Eastmure*, 8 C. & P. (n. s.) 205.

3. Where the plaintiff shipped goods and became a passenger to India in the defendant's ship,



and on a loss, by striking on a rock near the Cape, the goods were damaged nearly to the value, and the amount of the insurance was received by the defendant, the captain refusing to carry on the passengers unless fresh arrangements were made, and which were declined by the plaintiff, and the voyage not having been completed the plaintiff claimed to be allowed the sums paid for freight of the goods and his passage-money; held, that the defendant was entitled to set-off the passage-money unless it were shown to belong to the owners, but not the freight, which was not due, unless the ship arrived; nor any sum not actually paid by him before the action brought, although he might have made himself liable to pay them. *Leman v. Gordon*, 8 C. & P. (N. R.) 392.

4. Where the plea set up an agreement, by which the plaintiff's intestate guaranteed sums to be advanced by the defendant; held, that the liability, not being capable of being assessed without the intervention of a jury and sounding in unliquidated damages, could not be the subject of set-off. *Morley v. Inglis*, 4 Bing. N. S. (c. r.) 58; and 6 Dowl. (r. c.) 203; 3 Sc. 314; supporting *Crawford v. Stirling*, 4 Esp. 266.

5. Where the plea of set-off alleged that the plaintiff was indebted in a certain sum, but omitted "and still is," held bad on demurrer. *Dendy v. Powell*, 3 Mees. & W. (N. R.) 442.

6. Where the parties had expressly agreed that a particular question should be tried between them, the court refused to allow the defendant an advantage of a set-off which it was the intention of both he should not have. *Gould v. Oliver*, 6 Sc. (c. r.) 648.

7. Where a verdict was given against the plea of set-off, and the defendant afterwards brought an action for such cause of action, held that he was estopped from suing for the same demand, and a plea stating the former action, and that the second action was for recovery of the identical claim specified in that set-off, was not answered by a replication that no evidence was offered to substantiate the plea of set-off. *Eastmure v. Laws*, 5 Bing. N. S. (c. r.) 444; and 7 Dowl. (r. c.) 431.

And see *Agent; Bankrupt; Costs; Debt; Lien; Pauper; Pleading*, (c. L.)

## SEWERS.

The Commissioners have no jurisdiction to make a rate upon a township. *Emmerson v. Saltmarsh*, 2 Nev. & P. (Q. B.) 446.

And see *Action on the Case*.

## SHERIFF.

[A] LIABILITY OF.

[B] INTERPLEADER.

[C] TRIALS BEFORE.

### [A] LIABILITY OF.

1. In case against the sheriff for a false return of *nulla bona*, to which the only plea was not guilty; held that, upon such plea, the only matter in issue was the fact of having the money in his possession, and his making the return stated in the declaration; and that in the term *inducement*, in Reg. Hil. 4 Will. 4, c. 1, was included everything not involved in the charge alleged against the sheriff; and he could not therefore avail himself on that defence of the bankruptcy of the debtor before the execution of the writ. *Wright v. Lainson*, 2 Mees. & W. (N. R.) 739.

2. And *sembl.* in such case, the petitioning creditor is a competent witness for the defendant. *Id.*

3. In escape against the sheriff, held that he was bound by his return, both as to the fact of arrest, and also as to the day on which made. *Cook v. Round*, 1 M. & Rob. (N. R.) 512.

4. In trespass against the sheriff for taking goods of plaintiff under an execution against another; held that, if the execution creditor has indemnified the sheriff, his statements are evidence. *Proctor v. Lainson*, 7 C. & P. (N. R.) 629.

5. In case against the sheriff for executing an attachment against a party in contempt for not obeying an order of the Court of Chancery, by attaching the body, he "being then privileged from being so attached, and the defendant well knowing," &c.; held, that the declaration was bad for not showing the nature of the privilege, and that it was such as to prevent the ordinary duty of the sheriff; and *quere*, if such action was maintainable? *Lloyd v. Wood*, 5 Ad. & Ell. (N. R.) 228.

6. In debt against the sheriff, on 32 Geo. 2, c. 28, s. 1 & 12, for taking the plaintiff to prison within 24 hours, the plaintiff not having refused to nominate a place, &c.; plea, that the defendant informed the plaintiff she might be carried to a safe, &c., of her own nomination, and that she thereupon consented to be taken to the house of L., and was accordingly taken there; but afterwards requested, within 24 hours, to be taken from thence to prison; and issue upon such consent to be taken to the house of L.; held, that the plea was a sufficient answer to the declaration. Under the statute, the prisoner may abandon the right to nominate a house, and circumstances may amount to a refusal to nominate; the sheriff may exercise a discretion whether a house nominated is a safe and convenient place of custody; but if the prisoner desires to be taken to a house for the purpose of consulting one there, that is not to be deemed a nomination of a place within the statute. *Silk v. Humphrey*, 4 Ad. & Ell. (N. R.) 959.

7. Where, in case for a false return, the declaration alleged the seizing and taking the goods in execution, and that the defendant then levied the debt thereout; plea, that he did not take the goods, &c., and levy, &c., *moda et forma*; held bad, as tendering too large an issue, and rendering it incumbent on the plaintiff to prove more than he was bound to do. *Stubbs v. Lainson*, 1 Mees. &



W. (xx.) 728; 1 Tyr. & Gr. 1000; and 5 Dowl. (p. c.) 162.

8. Where in an action on 28 Eliz. c. 4, against the sheriff for extortion, the declaration stated that he took "more and other consideration than is by the statute limited and appointed in that behalf, that is to say, divers large sums of money, in the whole amounting to £—, more than is in the said act limited and appointed in that behalf;" held bad, on special demurrer. *Ashby v. Harries*, 1 Nev. & P. (x. s.) 673; and 5 Dowl. (p. c.) 742.

9. Although the sheriff's replevin-clerk is not bound to go about to inquire as to the sufficiency of the sureties, yet where he had confined his inquiries to the parties alone; held, that the jury were warranted in finding that reasonable caution had not been used; the bond having been taken for granted at the trial, though not produced, and stated to have been for double the value of the goods taken, a motion to increase the damages beyond its amount, refused. *Jeffery v. Bastard*, 6 Nev. & M. (x. s.) 303; and 4 Ad. & Ell. 823.

10. Where the old sheriff, not having sold goods seized, is distrained, and a motion made to increase issues, the court will allow it to be for the whole amount, and further to cover the costs of delay and of the application, and it is absolute in the first instance. *Nowell v. Underwood*, 5 Dowl. (p. c.) 229.

11. In order to entitle a party to an attachment against the sheriff for not obeying a Judge's order to return the writ, the original order must be shown at the time of serving the copy. *Granger v. Fry*, 5 Dowl. (p. c.) 21.

12. Where the plaintiff was entitled to an attachment for not obeying a Judge's order in vacation to bring in the body; held that he ought to have applied promptly in the following term. *R. v. Sheriff of Middlesex*, 5 Dowl. (p. c.) 245.

13. The application to set aside the attachment against the sheriff on staying proceedings on the bail-bond, to be grounded hereafter on an affidavit of merits, or if made on the part of the sheriff, &c., on an affidavit that it is really made on the part of the sheriff, &c., at his expense, and for his indemnity, and without collusion with the defendant. *Reg. Gen.*, Hil. 7 Will. 4, 2 Mees. & W. (xx.) 219.

14. Where, after the warden was in contempt for not bringing in the body after a return of *cepi corpus*, notwithstanding bail had been justified, after attending to protest and oppose them; held no waiver of the irregularity, and the warden still subject to an attachment, but the money paid by him allowed to be returned, on terms. *Smith v. Andrews*, 2 Mees. & W. (xx.) 536; and 5 Dowl. (p. c.) 607.

15. It is the duty of the sheriff, since the Uniformity of Process Act, to arrest the party upon the *capias* on the first opportunity that he can, and if he does not, he is liable to answer in damages for the neglect; but, *semb.*, there must be proof of damage. *Brown v. Jarvis*, 1 Mees. & W. (xx.) 704; 1 Tyr. & Gr. 1033; and 5 Dowl. (p. c.) 281.

16. The court refused to order the sheriff to refund money in his hand to the defendant, on the ground of the action having been defended by an attorney, until it were ascertained whether the attorney were insolvent or not. *Stanhope v. Eavery*, 5 Dowl. (p. c.) 357.

17. Where the sheriff is ruled in vacation to bring in the body or return the writ, the court will not fix the sheriff with costs of any irregularity between the default and attachment, unless the plaintiff, so soon as he discovers the irregularity, gives notice of his intention to proceed against him. *R. v. Sheriff of Essex*, 1 Mees. & W. (xx.) 720.

18. Where the sheriff levied and sold under a *fi. fa.*, and, after notice of the defendant having petitioned for his discharge under the Insolvent Act, returned *feri feci*; held, that he was bound by such return, notwithstanding the defendant's subsequent discharge. *Field v. Smith*, 2 Mees. & W. (xx.) 388; and 5 Dowl. (p. c.) 735.

19. The Court will not compel the sheriff to make his return to the writ where the parties have compromised, and he has notice not to do so, although made behind the back of the plaintiff's attorney. *Hedges v. Jordan*, 5 Dowl. (p. c.) 6.

20. Where the writ directed to the sheriff contained no *non omittas* clause, and was issued by him to the bailiff of a liberty, and, after both officers obtaining time to return it, the sheriff returned *cepi corp.*; held, that the bailiff, by applying for time, was not precluded from having the rule for returning the mandate discharged, the plaintiff having obtained all that he had a right to require. *Jackson v. Taylor*, 5 Dowl. (p. c.) 140; and 5 Dowl. (p. c.) 212.

21. On an application to set aside a warrant of attorney, given to secure an annuity, it cannot be made a part of the rule to stay proceedings against the sheriff for a false return to the execution issued thereon. *Cassell v. Lord Glengall*, 5 Dowl. (p. c.) 269.

22. Where the plaintiff might have proceeded to trial at the third sittings, held, that a trial was not lost, so as to enable the plaintiff to have the attachment stand as a security: according to the old practice, there was no distinction as to the sittings. *R. v. Sheriff of Shropshire*, 5 Dowl. (p. c.) 526.

23. After bail put in, it is the duty of the attorney to except before he can attach the sheriff for not bringing in the body, although notice of justification given. *R. v. Sheriff of London*, 5 Dowl. (p. c.) 387.

24. Where the plaintiff, by letter to the under-sheriff, desired him to direct writs to B. and M., and added, "I shall write to B. in a day or two;" held to amount to an appointment of B. and M. to be his own bailiffs to make the arrest, and to have been a suspension of the authority, and consequent liability of the sheriff for the escape of the party who had been discharged on giving bail in another suit, before B. and M. had been instructed by the plaintiff. *Ford v. Leche*, 1 Nev. & P. (x. s.) 737.



25. Sheriff's rules (except for London and Middlesex) to return writs on mesne or final process, or to bring in the body, in future to be eight, instead of six day rules. Reg. Gen. 3 Bing. N. S. (c. r.) 386; 2 Mees. & W. (xx.) 1; and 1 Nev. & P. (x. s.) 1.

26. Fees payable to the sheriffs on the execution of civil process regulated by 1 Vict. c. 55.

27. The sheriff is bound to return the writ within a reasonable time, although he would not be in contempt until he had been ruled to do so; and held, that the arrest having been made in August and no return until after being ruled in October, he had not returned it according to the exigency of the writ; held, also, that although his officer making the arrest on a bailable *capias*, is not bound to receive the amount of debt and costs indorsed on the writ, yet if he does so, the sheriff is liable to the plaintiff for it. Woodman v. Gist, 8 C. & P. (n. r.) 213.

28. Where the sheriff pleaded that he was lawfully in a part of the house of the party, occupied by a lodger, and that the communication between the two was open, and that in order to take out the goods seized under a *fi. fa.* it was necessary to break the outer door, which was locked, and that there being no one to request to open it, that he opened it in order to execute the writ; held that he was justified in breaking the lock for that purpose, and that it was not necessary he should aver that the trespass was not occasioned by his own default. Pugh v. Griffith, 3 Nev. & P. (q. s.) 187.

29. Where the plaintiff in trespass for taking goods, &c. claimed under a sale by the sheriff, held that, under the plea that the goods were not the plaintiff's, he might show that the sale by the sheriff was not *bona fide*, and that the plaintiff had himself seized the goods subsequently in execution for his debt from the same party. Ashley v. Minnett, 3 Nev. & P. (q. s.) 231.

30. In trespass against the sheriff for false imprisonment, plea, justifying under an attachment out of Chancery, and the replication only stated the detainer by the defendant after thirty days, contrary to the 11 Geo. 4, and 1 Will. 4, c. 36, s. 15; held on demurrer that the replication was bad, the sheriff not being a trespasser *ab initio*, the action of trespass was not maintainable; and *semb.* if, in case, it ought to appear that the sheriff had notice of the contempt for which the party was in custody, and when the legal term of imprisonment expired. Smith v. Eggington, 6 Dowl. (r. c.) 38; and 2 Nev. & P. (x. s.) 143.

31. The sheriff being only liable to pay the plaintiff the damages which he has sustained, the court will stay the proceedings in an action against the acceptor of a bill of exchange on payment of debt and costs in that action only, although another action against the drawer may also be pending. Vaughan v. Harris, 3 Mees. & W. (xx.) 542.

32. In case against the sheriff for not levying, and for a false return of *nulla bona* to a *fi. fa.*; held that the plea of not guilty, admits the judgment, writ and delivery thereof, goods within his bailiwick and notice thereof, and that he can

only avail himself, as a defence, that he did levy within a reasonable time, and that he did not make the return alleged. Lewis v. Alcock, 6 Dowl. (r. c.) 389.

33. Where *capi corpus* has been returned, it is immaterial whether it was so under a judge's order or not, and the attachment is regular. Bertram v. Davis, 6 Dowl. (r. c.) 180.

34. In an action against him, for not arresting a party on a *capias*, plea alleging that the plaintiff did not furnish the sheriff with information to enable him to identify and arrest, and that before the arrest the plaintiff countermanded it; held bad on demurrer, being so, as to the former part of the plea, the plaintiff not being bound to furnish information, and the countermand not covering the whole time from the delivery to the return of the writ. Dyke v. Duke, 4 Bing. N. S. (c. r.) 197.

35. Where the bailiff of a franchise received an instrument, on the face of it a common sheriff's warrant to levy, and having communicated it to the lord, by his direction paid the proceeds, not to the sheriff, but to assignees of plaintiff; held to be an adoption of the warrant binding on him to make a return. Platel v. Dowse, 4 Bing. N. S. (c. r.) 204.

36. The property in goods taken in execution is not changed by the delivery of the writ to the sheriff until sale by him, but remains still in the debtor, and may be dealt with by him, subject to the claims upon it and to the execution; where by taking security for the debt of a third person, and other circumstances, there was evidence for the jury to presume an abandonment by the creditor of his writ of execution, and the debtor *bona fide* transferred the property to the plaintiff, held that he might maintain trespass against the execution creditor for the seizure and subsequent sale of the goods. Samuel v. Duke, 3 Mees. & W. (xx.) 622.

37. The affidavit for setting aside the attachment on the bail bond must allege the application "for his indemnity only," where the last words were inserted "only indemnity," held irregular; alleging the form in the books of practice to be erroneous. R. v. Cheshire Sheriff, &c., 3 Mees. & W. (xx.) 605.

38. Garland v. Carlisle affirmed in error, 4 Bing. (n. s.) 7; and 4 Sc. 587.

39. Where the writ of *capias*, and rule to return it were delivered to the sheriff at the same time, and the sheriff returned *non est* *inc.* two days after; the court refused to interfere, leaving the party to his action, if any neglect of duty in endeavoring to apprehend the party. Evens v. James, 6 Sc. (c. r.) 354.

40. Where the sheriff had taken parties on an attachment for non-payment of money into court pursuant to order, and let them go out of custody on giving bail, the court allowed his liability to be terminated by the defendant's paying into the Bank, to the credit of the cause, the sum mentioned in the order, and 20*l.* deposit in the sheriff's hands for the relator's costs occasioned by the default, and thereupon to be discharged as to their



contempt. *Attorney-general v. Mills*, 1 Coop. (CH. C.) 261.

41. A warrant obtained from the office of the London agents of the sheriff, held sufficient to connect the sheriff with the acts of the officer executing it. *Shepherd v. Wheelie*, 8 C. & P. (N. P.) 534.

42. A mere request that a particular person named should be employed, held not to constitute him a special bailiff of the party, and to relieve the sheriff. *Corbet v. Brown*, 6 Dowl. (P. C.) 794.

43. Where the party being arrested on a *capias*, the copy served directed bail to be put in in the Exchequer; held that the omission to put in bail was not a ground for an attachment against the sheriff for not bringing in the body. *Mayhew v. Hoadley*, 6 Dowl. (P. C.) 629.

44. Where the sheriff had neglected to arrest the defendant in an action by the indorsee against the acceptor, and an action was brought against him, the court directed the proceedings to be stayed upon payment of the debt and costs in that action only. *Ball v. Blackwood*, 6 Dowl. (P. C.) 589.

45. Where, upon the seizure by the sheriff at the suit of an execution creditor, and claim made on the ground of assignment as a security for money, and the sheriff having obtained the rule, the plaintiff did not appear, the court ordered the sheriff to withdraw and to be discharged from all proceedings by the execution creditor in respect of his seizure of the goods so claimed. *Doble v. Cummins*, 2 Nev. & P. (Q. B.) 575; and 7 Ad. & Ell. 560.

46. A return to a *fi. fa.* that he had seized by virtue of that and another writ, goods, &c. which remained unsold for want of buyers; held bad, as one must have a priority, and also for not stating the value of the goods seized; although he might not be bound by the value returned, he must make a return as to their value as well as he can. *Wintle v. Lord Chetwynd*, 7 Dowl. (P. C.) 554.

47. In case against the sheriff, the first count stating that the plaintiff having obtained a judgment in the county court, sued out a *fi. fa.* directed to the sheriff to levy, and that although there were goods, &c., his bailiff refused to levy, and falsely returned, &c.; held, not to disclose a sufficient cause of action against the sheriff, who acted judicially only: a second count, stating a judgment recovered by the plaintiff in K. B., and *fi. fa.* issued, and alleging a false return of want of buyers; the third count stating another judgment in K. B., and against the same defendant, and writ of *fi. fa.* alleging a like false return; to the two last counts, the defendant, by his plea averring the identity of the judgments, &c., alleged that the plaintiff afterwards impleaded the defendant in K. B., and recovered judgment on the former judgments, whereby they became merged, the former writs waived, and the defendant discharged; held, on demurrer, that the plea was no answer to the action. *Pilcher v. King*, 1 Perr. & Dav. (Q. B.) 297.

48. Where the second writ lodged against the party was, by mistake, omitted to be entered in the index book, and the former writ having been withdrawn, the gaoler turned the prisoner out; held to be a voluntary escape, and that a subsequent retaking by the sheriff was void, and the party entitled to be discharged; and the custody being illegal, the lapse of time was not a waiver of the objection; but without costs, unless an undertaking given to bring no action. *Felwood v. Clement*, 6 Dowl. (P. C.) 508.

49. The four first rules of Trin. Term, 1 Will. 4, only apply to cases where bail is put in in the ordinary course, and not to cases in which the sheriff is obliged not only to put in, but also to justify bail; and where, therefore, an attachment had issued against him for not bringing in the body, the court could not relieve him on entering a common appearance under 1 & 2 Vict. c. 110, s. 7. *R. v. Middlesex Sheriff*, 7 Dowl. (P. C.) 82; and 4 Mees. & W. (EX.) 529.

50. In case against the sheriff for a false return of *nulla bona* to a *fi. fa.*, the defence being that the goods had passed to the assignees of the debtor; held not necessary to put in the deposition of the petitioning creditor to show what the debt was, as he might show a different debt. *Birt v. Stephenson*, 8 C. & P. (N. P.) 741.

51. The court refused to set aside the attachment, on an application at his instance, where the bail-bond had been taken with only one security. *R. v. Sheriff of Middlesex*, 7 Dowl. (P. C.) 313.

52. The right to poundage under 29 Eliz. c. 4, is not affected by the 1 Vict. c. 55, or the table of fees made under it. *Davies v. Griffiths*, 4 Mees. & W. (EX.) 377; and 7 Dowl. (P. C.) 204.

53. Where an indemnity bond had been fraudulently obtained by the sheriff's officer, held that it formed a good plea to an action on the bond by the sheriff. *Raphael v. Goodman*, 2 Nev. & P. (Q. B.) 547.

And see *Arrest; Bankrupt; Costs; Evidence; Execution; Pleading; Trespass; Witness.*

#### [B] INTERPLEADER.

1. Where the sheriff had paid over the proceeds of the execution to the creditor, the court could not interfere, although he offered to bring the same amount into court. *Inland v. Bushell*, 5 Dowl. (P. C.) 147.

2. Where the rule obtained by the sheriff was discharged; held, that he was still entitled to a reasonable time to make his return, and that an attachment, issued immediately after the interpleading rule discharged, was irregular. *R. v. Hertfordshire Sheriff*, 5 Dowl. (P. C.) 144.

3. The court has no power to dispose summarily of a case on an interpleading rule without the consent of both the plaintiff and claimant, but only to grant an issue. *Curlewis v. Pocock*, 5 Dowl. (P. C.) 381.



4. Where the execution creditor did not appear, and the sheriff appeared to have acted under his direction, and to have misconducted himself subsequently to the seizure, the court ordered the creditor to be barred, and the goods restored to the claimant, who was to be at liberty to sue the sheriff or the execution creditor if it should turn out that they had misconducted themselves. *Lewis v. Jones*, 2 Mees. & W. (xx.) 203.
  5. Where neither the plaintiff nor defendant appeared after service of the sheriff's rule upon a claim by a third party, a sale of so much of the goods as would be sufficient to satisfy the sheriff's poundage and expenses ordered, and the rest of the goods to be abandoned. *Eveleigh v. Salisbury*, 3 Sc. (c. r.) 674; 3 Bing. N. S. 298; and 5 Dowl. (r. c.) 369.
  6. Where an order for relief is made by consent, by a Judge at chambers, the case comes within the act, and the party succeeding must apply to the court to obtain his costs. *Matthews v. Sims*, 5 Dowl. (r. c.) 235.
  7. The sheriff's rule is in existence for the purpose of an application for costs, although it has not been formally continued from term to term. *Levy v. Champneys*, 4 Ad. & Ell. (x. s.) 365.
  8. The sheriff is not entitled to costs, although the execution creditor fails to appear. *Beswick v. Thomas*, 5 Dowl. (r. c.) 458.
  9. The sheriff must apply in the term next after the claim made, in sufficient time to enable the other party to show cause in that term, or the rule will either be discharged, or he must pay the costs of both the other parties. *Beale v. Overton*, 2 Mees. & W. (xx.) 534; and 5 Dowl. (r. c.) 599.
  10. Where the declaration contained a count in case and one in trover; held, that the court had no jurisdiction under 1 & 2 Will. 4, c. 58, s. 1. *Lawrence v. Matthews*, 5 Dowl. (r. c.) 149.
  11. Where the sheriff, after entering for the purpose of levying, upon the claim made, had withdrawn, held not entitled to the relief under the act. *Holton v. Guntrip*, 6 Dowl. (r. c.) 130; and 2 Mees. & W. (xx.) 145.
  12. Where the claim was made under a bill of sale, bearing date after the levy, the court discharged the application by the sheriff, with costs of the execution creditor. *Oxfordshire Sheriff, in re*, 6 Dowl. (r. c.) 136.
  13. On a rule, the claimant as execution creditor, held entitled to be heard, without any affidavit. *Angus v. Wootton*, 3 Mees. & W. (xx.) 310.
  14. Where an issue is directed, the party succeeding may apply for costs of the issue, interpleading rule, and of the application before the judgment was signed, on undertaking to sign it; but the court would not order the sheriff to pay costs, unless misconduct were shown; and where he effects a sale and pays the proceeds by order into court for the benefit of all parties, he will be allowed to deduct the expenses of the sale. *Bland v. Delano*, 6 Dowl. (r. c.) 293.
  15. Unless there is anything to show that the conduct of the party is vexatious, the sheriff is not entitled to be paid his costs by the claimant of the goods, upon an arrangement being made between the parties. *Cox v. Fenn*, 7 Dowl. (r. c.) 50.
- And see *Interpleader*, 13; and *supra*, [A] 45.

### [C] TRIALS BEFORE.

1. Where the action was in substance for the price of a pony; held, that it was a case within the 3 & 4 Will. 4, c. 42, s. 17, nor would the court set aside the trial before the sheriff on the ground that the case was not within the statute, at the instance of the plaintiff who had obtained the writ of trial. *Price v. Morgan*, 2 Mees. & W. (xx.) 53.
2. An action on a building contract, ultimately referred, held a fit case to be tried at *nisi prius*, and that the Judge who tried it might certify at any time. *Broggref v. Hawke*, 3 Bing. N. S. (c. r.) 881.
3. The court will not sanction a party, neither barrister nor attorney, to act before the sheriff; and a rule by the latter not to permit any one, not a barrister, to be heard for a party who declined to conduct his case in person, approved of. *Tribe v. Wingfield*, 2 Mees. & W. (xx.) 128.
4. After an issue delivered in the usual form for trial at *nisi prius*, and a subsequent order for trial before the sheriff; held, that the former issue ought to have been amended, and that the delivery of it in the original form was irregular. *Ward v. Peel*, 1 Mees. & W. (xx.) 743; 1 Tyr. & Gr. 1135; and 5 Dowl. (r. c.) 169.
5. Where the date of the writ of summons was incorrectly stated in the writ of trial, held fatal, and the verdict set aside. *Wight v. Perrins*, 5 Dowl. (r. c.) 463.
6. After the trial, at which the defendant appeared and defended, the court refused to set aside the verdict on the ground of variance between the writ of summons and writ of trial, but would give leave to amend on payment of costs. *Percival v. Connell*, 3 Bing. N. S. (c. r.) 877.
7. Where an action had been tried before the sheriff against carriers for negligence; held, that having no power to try such a cause, the court would not order the *postea* to be delivered to the defendant, but set aside the judgment. *Smith v. Brown*, 5 Dowl. (r. c.) 736.
8. The sheriff has no power on a writ of trial to certify that the freehold or bankruptcy came in question, although, upon the application before the Judge for a trial before the sheriff, it may be imposed as a term. *Pritchard v. M'Gill*, 2 Mees. & W. (xx.) 380; and 5 Dowl. (r. c.) 731.
9. The sheriff has no power to certify under 43 Eliz. c. 6, to deprive the plaintiff of costs where the verdict is under 40s.; it should be stated at the time of applying for the writ of trial. *Jones v. Bond*, 5 Dowl. (r. c.) 455.



10. The court will not interfere to disturb the verdict when under 5*l.*, although alleged to be against evidence. *Lyddon v. Combes*, 5 Dowl. (r. c.) 560.

11. So, where less than 5*l.* had been recovered before the sheriff, a new trial refused, although it appeared that the work was under a joint employment, and that actions were pending at the suit of the others. *Williams v. Evans*, 2 Mees. & W. (ex.) 220.

12. On an application for a new trial, upon affidavits verifying a copy of the under-sheriff's notes, held that affidavits of evidence taken, but not appearing on his notes, were admissible. *Lilley v. Johnson*, 2 Mees. & W. (ex.) 386; and 5 Dowl. (r. c.) 606.

13. Where the cause had been made a *remanet*, and the writ was returnable on the day before the trial, the court would allow, if necessary, the writ to be amended by altering the return. *Sherman v. Tinsley*, 4 Sc. (c. r.) 286.

14. Where an action of tort against carriers had been tried by consent before the sheriff, held, that not being competent to try it, neither were entitled to sign judgment, which was therefore set aside. *Smith v. Brown*, 2 Mees. & W. (ex.) 851.

15. Where the writ of trial omitted to refer to the amount sought to be recovered, which founds the jurisdiction of the inferior court, and is required to be stated by the form by the Reg. Hil. 4 Will. 4; held a ground for arresting the judgment; but the want of the *similiter* aided by an " &c." *Handford v. Handford*, 6 Dowl. (r. c.) 473.

16. Where the writ of trial was returnable on the 19th, (there being a court holden on the 18th, but which was adjourned to the 20th, on which day the cause was tried,) held a mis-trial, as the plaintiff ought to have obtained a judge's order to extend the time. *Mortimer v. Preedy*, 3 Mees. & W. 602.

17. Where, on a writ of trial, a bill of exceptions had been tendered on account of the refusal to admit evidence, and the assessor of the under-sheriff had refused to seal it, the court refused to stay judgment or execution. *White v. Hislop*, 4 Mees. & W. (ex.) 73; and 6 Dowl. (r. c.) 693.

18. Where the declaration on a contract for the sale of a horse, with a verbal warranty, alleged to have been falsely and fraudulently made, was in substance an action to recover back the price paid, under £20, held to be within the 3 & 4 Will. 4, c. 47, s. 17; held, also, that parol evidence might be given of the warranty, although the memorandum given of the price was silent as to that point, being merely a receipt, and not containing the terms of the contract. *Allen v. Pink*, 4 Mees. & W. (ex.) 140; and 6 Dowl. (r. c.) 668.

19. Where issues were joined on several pleas in debt, and demurrers to others, and the writ of trial omitted the award of *venire* to assess damages on the latter, but the plaintiff gave notice that he did not intend to assess any damages

thereon; held, that the omission was immaterial. *Hiam v. Smith*, 6 Dowl. (r. c.) 710.

20. The writ of trial cannot be sent to the sheriff, under 3 & 4 Will. 4, c. 42, s. 17, unless the whole debt or demand of the plaintiff is of such a nature as can be endorsed on the writ of summons; where, therefore, in the first count the plaintiff sought to recover damages for a wrongful dismissal from service, and, in the second, £5 19s for arrears of wages, and the damages were laid at £100, held not within the statute. *Jacquet v. Brown*, 7 Dowl. (r. c.) 331; and 5 Mees. & W. (ex.) 155.

21. The court refused a new trial, in a case before the sheriff, where the verdict in favor of the plaintiff was under £5, on the ground of its being against evidence. *Fleetwood v. Taylor*, 6 Dowl. (r. c.) 796.

### SHIP.

1. An owner retaining the possession of his ship, held to have a lien on the cargo for the freight due under a charter-party, and that the goods being consigned to third parties did not alter the principle. *Campion v. Colvin*, 3 Bing. N. S. (c. r.) 17; and 3 Sc. 338.

And see *Saville v. Campion*, 2 B. & Ad. 503; and *Tate v. Meek*, 8 Taunt. 280.

2. Where the charter-party enumerated the articles of the homeward voyage from N., and specified freight on each, with liberty to fill up at M. with other merchandises; held, that it was to be construed that the homeward cargo should consist of those articles, or some of them, and that the defendant was liable to pay freight on an average quantity of each, and that the liberty to fill up meant, merchandises *ejusdem generis*. *Capper v. Forster*, 3 Bing. N. S. (c. r.) 933.

3. In *assumpsit* against the charterer for demurrage; held that, upon the plea of the general issue, the defendant could not object that the plaintiff had not complied with the provisions of 3 & 4 Will. 4, c. 52, s. 108, requiring notice to be given to the collector of customs, &c., previous to the unloading; such a defence ought to be specially pleaded. *Alcock v. Taylor*, 6 Nev. & M. (x. b.) 296.

4. Where, upon a contract of mortgage of the ship of which the plaintiff, the mortgagor, was to continue the management and procure freight, which was to go in discharge of the mortgage debt; held that, although the contract might be invalid under the Ship Registry Acts, yet that as the contract as to the freight was distinct from and not depending on the title to the ship, a suit for an account of the freight might be maintained; (reversing the decision of the Master of the Rolls.) *Davenport v. Whitmore*, 2 Myl. & Cr. (ex.) 177.

5. In *assumpsit* for repairs against a partowner, held that, after a release, a co-partowner was a competent witness for the defendant. *Jones v. Pritchard*, 2 Mees. & W. (ex.) 199.



6. Where an anchor had been attached to a vessel ashore, by a party who had rendered assistance, and had quitted only for the purpose of removing part of the cargo, with the intention of returning, and in the meantime the anchor and hawser had been carried away and delivered to the defendant, as deputy vice-admiral of E., within whose limits the vessel was; the defendant having refused to deliver up the articles unless salvage was paid or secured, held, in trover, that they could not be deemed to have been left at sea within the meaning of 1 & 2 Geo. 4, c. 75, s. 1, and that the refusal amounted to a conversion. *Semb* it would not have been so, if the defendant had only refused to deliver the goods until it could be ascertained whether salvage was due or not. *Clark v. Chamberlain*, 2 Mees. & W. (ex.) 78.

7. The master, before he resorts to a bottomry bond, is bound to ascertain whether the supplies can be obtained on the personal credit of the owners; and, where a party is bound to know a fact, he must show that he has exercised due diligence to ascertain the fact. *Heathorn v. Darling*, 1 Moore, (p. c.) 5.

8. In covenant on a deed poll, dated 21st October, for the sale of a ship, then on a foreign voyage, and it appeared that on the 12th the ship had got on shore, and was left by the crew on the sands, but they afterwards had access to her, and if there had been facilities she might have been repaired; held, that the simple bargain and sale did not imply that it was then sea worthy, and being still a ship, though from circumstances not capable of being employed as such beneficially, the covenant by the defendant that he had power to transfer her as a ship at the time of executing the deed was not broken. *Barr v. Gibson*, 3 Mees. & W. (ex.) 390.

9. In an action for not delivering goods, undertaken by the defendant to be carried from D. to L., and to be delivered to the plaintiff or his agents at the port of L.; plea, that the defendant caused the goods to be deposited on a wharf at L., to remain until they could be delivered to the plaintiff, and where goods were accustomed to be landed, and that whilst there they were destroyed by fire before a reasonable time had elapsed for delivery, held on demurrer. *Gatliffe v. Bourne*, 4 Bing. N. S. (c. r.) 314.

And see *Hyde v. Trent Navigation Company*, 5 T. R. 389.

10. Where the vessel was chartered for a port on the coast of Africa, where there was no custom-house, or place for giving *pratique*; held, that the clause in the charter party for being ready to unload within, &c., "and having received *pratique*," was to be construed as an unloading in accordance with the custom of that port; and the jury having found that the ship was ready to unload on that day, and that no impediment existed, but that it had not received *pratique*, held that the plaintiff was entitled notwithstanding to the verdict. *Balley v. Arroyave*, 3 Nev. & P. (q. b.) 114.

11. In *assumpsit* by the consignee against the owners for non-delivery of goods shipped; upon

plea that the plaintiff did not cause the goods to be shipped, the bill of lading when produced showing the shipment to have been by a third party (who in fact was the agent of the plaintiff); held, that the bill of lading was not conclusive on the defendant, but that he might show that no goods were actually shipped. *Berkley v. Watling*, 2 Nev. & P. (x. b.) 178.

12. In an action by a passenger against the captain for an insufficient supply of good and fresh provisions, held, that the plaintiff must show that he had sustained a real grievance; also, that an allegation of the passage money having been paid by the plaintiff was supported by showing that it was paid by the charterers, his employers. *Young v. Fewson*, 8 C. & P. (n. r.) 55.

13. Where the East India Company had, under 54 Geo. 3, c. 36, sold and received the proceeds for the payment of duties and dues, and upon an interpleading suit been ordered to pay into court the surplus claimed by the consignee and ship-owners for freight; the litigation having been protracted improperly until the amount due for principal and interest was awarded to the successful party; the House of Lords, on appeal, reversed the judgment below, directing the payment by the Company into court, of a sum which had been paid over to one of the litigant parties, and on which the other was admitted to have a lien. *East India Company v. Campion*, 11 Bk. N. S. (p.) 160.

14. Where goods consigned to a factor abroad were, after being discharged, confiscated by the government, and afterwards compensation awarded, held that the factor was entitled thereout to sums paid by him for freight, &c., as money had and received to his use. *Good, ex parte*, 3 M. & Ayr. (a.) 246; and 2 Deac. 389.

15. The broker held entitled to his commission on the sale of a ship, where up to a certain point he acted as middleman, although the contract was completed without his instrumentality: but the mere fact of his having introduced the parties, unless the negotiation proceeds thereupon, would not be sufficient to entitle him to it. *Wilkinson v. Martin*, 8 C. & P. (n. r.) 1.

16. Where a custom was found for ships engaged in the timber trade to carry timber on deck, held, that such having been thrown overboard for the preservation of the ship and cargo, the owner was entitled to contribution against the ship-owner. *Gould v. Oliver*, 4 Bing. N. S. (c. r.) 134.

17. Under the 53 Geo. 3, c. 259, limiting the extent of the liability of the owner to the value of the ship doing damage to another, held that such value was by valuation and appraisement, and not of cost price and deduction. *Dobree v. Schroeder*, 2 Myl. & Cr. (cn.) 489.

18. Where, by the terms of the charterparty the charterer was to pay disbursements and seamen's wages, but the owners were to appoint the crew; held, that they must be considered their servants, and that the owners were liable for an injury occasioned by the unskilful navigation of



the vessel whilst so under the control of their servants. *Fenton v. Dublin Steam Packet Company*, 1 *Perr. & Dav.* (q. n.) 103.

19. The master is at liberty to procure another ship to transport the goods to their destination, and will be entitled to the full consideration for which the original contract was entered into; and *semb.* if circumstances render it necessary that another ship be procured, and it can only be obtained at a higher rate of freight, the owner would be bound by the act of his agent, and liable for the increased freight: the jury being the proper tribunal to decide as to the propriety of the measure, the court would not disturb their finding. *Shepton v. Thornton*, 1 *Perr. & Dav.* (q. n.) 216.

20. In an action by the owner to recover contribution in respect of general average, held that the defendants (not underwriters) although entitled to the inspection of the statement of such average, were not so of the documents from which it was drawn up. *Tunzell v. Allen*, 7 *Dowl.* (r. c.) 496.

21. Upon a charterparty to load a cargo at C., and proceed with it to A., the running days to commence on the 16th December, and the parties afterwards agreed to substitute P. for the port of loading; held, that upon proof of the defendant's assent to that change, it followed that he impliedly assented that the running days should be reckoned there also from the same period. *Jackson v. Galloway*, 5 *Bing. N. S.* (c. r.) 71; and 6 *Sc.* 786.

22. Where the defendant, trading separately, and also in partnership, had goods consigned to him on both accounts, and the bills of lading transmitted to him, and being desirous of receiving both consignments, he signed an agreement, signed by himself in the name of the firm, containing an undertaking to be answerable for the amount of freight for his own goods, and another for that of the partnership; held, that having an interest in both, it was competent for him to make himself personally liable for the freight of both; and that although the agreement might contain a plurality of contracts, it did not require more than one stamp; held, also, that having received the goods on the faith of his undertaking, he could not object that the mode of signature, which would bind the firm, as to one part, did not bind him personally as to the other. *Shipton v. Thornton*, 1 *Perr. & Dav.* (q. n.) 216.

23. Threats of personal violence to the captain will justify the latter in excluding a passenger from the cuddy table, although it may be difficult to say what degree of discourteous or vulgar behaviour would do so; and where a husband was so excluded, the voluntary withdrawal of the wife held not a breach of the captain's contract as to the treatment of the passengers. *Prendergast v. Compton*, 8 *C. & P.* (n. p.) 454.

24. Where articles had been signed, as required by 5 & 6 *Will. 4*, c. 19, and the seamen had quitted the vessel after the voyage and return into port, but before the cargo had been discharged; held, that he did not thereby forfeit his whole wages within sect. 9, but of a month only under

sect. 7. *M'Donald v. Jopling*, 4 *Mees. & W.* (zx.) 235.

And see *Bankrupt; Broker; Contract; Covenant; Evidence; Injunction; Insurance; Pleading* (c. l.); *Set-off; Witness*.

## SLANDER.

1. Where the words were spoken by one subscriber to another of a charity, as to the conduct of the plaintiff, the medical attendant on the objects of the charity; held, that a claim of privilege to so large an extent could not be sustained. *Martin v. Strong*, 5 *Ad. & Ell.* (x. n.) 535; and 1 *Nov. & P.* 29.

2. Where the jury found words spoken of an attorney, "he has defrauded his creditors, and been horsewhipped off the course at D.," not to have been spoken of him in his character as an attorney, held not actionable. *Doyley v. Roberts*, 3 *Bing. N. S.* (c. r.) 835.

3. Where a party has a mutual interest with another, he is justified in prevailing on him to become party to a suit, and expressions of angry and strong animadversion on the conduct of the party impeached, unless malicious, are privileged; and, in the case of words, the jury merely take into consideration the whole conversation, to see whether particular words, which may be actionable in themselves, are qualified so as not to convey the primary meaning. *Shipley v. Todhunter*, 7 *C. & P.* (n. p.) 680.

4. A party is justified in stating his opinion *bona fide* of the respectability of the tradesman inquired about; *aliter*, where he volunteers the statement; held, also, that the loss of a customer is special damage, although if the dealing had taken place, it would have been a losing transaction. *Storey v. Challands*, 8 *C. & P.* (n. r.) 234.

5. Declaration in slander of the plaintiff as clerk of a company, "you have done many things with the company for which you ought to be hanged, and I will have you hanged before," &c.; *insuendo*, that the plaintiff had been guilty of felonies punishable by law with death by hanging, held sufficient, on motion in arrest of judgment. *Francis v. Roose*, 3 *Mees. & W.* (zx.) 191.

6. In slander, for words "he is a returned convict," held actionable, although importing that the punishment had been suffered, the obloquy remaining. *Fowler v. Dowdney*, 2 *M. & Rob.* (n. r.) 119.

7. Where a party interested in a building contract, on which the plaintiff had been engaged, applied to the defendant to recommence a surveyor to measure the work, when the defendant stated that he had seen the plaintiff take away some of the materials, upon which the plaintiff's employer applied to the defendant if he had seen the plaintiff taking them away, when he alleged that he had seen the plaintiff taking them, and that he hallooed to him; held, that the judge properly directed the jury to say, first, whether



the words imputed felony; and, secondly, that even if they did, the plaintiff was not entitled to recover, unless malice were expressly shown, or the jury believed, from the circumstances, that the defendant was actuated by malicious motives. *Kine v. Sewell*, 3 Mee. & W. (xx.) 297.

8. On a general demurrer to a declaration in slander, held, that it did not admit the intent attributed by the innuendo; and the words being that he had corn from B.'s barn (meaning that he had stolen it from B.), held that the words did not warrant the innuendo. *Wheeler v. Haynes*, 1 Perr. & D. (q. n.) 55.

And see *Information; Libel*.

### SLAVERY.

The rule for filing the certificate on taxation of costs under the 6 Will. 4, c. 5, s. 10 (Slavery Abolition), is not a matter of course, but only  *nisi* in the first instance. *Maynard v. Lackington*, 6 Dowl. (r. c.) 1.

### SPECIFIC PERFORMANCE.

1. In a suit for specific performance between vendor and vendee, every thing that appears connected with the title may be the subject of reference, but not matters having no reference to the title, nor admitted by the answer; the Court therefore allowed an inquiry, whether the defendant objected at any time to the want of evidence of the identity of the premises, but not whether the abstract was perfect, and, if deficient, in what respects, and whether ever perfected. *Bennett v. Rees*, 1 K. (ch.) 405.

2. Where a contract of partnership was formed for the unlawful purpose of representing at a theatre prohibited performances, although a licence had been obtained, which might have been used for lawful purposes; held, that the Court could not decree specific performance of the contract, or any relief growing out of it. *Ewing v. Osbaldiston*, 2 Myl. & Cr. (ch.) 53.

3. Where premises were given in trust for A. for life, with power to the trustees to lease, and the husband of A., with the alleged knowledge and consent of one of the trustees, agreed with the plaintiff for a lease, and he was let into possession of part of the property; held that slight evidence of general insolvency, opposed by unimpeachable evidence of his responsibility, did not disentitle the plaintiff to a specific performance of the agreement for the lease, so far as affected the interest of the tenant for life. *Neale v. Mackenzie*, 1 K. (ch.) 474.

4. Where the testator, by general words creating a charge by implication, devised an advowson to trustees, to present the testator's son when it should become vacant, and, subject thereto, to sell, and divide the monies amongst the testator's daughters who should be then unmarried; the personal estate being insufficient, the trustees

contracted for the sale of the advowson to the defendant; and held in a suit for specific performance, that, if the only title to sell were for the purposes of the special trust, the Court would not compel a purchaser to accept the title; but that the charge creating a trust for the payment of debts, and the purchaser not bound to inquire whether other sufficient property was applicable or ought to be applied first, or to see to the application of the purchase-money, the court overruled the exception as to the title. *Shaw v. Borrer*, 1 K. (ch.) 559.

5. Where the bill alleged that K. having an equitable interest in premises about to be purchased by respondent, the latter, in writing, agreed to pay him a sum when the contract should be completed, upon receiving a proper release, but there was no evidence in support of the allegation that K. had any interest whatever; and there being ground for believing that it was intended as a purchase of the interest of a party who was an uncertificated bankrupt, to protect him from the claim of his assignees; a bill by K. for an account and payment, according to the undertaking, dismissed; (affirming the judgment below). *Staley v. King*, 3 Cl. & F. (r.) 132; and 8 Bli. N. S. 717.

6. The court refused to restrain a creditor, after a decree, from issuing execution on a judgment previously obtained against an executor *de bonis test.*, *et si non de bonis propriis*; and *scmb.*, it will look at the nature of the suit, and time of filing the bill, the statements as to assets, and time of obtaining the decree, as also to the time of bringing the action and obtaining judgment, and other circumstances affecting the rights of creditors, with a view to a just administration, before it declares priority of the decree or judgment. *Lee v. Park*, 1 K. (ch.) 714.

7. Where the plaintiffs were devisees of a leasehold, in trust to sell, and also executors, and being unable to sell, had agreed to under-let the premises to the defendant; held, that being *prima facie* inconsistent with the trust for sale, the court could not compel performance of the agreement in a suit to which the *cestuis que trusts* were not parties. *Evans v. Jackson*, 8 Sim. (ch.) 217.

8. Where the defendant, employed to bid at an auction for a particular estate sold with others, by mistake bid for the wrong lot, and was declared the purchaser; held, that in a clear case of mistake, the court would leave the party to his remedy at law, and the bill for a specific performance dismissed, without costs. *Malins v. Freeman*, 2 Keene, (ch.) 25.

9. Where a party entitled for life, with remainder in fee, subject to trust terms, to raise jointure and portions, exchanged in fee for other lands with B., whose heir afterwards agreed with the defendant for the sale of them, who afterwards, objecting that the party had no power to exchange in fee, refused to complete the contract: upon a bill for a specific performance, held, that the executing subsequent deeds, with the view of bringing the exchange within the terms of a power of



sale and exchange by the trustees, not being a direct sale or exchange under the settlement, but to satisfy what had been imperfectly done before, and very doubtful whether a proper exercise of the powers, and the later deeds being very inaccurately drawn, the court would not compel the defendant to take such a title. *Cowgill v. Lord Oxmantown*, 3 Younge & Cr. (xx. xq.) 363.

10. The court will not decree a specific performance against a party who has mistaken a material fact in the agreement: where on an agreement for the sale of a garden, it was clear that the vendor could never have intended that buildings which had been erected on part of the garden, and necessary to the enjoyment of his own premises, were within the agreement, and to form part of the premises to be conveyed, a specific performance refused. *Neap v. Abbott*, 1 Coop. (ch. c.) 333.

11. Where a bill prayed that an agreement with creditors, on certain conditions, might be enforced, but did not state the conditions, or that they had been complied with, held bad, on demurrer. *Jones v. Maund*, 3 Younge & Cr. (xx. xq.) 347.

12. Where after previous discussion for the purchase, and difference as to price, the plaintiff sent over his solicitor, who concluded the bargain, but no solicitor attended on the side of the vendor, and some liquor was drank, but no fraud was established, and afterwards the defendant asked, as a favor, to be let off his bargain, and he appeared to have collusively transferred the premises to a son-in-law, a specific performance decreed, and the latter to execute a proper conveyance. *Lightfoot v. Heron*, 3 Younge & Cr. (xx. xq.) 586.

13. In a suit to enforce the performance of an agreement for the purchase of a manor and lands made in 1812, the bill being filed in 1817, and a decree pronounced in 1821, referring it to the master to report on the title, which he at first reported against, but afterwards, on consideration of additional abstracts, he reported that the plaintiffs were able to make a good title except as to a small portion, and that there was a binding agreement for mutual compensation up to 1816; and that such title was first showed by the defendant in 1825, when the whole of the abstracts were first brought into the office; held, that the failure of title as to such small portion was only the proper subject of compensation to the defendant, and that the date of conveyance should be from the earliest period when a good title was shown, viz., 1825, and the plaintiffs entitled to the principal with interest, and the defendants to the rents and profits from that date, and the general costs of the suit, deducting the costs of those points on which he had been wrong, and each party to bear the costs of the discussion in the master's office as to title, the defendants appearing to have taken many insufficient objections, and caused much unnecessary expense and outlay. *Townsend v. Champernowne*, 3 Younge & Cr. (xx. xq.) 505.

And see *Vendor and Purchaser*.

## STAMP.

1. An instrument, being a mere attornment, and not an agreement as to any new terms of tenancy, held not to require any stamp. *Doe v. Edwards*, 6 Nev. & M. (x. n.) 633. Held also, that it would be evidence for the party to whom made and those claiming under him, as an assertion of right and act of ownership on his part, acquiesced in by the parties then in possession. *Ib.*

2. An agreement for a sale of goods and goodwill is not a sale merely of goods within the exemption of the Stamp Act, but held to require a stamp. *South v. Finch*, 3 Bing. N. S. (c. p.) 506; and 4 Sc. 293.

3. Assignment of a mortgage as a mere transfer of an old security for money previously due, held sufficiently stamped with a 35s. stamp, although the assign of the mortgagor not proved. *Doe v. Maple*, 3 Bing. N. S. (c. p.) 832.

4. Where an agreement for the demise of premises, from 25th March, at a certain rent, afterwards went on to agree to let two fields, from the succeeding Michaelmas, at the same rent as paid by the lessor; held, to fall within the class of leases designated in the Stamp Act as "not otherwise charged in the schedule," and that an *ad valorem* stamp affixed, sufficient to cover the whole amount of rent to be paid, was sufficient. *Parry v. Deere*, 1 Nev. & P. (x. n.) 47.

5. Upon an agreement between A. and defendant, that the defendant should have A.'s tenement during his life for £.—a year, and his keep and maintenance for life, the possession to be given and rent commence immediately, the defendant to take off the stock at a stated price, and to pay for seeds, &c.; held, that A.'s executors might maintain an action for the price of the goods, as for goods sold and delivered, and that the memorandum, stamped with an agreement stamp, was properly admitted. *Stone v. Rogers*, 2 Mees. & W. (xx.) 443.

6. In debt on bond, conditioned to pay a sum secured to be paid by a certain indenture; held, that it was necessary to produce the deed, in order to see whether it was such as to require an *ad valorem* stamp, to exempt the bond from a higher stamp than 1*l*. *Walmesley v. Brierly*, 1 M. & Rob. (x. p.) 529.

7. The receipt indorsed on a deed may be read, although coupled with a statement of an agreement requiring a different stamp. *Ody v. Cookney*, 1 M. & Rob. (x. p.) 517.

8. Where to the 1. O. U. was added the words, "to be paid on," &c.; held, to be either a note or an agreement, and a stamp therefore necessary. *Brooks v. Elkins*, 2 Mees. & W. (xx.) 74.

9. Where, by a resolution in vestry, that the plaintiff should be reimbursed sums which he had paid for church repairs out of the rents of certain church lands; held, that, if such consent amounted to a charge on the land, the entry was inadmissible in evidence for want of a stamp, in an action against the churchwardens to recover



the rents received; and *semb.* the churchwardens would have no power to bind their successors in charging the land. *Wrench v. Lord*, 3 Bing N. S. (c. r.) 672; and 4 Sc. 381.

10. Where a mortgage deed, stamped with the *ad valorem* duty for £400, was transferred, and a further sum of £1,000 advanced; held, that an *ad valorem* stamp in respect of the latter sum only was not sufficient, and that the previous *ad valorem* stamp could not be taken into the account of the duty payable on the transfer and further security. *Lant v. Pearce*, 3 Nev. & P. (q. n.) 329.

11. Where a dairy was let by agreement not under seal, the instrument containing words of demise of specified land therewith, found by the sessions to be of the value of £10, and the rent paid, held that it was not void as containing a demise of incorporeal hereditaments not under seal, and that the instrument demising several matters at one fixed rent, it was properly stamped with an *ad valorem* stamp. *Reg. v. Hockworthy*, 2 Nev. & P. (q. n.) 383.

12. A memorandum, in the terms, "H. has advanced me £—, on furniture, &c., delivered to him at S.," held not a receipt requiring a stamp. *Huxley v. O'Connor*, 8 C. & P. (n. r.) 204.

13. Upon a consent, under a judge's order, to admit documents of a deed as "a counterpart," held, that it was too late afterwards to object to the insufficiency of the stamp, it appearing to be the original instrument. *Doe v. Smith*, 2 M. & Rob. (n. r.) 7.

14. The refusal by a party to produce an instrument, so as to enable the other to get it stamped, cannot have the effect of repealing the Stamp Act, and the want of it may be objected by the party so refusing. *Gardiner v. Childs*, 8 C. & P. (n. r.) 347.

15. Where a party against whom judgment in ejectment had been recovered, by writing, reciting the judgment and demise by the lessor to A. B., to whom he thereby attorned tenant, held not to require a stamp; and where an instrument had been, on a Judge's order, produced for inspection, and admitted, held, that it was too late afterwards to object that, appearing to be a lease, it bore only a counterpart stamp. *Doe v. Smith*, 3 Nev. & P. (q. n.) 335.

16. Stamps denoting the duties payable on deeds, &c., in either part of the United Kingdom, permitted to be used in the other, by 1 & 2 Vict. c. 85.

17. Upon a sale by auction of the "herbage of closes" for five months for £46, paying a deposit of £10 and a joint note for the remainder payable within that period, and if not given to the satisfaction of the vendor, that he should be at liberty to relet the premises; held to be properly stamped with a £1 stamp as a conveyance or lease, upon the sale of any lands or tenements under £50. *Cattle v. Gamble*, 5 Bing. N. S. (c. r.) 46; 6 Sc. 733; and 7 Dowl. (c. r.) 98.

18. When a mortgage was transferred upon a

farther advance, held, that an *ad valorem* stamp upon such advance was sufficient, without the addition of any deed stamp; held also, that the assignee proving the payment of the original advance, although he failed as to proof of payment of further advance, it was sufficient to establish his right as a purchaser for a valuable consideration. *Doe v. Rowe*, 4 Bing. N. S. (c. r.) 6 Sc. 525.

19. Where three parties, in consideration of plaintiff discharging a debt of a third party, severally undertook to indemnify to the extent of £— each, and in the meantime severally to execute bills for such respective sums, held, that one stamp to the instrument was sufficient. *Ramsbottom v. Davis*, 7 Dowl. (c. r.) 173; and 4 Mees. & W. (ex.) 584.

20. In an action to recover the price of goods obtained by a third party from the plaintiff, held, that an unstamped instrument which had been made use of in the transaction was receivable as evidence, and that it was immaterial whether the fraud was committed by a party to the trust or by a third person. *Keable v. Payne*, 3 Nev. & P. (q. n.) 531.

21. Where a letter was addressed by the holders of a fund out of which payment was to be made in these terms, "after paying yourselves the balance we owe, we authorize you to pay one half of the remainder of the proceeds of said shipments to Messrs. R. & Co., provided the same shall not exceed £5,000," held, not to require a stamp as an order for payment of money within 55 Geo. 3, c. 184, sch. p. 1, the parties to whom the payment was to be made being the commission agents to H. & L., on whose account it was to be made, and to be applied or paid over, as circumstances required. *Hutchinson v. Heyworth*, 1 Perr. & D. (q. n.) 266.

22. An agreement by the execution creditor to the sheriff to indemnify him on the sale of goods, held to require a stamp, although the value of the goods was under £20. *Shepherd v. Wheebly*, 1 C. & P. (n. r.) 534.

23. Plea, to an action on a bill, that it was not duly stamped, held ill, on special demurrer. *Howard v. Smith*, 4 Bing. N. S. (c. r.) 684; and 6 Sc. 438.

And see *Agreement; Annuity; Assumpsit; Bill; Bankrupt; Bond; Ejectment; Lien; Limitations, Stat. of; Mortgage; Poor; Practice*, (c. L.)

## STOCK.

Where dividends had been unclaimed for ten years by a surviving trustee, a transfer of the stock into the name of the representative of the survivor refused, but a reference directed to the master to inquire as to the title to the fund, with liberty, &c. *Ram, ex parte*, 3 Myl. & Cr. (cm.) 25.

And see *Bank of England*.



## STOCKBROKER.

In *assumpsit* by a stockbroker for work, &c., in the buying and selling stock on account of the defendant; plea, that the plaintiff at the time was not duly licensed or empowered to act as a broker within the city of London, pursuant to 6 Anne, c. 16, held good on demurrer. *Cope v. Rowlands*, 2 Mees. & W. (xx.) 149.

## STOCK-JOBING.

1. Time bargains for stock in foreign funds held neither void as illegal at common law, or within 7 Geo. 2, c. 8. *Elsworth v. Cole*, 2 Mees. & W. (xx.) 31; supporting *Wells v. Porter*, 2 Bing. N. S. 722; and 2 Sc. 194; and *Oakley v. Rigby*, Ib.

2 So, a wager on the price of foreign stock is not void at common law, or within the 14 Geo. 3, c. 48, which is confined to wagering policies of insurance. *Morgan v. Pebrer*, 3 Bing. N. S. (c. r.) 457; and 4 Sc. 230.

## STOPPAGE IN TRANSITU.

1. Where, in the absence of the consignee, his clerk recommended the captain, who was anxious to relieve himself, to land the goods at a wharf, which was done, and they were entered in the wharfinger's books in blank, with freight and charges set against them; held that the wharf was to be deemed only a place of deposit *in transitu*, and not of reception, and that the right of stoppage continued; held also, that, by an acceptance of bills, the vendor's right was not taken away. *Edwards v. Brewer*, 2 Mees. & W. (xx.) 375.

And see *Feize v. Way*, 3 East, 93.

2. Where the purchaser of lead, no place of delivery being stated, after a time directed it to be forwarded to him at L., and the vendor gave the purchaser's agent an order on his servant for its delivery, and the order being indorsed by the agent, it was put on board a lighter for L., where it arrived on the 21st of June, on which day the purchaser became bankrupt; he afterwards demanded the lead of the captain of the vessel and tendered the freight, but who refused to deliver it, alleging that he stopped it on account of the purchaser being a bankrupt, and a letter dated 26th afterwards arrived from the vender, directing the lead to be stopped *in transitu*, held, that the lead being at the time on board the defendant's vessel the *transitus* was not at an end. *Jackson v. Nichol*, 5 Bing. N. S. (c. r.) 508.

3. Where the defendant having sold wheat to the plaintiffs, to be paid by a draft, which not being remitted, the defendants took back the wheat from the carmen to whom they had delivered it for the plaintiffs, held, that the plaintiffs could not maintain trover for the wheat. *Wilms-hurst v. Bowker*, 5 Bing. W. S. (c. r.) 541.

## SUNDAY.

See *Lien's Master*.

## SURETY.

1. Where J. H., being indebted on simple contract to W., prevailed on his father to execute a bond for the payment within four years, within which period the latter died, and W. obtained from the son and representative of the father a fresh bond for payment by yearly instalments: upon a creditor's suit for administering the father's estate, W. having claimed to come in upon the original bond, which he had retained; held, that the second bond was to be presumed a satisfaction of the first, and that the father was to be considered only as a surety for the son, and that by giving time to the principal debtor the creditor had discharged the surety. *Clarke v. Henty*, 3 Younge & Cr. (xx. xq.) 187.

2. In an action against a surety on a contract for works, to be paid for as the work proceeded, but the contractor becoming bankrupt, and received advances beyond what he was entitled to under the contract, and for which extra advances security had been taken; held, that in respect of the latter, the surety was not liable for the loss sustained by the non-fulfilment of the works. *Warre v. Calvert*, 2 Nev. & P. (x. a.) 126.

3. Where separate actions had been brought against A. and B., as surety on a joint and several note, and judgment obtained against B., who paid the whole debt and costs; held, that as the creditor could not afterwards make the judgment available at law, B.'s representative had no equity to compel an assignment of the judgment. *Dowbiggen v. Bourne*, 2 Younge & Cr. (xx. xq.) 462.

4. On a plea to debt on bond, conditioned for the trustee of a bankrupt's estate in Scotland, appointed by the commissioners, faithfully, &c., that by the neglect of the obligees for thirteen years, and contrivance, they had caused and permitted the trustee's default, but of which there was no proof; held, that he was not discharged: reversing the judgment below. *M' Taggart v. Watson*, 3 Cl. & F. (r.) 525.

5. Acceptance of the bills being by the French law apparent payment, unless dishonoured at maturity, where bills were accepted on account of the insufficiency of consignments to cover advances, for which the appellants were sureties, held that they were discharged. *Bellingham v. Freer*, 1 Moore, (r. co.) 333.

6. Where one of two sureties for the committee of a lunatic's estate on the bankruptcy of the principal, by a deed of arrangement obtained an assignment of the bankrupt's wife's separate estate for life to the extent of £50 a year, and the amount of premium on an insurance policy, and by a subsequent deed he afterwards released the other surety, without the concurrence of the wife, held, that the wife's estate was thereby relieved from a moiety of the charge against the principal, and in respect of which the plaintiff



had a right to contribution; but that interest was only payable on the sums paid under the liability as surety, and on the premiums, but not on the costs, &c. *Hodgson v. Hodgson*, 2 Keene, (c. r.) 704.

7. The wife's trustee, after notice of the charge, taking on himself to act as if the deed were invalid, did so at his peril, and held liable for paying over sums to the wife, after such notice. *Ib.*

8. Where a party who had lent his name to bills, deposited with the plaintiff as a security upon a deed of composition giving time to the principal, consented thereto before the bills became due, held sufficient to revive the liability, and that such promise was valid, without any new consideration, not as the constitution of a new, but the revival of an old debt. *Smith v. Winter*, 4 Mees. & W. (xx.) 462.

And see *Mayhew v. Cricket*, 2 Swanst. 185.

9. Where the defendant joined in a note as surety on an advance to a third party, with a mortgage as a collateral security, in which it was recited that a previous debt from C. had been paid, but was in fact agreed to be retained out of the second advance, held to amount to such a fraud in law as to invalidate the defendant's liability as surety on the note. *Stone v. Compton*, 5 Bing. N. S. (c. r.) 142.

10. Where the guaranty provided that the principal might extend the period of credit, and hold over or renew bills, and compound with him or the parties liable, as the plaintiff might think fit, without in any manner discharging the surety, held that a discharge and a release under a composition deed of the debtor did not discharge the surety. *Cowper v. Smith*, 4 Mees. & W. (xx.) 519.

11. On a bill for an injunction to stay proceedings at law against the sureties in a bond given by the principal on a contract for works, alleging that the defendants, by making advances beyond the value of the work done, had varied the contract to the prejudice of the sureties; held, that the sureties were thereby released, and entitled to have the injunction made perpetual. *Calvert v. London Dock Co.*, 2 Keene, (ca.) 638.

And see *Bankrupt; Bill; Bond; Guaranty*.

## SURRENDER.

Where it was shown to be the practice in the office of the bishop's steward to have old leases returned before a renewal or re-grant, where produced with the seals torn off, held admissible in evidence, as a foundation for the jury to presume a surrender, by operation of law, of the former lessee. *Walker v. Richardson*, 2 Mees. & W. (xx.) 882.

## TAXES.

1. The returns of defaulters of taxes made

under 5 & 6 Will. 4, c. 29, s. 13, cannot be applied to sustain an information *in personam* in the Exchequer to recover them. *Attorney-General v. Sewell*, 8 C. & P. (N. P.) 376.

2. The 5 & 6 Will. 4, c. 20, s. 13, providing that arrears of assessed taxes shall be recoverable as a debt of record to the king; held, that an information in the nature of a popular action of debt, upon the mere assessment and warrant, was not sustainable. *Attorney-general v. Sewell*, 4 Mees. & W. (xx.) 77 and 6 Dowl. (r. c.) 673.

## TENANT.

### IN TAIL—FOR LIFE.

1. Where, upon suits raised in the court below for satisfying portions and charges on lands settled in strict settlement, irregular and collusive sales had taken place, and, upon a bill filed by a tenant in tail, a minor, the court had directed issues as to the value, and that the plaintiff might redeem on re-payment of the purchase-money, or that he might be compensated out of the assets, which latter relief was ordered by the decree; decree affirmed on appeal. *Bandon v. Becher*, 9 Bli. N. S. (r.) 533.

2. Where the testator directed a sale of all his real and personal estate with all convenient speed, and to be invested; held, that 12 months were to be deemed a reasonable time for that purpose; and the lands remaining then unsold, held that the tenant for life was entitled to the rents from that period. *Vickers v. Scott*, 3 Myl. & K. (c.r.) 500.

And see *Timber*.

## TENDER.

1. Plea by acceptor, of tender of the amount of bill and interest to the plaintiff, the indorsee, after it became due, held bad on demurrer. *Pools v. Crompton*, 5 Dowl. (r. c.) 468; questioning *Johnson v. Clay*, 7 Taunt. 486.

And see *Hume v. Peplow*, 8 East, 168.

2. Where the defendant's attorney tendered a sum, saying, "I tender you £—, for your claim on M.," which plaintiff refused to accept in discharge of his bill; and the former again said, "I tender you £—;" held unconditional and sufficient. *Jennings v. Major*, 8 C. & P. (N. P.) 62.

3. Where the sum offered was tendered as all that was due, held not a good tender, as, if accepted, the future claim to more would have been compromised, which it could not where the party takes a sum properly tendered. *Stutton v. Hawkins*, 8 C. & P. (N. P.) 259.

4. Where the words of the tender, "I have called to tender £—, in settlement of R.'s bill;" held, that it was for the jury to say if the offer was conditional or not. *Eckstein v. Reynolds*, 2 Nev. & P. (x. s.) 256.



5. Where the sum tendered was as for half a year's rent, which the plaintiff's agent refused; held, only a conditional tender, as, it taken, involving an admission of the amount of rent, and therefore bad. *Hastings, Marquis of v. Thorley*, 8 C. & P. (N. P.) 573.

6. An allegation at the time of the tender, that it was all he considered to be due, held not to make it a conditional one, if otherwise good. *Robinson v. Ferreday*, 8 C. & P. (N. P.) 753.

7. Where the creditor asked how much was due, and laying down a sum exceeding what was due, desired the party to take what was due, held, that the offer not being coupled with any condition, the tender was legal. *Bevan v. Rees*, 7 Dowl. (P. C.) 510.

And see *Debt; Execution; Lien; Pleading*, (C. L.)

### TERM.

In a suit by A. against his co-heir and the party in possession of the estates descended, for a discovery and production of deeds, and for restraining the setting up of outstanding terms, in the ejectment brought on the joint and several demises; held that the allegation of outstanding terms was sufficient, but that the bill was demurrable for imperfectly stating the plaintiff's title by descent; held also, that the other co-heir ought to be joined as a co-plaintiff. *Baker v. Harwood*, 7 Sim. (Ch.) 373.

And see *Injunction*.

### TIMBER.

1. Tenant for life without impeachment, &c., except as to timber in park, avenues, and woods adjoining the mansion; held, that the timber not strictly within the description, but an ornament and shelter thereto, were within the exception, and the tenant for life liable for equitable waste, and an injunction granted. *Newdigate v. Newdigate*, 2 Cl. & Fi. (P.) 601; 8 Bli. N. S. 735.

2. Where lands were devised to trustees, in trust to A. for life, with power to cut timber for repairs only, remainder over, and the trustees, under the advice of surveyors, felled timber, and invested the produce in stock in his own name; held, that the tenant for life was entitled to the dividends for life. *Waldo v. Waldo*, 7 Sim. (Ch.) 261.

### TIME, COMPUTATION OF.

In orders for payment of money, month held to mean a lunar month. *Attorney-general v. Newbury Corporation*, 1 Coop. (Ch. C.) 353.

And see *Action*.

### TITHES.

[A] TITLE TO.

[B] SUITS IN RESPECT OF—EVIDENCE.

[A] TITLE TO.

1. A portioner, entitled to tithe of hay, held not necessarily entitled to that of clover, vetches, &c., cut and carried away green. *Lewis v. Bridgman*, 2 Cl. & Fi. (P.) 739; and 8 Bli. N. S. 907; affirming the judgment below.

2. Upon a devise in 1671 of tithes, in trust for a minister at B., to be nominated by the trustee; and his heir, in 1716, sold them with other property, and conveyed to R. and T., in trust for R., subject as to the tithes on the same trust, the minister to be nominated by R. and his heirs; F. became by survivorship seized of the legal estate, and his descendants continued so until 1826, when his heir-at-law conveyed the tithes on the original trust to F., the heir-at-law of R., but he had in 1821 nominated B. as minister; held a valid nomination. Held also, that in the absence of any endowment of rectory, or vicar or curate at any time, the grant of the tithes, originally appropriated to an alien priory, dissolved by 27 Hen. 8, comprised all tithes, and a decree for account to F. and B. affirmed. *Holdsworth v. Fairfax*, 3 Cl. & Fi. (P.) 115; and 8 Bli. N. S. 882.

3. The reasonableness of a custom to set out for tithe every tenth turnip, instead of every tenth heap, depends upon the fact, whether the parson has thereby an opportunity of seeing it set out fairly, and was disallowed. *Clarke v. Clarke*, 2 Younge & C. (Ex. Eq.) 245.

4. The 6 & 7 Will. 4, c. 71, for the commutation of tithes, amended by 1 Vict. c. 69.

5. Where the evidence of money payments extended to *temp. Car* 1, but more ancient documents made no mention of them; held, that the origin was to be deemed subsequent to the time of legal memory, and an account decreed. *Lord Graves v. Fisher*, 3 Cl. & Fi. (P.) 1; and 8 Bli. N. S. 937. Affirming the judgment below.

6. The notice of determining a composition for tithes is on the same footing as a notice to quit lands, i. e. a six months' notice, terminating at the end of the year of composition; where therefore the year ended at Michaelmas, and the notice was given in March, held, that it did not apply to tithes of wool which became due in May. *Goode v. Howells*, 4 Mees. & W. (Ex.) 198.

And see *Bishop v. Chichester*, 2 Bro. C. C. 161.

7. The commissioners under 6 & 7 Will. 4, c. 71, have no jurisdiction to interfere with suits pending at the time of the passing of the act; the suits and differences mentioned in it refer only to such as prevent the making of the award. *Gridlestone v. Stanley*, 3 Younge & C. (Ex. Eq.) 423.



8. Commutation Acts, amendment of, by 2 & 3 Vict., c. 62.

And see *Pleading*, (1N *eq.*); *Poor*.

[B] SUITS IN RESPECT OF—EVIDENCE.

1. Where an occupier filed a cross-bill to establish moduses, pending a suit against the same parties for tithes, held that an admission of their occupation was not necessary. *Fisher v. Arlett*, 2 Younge, (xx. *eq.*) 208.

2. An ancient document, in the nature of a terrier, produced from the proper custody and under the proper authority, although without date, and signed by various persons, without designating their character, held admissible. *Hall v. Farmer*, 2 Younge (xx. *eq.*) 145.

3. Upon a bill for great and small tithes of an ancient park, which had been disparked and cultivated, there being no evidence of composition or preception of tithes, although compositions were proved to have been paid for other lands in the same township, dismissed with costs. *lb.*

4. Where the ancient documents only showed an endowment of the vicarage, but not its character or extent, and the ecclesiastical survey recognised "privy tithes" as well as small tithes, but a subsequent terrier mentioned privy tithes in contradiction to tithes in general, as payable to the vicar, and he had always received payments denominated privy tithes; held that, under such description, he was entitled to the small tithes. *Hall v. Godson*, 2 Younge (xx. *eq.*) 153.

5. In debt by a lessee of tithes of sheaf-corn and grain, on 3 Edw. 6, for not setting out the tithes of vetches or tares sowed in a green state, held, that he was not entitled to recover. *Dare v. Derham*, 3 Mees. & W. (xx.) 539.

6. The action of debt for treble value of tithes not set out, is a penal action within 21 Jac. 1, c. 4, s. 4, and the Judges have therefore no power to deprive the defendant of the plea given by that act; and held, that *nil debet* was still a good plea, notwithstanding the 3 & 4 Will. 4, c. 42, s. 1. *Earl Spencer v. Swannell*, 6 Dowl. (r. c.) 326; 3 Mees. & W. (xx.) 154.

7. Where the defendant, in a vicar's suit, denied the plaintiff's right, alleging it to be in the rector, and the plaintiff amending, charging that the defendant ought to set forth to what tithes the rector was entitled; on demurrer to that part, held, that the case made by the answer being totally inconsistent with that made by the demurrer, it was thereby over ruled. *Salkeld v. Phillips*, 2 Younge & C. (xx. *eq.*) 580.

8. Where, to a bill for an account of tithes, the defence set up an arrangement by all proper parties, and with the approval of the bishop, (but after the disabling statute) by which certain lands and privileges were assigned, and an annuity granted in consideration of an exchange of lands, and giving up the tithes of the lands claimed by the plaintiff; held, that such agreement was void, and an account decreed; held, also, that the bill

having been filed before the 2 & 3 Will. 4, s. 100, but after the period limited thereby, amended, by making the owner of the lands a party, the original and amended bill formed but one record, and that the suit was instituted against the owner within the prescribed time. *Thorpe v. Mattingley*, 2 Younge & C. (xx. *eq.*) 421.

And see *Attorney-General v. Cholmondeley*, Gwill. 914.

And see *Church-rate*.

9. Merger of tithes in land facilitated by 1 & 2 Vict. c. 64, amending 6 & 7 Will. 4, c. 71, s. 71.

10. The case of *Scarlett v. Governors of Lucton School*, affirmed in D. P. 10 Bli. N. S. (r.) 592.

11. A plea of a *modus* of 4d. an acre for ancient pasture land, in the hands of an out-dweller, and where restored to pasture after being broken up, the same *modus* payable, held bad; the antiquity on which such a payment could be valid can only be referred to the time of legal memory, viz. of Richard 1st, and must continue such; *semb.*, however, that if properly pleaded, a *modus* might be supported in respect of the land when in a particular state of cultivation, and that a *modus* may be good for lands occupied by an out-dweller, which nevertheless pays tithes in the hands of an inhabitant. *Cooper v. Byron*, 3 Younge & C. (xx. *eq.*) 467.

12. Where the whole evidence is before him, no contradiction to be reconciled, no new facts to be brought to light, and the case one complicated of law and fact, a judge in equity is bound to decide the case without putting the parties to the expense and hazard of an issue. *lb.*

13. Where the bill charged the subtraction, on a pretence of a discharge by a *modus*, &c., and at other times that the lands were extra-parochial, whereas the defendant possessed deeds, &c., showing the lands to be within the parish; held, that the defendant could not plead no titheable matters, and that such a plea must enumerate all the tithes specified, and negative the perception of each titheable article. *Clayton v. Earl of Winchelsea*, 3 Younge & C. (xx. *eq.*) 426.

14. Under the 6 & 7 Will. 4, c. 71, s. 45, (Tithe Commutation,) the commissioners having a discretionary power to determine suits theretofore pending; but where they intend to do so, specified notice of such intention must be given, and for that purpose the ordinary notice of commutation is not enough. *Wetherell v. Weighill*, 3 Younge & C. (xx. *eq.*) 243.

TOLLS.

1. A lease by the corporation of the Trinity-House of a lighthouse, and the tolls, held to be an interest in a chattel real of the interest of the wife therein, and assignable by the husband; held, also, that the 6 & 7 Will. 4, c. 79, directing the purchase-money of lighthouses purchased by the corporation, to be paid into and applied under



the direction of the Court of Exchequer, amongst the parties beneficially entitled thereto, the order of the court as to its disposition superseded the ordinary forms of conveyance for securing the real property of the wife. *Ellison, ex parte*, 2 *Younge & C. (xx. xq.)* 528.

2. The declaration on a demise of tolls, must allege that the agreement was in writing and signed by the trustees, but need not go on to allege the compliance with the preliminaries required by the act. *Oldroyd v. Crampton*, 4 *Bing. N. S. (c. r.)* 24; and 2 *Sc.* 256.

And see *Mandamus; Poor; Turnpike*.

### TRADE.

1. Where the defendant, a druggist in the town of T., in consideration of the plaintiff receiving the defendant into his service as an assistant in that trade, at a certain annual salary, covenanted that he would not at any time thereafter directly or indirectly exercise that trade within T., or within three miles thereof, under a penalty; held, on error in Exchequer Cam., that such restriction was not unreasonable on account of its being indefinite as to duration, and that the consideration was legal and of some value; (reversing the judgment below). *Hitchcox v. Coker*, 1 *Nev. & P. (x. s.)* 796.

2. Powers for the crown to grant privileges to trading corporations. By 1 *Vict. c.* 73.

And see *Action; Covenant*.

### TRESPASS.

1. In trespass; plea, justifying as in defence of possession of his close; and replication, alleging a right of way over, &c., used and enjoyed for 40 years, *as of right*, and without interruption, &c.; rejoinder, alleging interruption submitted to, &c.; surrejoinder, traversing the interruption, and acquiescence *modo*, &c.; held that, upon proof of a non-user for part of the time, evidence was admissible, in order to show that the non-user was not a voluntary forbearance, and that, previous to such non-user, a consideration had been paid for permission to use the way by the party claiming the right. *Tickle v. Brown*, 4 *Ad. & Ell. (x. s.)* 369; and 6 *Nev. & M.* 230.

2. Held also, that the words of s. 2 (in 2 & 3 *Will. 4, c.* 71), "enjoyed by any person claiming right," and "enjoyment as of right," in s. 5, mean not a secret or occasional, but an open and notorious exercise thereof, by a party without leave, and claiming to use it without being treated as a trespasser, whether it be one strictly legal, or merely lawful, so far as to excuse a trespass. *Tickle v. Brown*, 4 *Ad. & Ell. (x. s.)* 369; and 6 *Nev. & M.* 230.

3. To a plea of such enjoyment, a licence, if it cover the whole time, must be pleaded; but an occasional licence, or for a definite period, may

be given in evidence under a general traverse of the enjoyment *as of right*. 1b.

4. In trespass for entering a close, &c.; plea, that, before plaintiff had any title therein, A. was seized in fee of that and certain other closes, of which the plaintiff's close was then parcel, and by himself and tenants, during all that time, used and enjoyed a right of way over the part, being plaintiff's close, to the other closes, and that A. afterwards conveyed the defendant's closes, "together with all ways and appurtenances whatsoever thereunto belonging;" held that, the way not being appurtenant at the time of the conveyance, the defendant should have pleaded that he was enfeoffed of the close and way, or that there was no way appurtenant *in alieno solo*. *Wilson v. Bagshaw*, 5 *M. & Ry. (x. s.)* 448.

5. Where in trespass, issues were joined, 1st, on a right of public carriage-way; 2d, of a bridge-way, and 3d, of a footway, and the jury found on the first for the plaintiff, and on the third for defendant, and were discharged as to the second without the plaintiff's consent; held, that the second issue was material, and a new trial granted, although the plaintiff had consented to merely nominal damages. *Tinkler v. Rowland*, 4 *Ad. & Ell. (x. s.)* 668.

6. Pleas in trespass, alleging a right of way for the purpose of bringing goods and water from the river W.; the jury found as to the latter, but negatived the former; held that, under the rules of Hilary, 4 *Will. 4*, the plaintiff was entitled to have the verdict entered for him, as to the right to carry goods. *Knight v. Woore*, 3 *Bing. N. S. (c. r.)* 3; 3 *Sc.* 326; and 5 *Dowl. (r. c.)* 201. 487.

7. Upon a purchase, by verbal contract, of a crop of growing grass, with liberty to enter, &c., to cut and carry it away; the money not being paid according to the agreement, the defendant turned the horse and cart of the plaintiff out of the field, being the trespass complained of; held that, although such contract might operate as a licence to excuse the entry, it could not give such an interest as to entitle the purchaser to maintain trespass, which would in effect charge the defendant on a parol contract for a sale of an interest in land within the 4th sect. of the Statute of Frauds. *Carrington v. Roots*, 2 *Mees. & W. (xx.)* 248.

8. A party is justified in entering and placing on the plaintiff's close, goods wrongfully placed by him on the adjoining premises of the defendant. *Rea v. Sheward*, 2 *Mees. & W. (xx.)* 425.

9. Plea, in trespass for breaking plaintiff's two closes, &c., a public right of carriage-way; replication, denying the right; it appeared that the closes were in the lordship of T., part of the parish of I., and the roads of the lordship were proved to have been immemorially repaired by the owners and occupiers in the lordship, under an agreement, but that they had latterly been assessed to the parish highway rates; held, that such owners were not competent witnesses on the part of the plaintiff to disprove the existence of a public way; as a verdict for the defendant would be evidence of reputation to charge the



pariah on an indictment for not repairing, and for which the witnesses would be liable to contribute; and that the case did not fall within the 3 & 4 Will. 4, c. 42, nor were they rendered competent by 54 Geo. 3, c. 170, s. 9. *Fowler v. Port*, 7 C. & P. (N. P.) 792.

And see *Oxenden v. Palmer*, 2 B. & Ald. 236.

10. Where the plaintiff, whilst in the custody of the marshal, was brought up to be charged with an attachment; held, (Abinger, L. C. B., *diss.*) that it was *prima facie* a trespass; and that, if the imprisonment were justifiable, the defendant must plead it specially. *Briant v. Clutton*, 5 Dowl. (r. c.) 166.

11. Plea, in trespass and false imprisonment, that the plaintiff made a great noise and disturbance in defendant's shop, and thereby caused a mob to assemble, and a riot and disturbance in the public street; whereupon, in order to preserve the public peace, the defendant gave the plaintiff in charge to the police; held that, although no riot proved, the plea showed a sufficient breach of the peace, and was a good justification. *Cohen v. Huskisson*, 2 Mees. & W. (xx.) 477.

12. In trespass for an assault, the defendant is entitled to offer in mitigation the publication of a libel upon him by the plaintiff; but the defendant having brought an action for such libel, he ought to derive no advantage from it in diminution of damages; held also, that the work of the defendant, of which the libel was a criticism, need not be read, but that the plaintiff might in reply read parts of the work as part of his speech, to show that the criticism was fair; if a critic goes out of his way and attacks the private character of the author, he will be liable to the author in damages. *Frazer v. Berkeley*, 7 C. & P. (N. P.) 621.

13. So, in trespass for false imprisonment, by giving plaintiff in charge of a peace officer; held, that the defendant, in mitigation of damages, might show the previous annoying conduct of the plaintiff towards him. *Thomas v. Powell*, 7 C. & P. (N. P.) 807.

14. Where the sheriff executed a *f. fa.* after notice of the defendant's discharge under the Insolvent Act; held, that, although the issuing the writ might be irregular, he could not be made a trespasser by obeying it. *Whitworth v. Clifton*, 1 M. & Rob. (N. P.) 531.

15. Plea, in trespass for shooting a dog, that he was ferocious and had attacked the plaintiff; held, not supported, where it appeared that the dog, after having attacked the defendant, was running away: the circumstance of the animal being of a ferocious disposition, will not justify the shooting him, unless actually attacking the party at the time. *Morris v. Nugent*, 7 C. & P. (N. P.) 572.

16. In trespass for taking goods as a distress for poor-rates, held that, notwithstanding the new rules, the whole defence, and consequently that they were not the plaintiff's goods, might be gone into under the general issue. *Maine v.*

*Davey*, 6 Nev. & M. (X. S.) 356; and 4 Ad. & Ell. 892.

17. In trespass; pleas, 1st, general issue, and 2d, entry to distrain for rent; and the jury found on the first for the plaintiff, with one farthing damages, and for the defendant on the second; held, that the plaintiff was not entitled to costs, without a certificate, under the stat. 22 & 23 Car. 2, c. 9. *Dunnage v. Kemble*, 3 Bing. N. S. (c. r.) 538; 4 Sc. 365; and 5 Dowl. (r. c.) 478.

18. Pleas, in trespass *quare cl. fr.*, 1st, not guilty; 2d, denying the close to be the plaintiff's, and 3d, a right of way; the two first issues having been found for the plaintiff, with nominal damages, and the last for the defendant, held that the latter was entitled to the *postea*. *Staley v. Long*, 3 Bing. N. S. 781; and 5 Dowl. (r. c.) 616.

19. Where, in trespass for assault on the plaintiff's wife, the defendant pleaded that the person assaulted was not the wife; held not to involve an admission of battery on the record, or to prevent the effect of the judge's certificate for costs under 43 Eliz. c. 6. *Wilson v. Lainson*, 3 Bing. N. S. (c. r.) 307; 3 Sc. 670; and 5 Dowl. (r. c.) 307.

20. Where, in trespass, the plea raised the issues of right of way to fetch water and convey goods from a river, the former of which was found in favor of the defendant; held, that the verdict, as to the breaking, &c., was substantially found for the defendant, and he was entitled to the general costs in the cause. *Knight v. Woore*, 3 Bing. N. S. (c. r.) 534; 3 Sc. 326; 4 Sc. 360; and 5 Dowl. (r. c.) 487.

21. In trespass for injury to plaintiff's reversion; first, pleas, the general issue, and second, a right to cleanse a drain under the plaintiff's wall, which right the plaintiff traversed; the plaintiff afterwards obtained leave to amend, withdrawing the traverse of the right, and new assigning excess, to which the defendant pleaded not guilty, but subsequently withdrew that plea, and paid money into court in satisfaction of the damages under the new assignment, which the plaintiff took out, and also withdrew the plea of general issue, as regarded the part of the declaration newly assigned; the master gave the plaintiff the costs of the writ and new assignment and subsequent proceedings, but gave the defendant the general costs, and held right. *Griffiths v. Jones*, 1 Mees. & W. (xx.) 731; 1 Tyr. & Gr. 1131; and 5 Dowl. (r. c.) 167.

22. The court will not order the party directing the trespass to be committed, but not made a party to the suit, to pay costs. *Berkeley v. Demery*, 5 M. & Ry. (X. S.) 442.

23. Where overseers enclosed common lands for the use of the poor, held, that they might maintain trespass against a stranger and wrongdoer, although they had not obtained the consent of the lord, as required by 1 & 2 Will. 4, c. 42, s. 2, to perfect their title. *Mayson v. Cook*, 4 Bing. N. S. (c. r.) 392.

24. Where an order in bastardy was made in duplicate, one regular and deposited in the parish chest, and the other, the one served on the se-



puted father, having inserted by mistake the mother's name, in lieu of the plaintiff's, but he was told at the time that he was ordered to pay, &c.; in trespass against justices for having committed him for disobedience of the order, held, that there being a valid order produced before the defendant, and upon which he acted, he was justified in the commitment. *Wilkins v. Hensworth*, 3 Nev. & P. (q. s.) 55.

25. Where the defendant, on a dispute upon a building contract with the plaintiff, went before a justice, who issued a warrant under 4 Geo. 4, c. 34, and the complaint was afterwards heard and dismissed; held, that the defendant could not be liable in trespass, but only in case, if actuated by malice; where the justice having general jurisdiction over the subject matter, erroneously thinking he has jurisdiction, grants a warrant, he would not be liable; *aliter*, if he acted without any jurisdiction at all. The defendant having pointed out the plaintiff to the officer, *seem*, would be evidence to go to the jury of interference, but where the plaintiff did not claim to have it left to the jury, the court would not afterwards interfere. *West v. Smallwood*, 3 Mees. & W. (ex.) 418.

26. Where one defendant in an action for trespassing in pursuit of game, justified under the authority of the other, who being owner of the lands, had demised them, with an alleged reservation of the game, and it appeared that the former had been summoned before a magistrate for the trespass, and on the defendant being called the case was dismissed; held, that the second defendant having never actually entered, the proceedings before the magistrate, under 1 & 2 Will. 4, c. 32, s. 46, was a bar to the action against both. *Robinson v. Vaughan*, 8 C. & P. (n. r.) 252.

27. Where in trespass against several, the plaintiff proved acts by two defendants only on one day, and acts by all on another day, held that the plaintiff, although he had elected to rely on the former trespasses, might prove also other trespasses against those two, but could not recover as against them for trespasses in which they were implicated with others; held, also, that where the defendants had pleaded specially, those against whom the plaintiff had abandoned his case were not entitled to acquittal, until the issue on those pleas were disposed of, as they might, by the new rules of pleading, be still subject to the costs of the special pleas. *Hitchen v. Teale*, 2 M. & Rob. (n. r.) 30.

28. Where the plaintiff, a sailor, lodged with one of the defendants, an innkeeper, and whilst in a state of intoxication, the other defendant desired a party to take out what money he had in his pocket, which the other received, desiring the plaintiff to be told when he awoke that his money was lost, although he was afterwards told it was all right, and he desired ll. of it to be given to a female, which was done, and the next morning the defendant, the landlord, offered him a small balance, after deducting his demand for lodging, &c.; held, that the one directing the money to be taken and the other taking advantage of it as soon as done, were jointly liable in trespass, and the plaintiff entitled to recover back the whole

sum taken, *minus* the ll. directed by him to be given. *Peddell v. Rutter*, 8 C. & P. (n. r.) 337.

29. Where the defendant, a sheriff's officer, arrested the plaintiff in two suits, and took a regular bailbond in one, and an instrument signed by the plaintiff, but not sealed nor filled up, in the other, although the fees were paid thereon, and it appeared that the defendant was informed of the debt in the first suit having been paid an hour before the plaintiff was liberated, held, that there being no evidence of the plaintiff having been detained a moment longer than the defendant was justified in detaining him under a lawful writ, the action for false imprisonment was not maintainable. *Bleasley v. Sloman*, 3 Mees. & W. (ex.) 40.

30. Where in trespass for an expulsion by A. B. and C., A. pleaded not guilty, B. and C. admitted the expulsion, but paid 20s. into court, and pleaded that no greater damages had been sustained; held, that if the jury found A. to have sanctioned the expulsion, he was liable only to nominal damages, the 20s. having been found by the jury a sufficient compensation for the expulsion, and been received from A.'s co-defendants. *Walker v. Woolcott*, 8 C. & P. (n. r.) 352.

31. Plea in trespass, for chasing plaintiff's sheep from a certain close into the highway, and leaving them there, that the sheep were doing damage in the said close of the defendants; replication, that they erred and escaped from the plaintiff's close into the defendant's through defect of fences, which the latter was bound to repair, and issue thereon; held, on a motion in arrest of judgment, that the replication was good, and that it was the defendant's duty to replace the sheep, and not to leave them in the highway, although it might be the proper road for them to return. *Carruthers v. Hollis*, 3 Nev. & P. (q. s.) 246.

32. Plea, in trespass for chasing and taking and detaining sheep, prescribing for defendant and other occupiers of a messuage, &c., for 30 years before, &c., in a right of common of pasture in the place in which, &c., and justifying the taking as distress damage *feasant*; held bad on demurrer, as being framed on the 2 & 3 Will. 4, c. 71, it did not allege the user to have been for that time before the commencement of the action; but held, that such a plea need not allege the user to have been "without interruption." *Richards v. Fry*, 3 Nev. & P. (q. s.) 67.

33. *Quare*, if in a plea, stating such a right of common, it is sufficient as against a wrongdoer, merely to allege possession. *Id.*

34. Plea, in trespass for taking cattle, damage *feasant*, first, prescribing for a right of pasture, under 2 & 3 Will. 4, c. 71, alleging enjoyment for 30 years next before, &c., and 2dly, a right of turning on cattle for 20 years; and it appeared, that although acts of depasturing were shown more than 20 years ago, that 28 years before the action commenced a rail had been erected to interrupt the enjoyment, and which had been removed during that period; held, that the first plea was not proved, and that it did not lie on the defendant to prove that the erection of the rail



was adverse to the plaintiff's right; 2dly, that, the second plea was demurrable, for not showing the purpose for which the cattle were turned on, and the sole object of the evidence being to prove the right of pasture, which was a *profit a prendre*, and not a mere easement, the right claimed was neither definite nor supported by the evidence; and since the act, the proof must be of actual enjoyment during the prescribed period, and no presumption is admissible. *Bailey v. Appleyard*, 3 Nev. & P. (q. n.) 257.

35. Where in trespass for taking the plaintiff's goods, plea, leave and licence; it appeared that the plaintiff an ignorant young person, on his father's bankruptcy, being told by the commissioners at an examination, the defendant not being present, that the goods were his father's, said, he would give them up; the court granted a new trial, on the ground that the evidence did not sustain the plea. *Roper v. Harper*, 4 Bing. N. S. (c. r.) 20; and 3 Sc. 250.

36. Where the trespass and assault alleged was, a beating with a bludgeon; and the pleas, as to the assaulting, beating, and ill-treating, first, a justification of *molliter manus* to remove the plaintiff from the defendant's house; and secondly, *son assault demesne*, and the judge directed the jury that the striking with a bludgeon would not be justified on those pleas; held a misdirection; *dub.* whether the pleas justifying only the beating were an answer to the aggravated battery laid in the declaration. *Oakes v. Wood*, 3 Mees. & W. (xx.) 150.

37. In trespass for assault, held that strong provocation, as a libel on the defendant by the plaintiff, although previous, was admissible in mitigation of damages under the general issue. *Fraser v. Berkley*, 2 M. & Rob. (n. r.) 3.

38. Where in trespass, issue was joined on one plea, and rejoinder and demurrer on the other, and the defendant afterwards gave notice that he should not proceed on the second plea; held that the plaintiff was not entitled to sign judgment on the whole record; but leave given to strike out the pleadings demurred to. *Hitchcock v. Walter*, 6 Dowl. (p. c.) 457.

39. In trespass for seizing goods under a regular judgment, but not within the jurisdiction into which the process might run; held that the plaintiff was entitled to recover the value of the goods, and not merely the extent of damage sustained by being taken in a wrong place; and a new trial refused, on the ground of the verdict being against evidence, the damages being under 20l. *Sowell v. Champion*, 6 Ad. & Ell. (q. n.) 407.

40. Plea in trespass for entering plaintiff's close, that plaintiff had entered defendant's close and seized goods against his will, and placed them on the close in the declaration mentioned, and that the defendant made fresh pursuit and entered to retake the goods; held a good plea, the plaintiff giving an implied licence to enter for the purpose of recaption. *Patrick v. Colerick*, 3 Mees. & W. (xx.) 483; and see Vin. Abr. tit. Trespass, 1, a.

41. In trespass for throwing down a wall, plea, first, that it was not the plaintiff's wall; secondly, that it was a party wall, which latter issue was found for the defendant; held, also, that he was entitled also to the verdict on the first. *Marley v. M'Dermott*, 3 Nev. & P. (q. n.) 356.

42. Plea, in trespass for breaking and entering, leave and licence, and not guilty of the residue, and 6d. damages; held that neither of the issues necessarily raising any question of title, the judge might certify under 43 Eliz. c. 6. *Mills v. Stevens*, 3 Mees. & W. (xx.) 460.

43. Where the defendant pleaded, first, not guilty; and secondly, that the dwelling-house in which, &c. was not the dwelling-house, &c. of the plaintiff, and he obtained a verdict of one farthing damages; held that he was entitled to full costs under 22 & 23 Car. 2, c. 9, s. 136, a denial of the close being the plaintiff's is a denial of his title thereto. *Pugh v. Roberts*, 3 Mees. & W. (xx.) 458.

44. Where the declaration alleged a seizing and taking hold of the plaintiff and imprisoning him, and the plaintiff having succeeded upon the pleas of justification with 1s. damages; held entitled to costs, notwithstanding the Judge had certified under 43 Eliz. *Rawlins v. Till*, 6 Dowl. (p. c.) 159; and 3 Mees. & W. (xx.) 28.

45. In trespass for breaking and entering a stable, and taking a horse, pleas, that the stable was not the plaintiff's, and also leave and licence, upon which the plaintiff obtained a verdict, and damages one farthing, and the Judge certified under the 43 Eliz.; held that he was nevertheless entitled to full costs. *Purnell v. Young*, 6 Dowl. (p. c.) 347; and 3 Mees. & W. (xx.) 288.

46. The 22 & 23 Car. 2, c. 9, s. 136, does not apply to actions for false imprisonment, and under it a farthing damages will carry full costs, unless the Judge certifies under the Statute of Eliz. *Gould v. Drake*, 3 Mees. & W. (xx.) 543.

47. Where the plaintiff had demised land, for 60 years, for building, at a rent, reserving a right of way to the grantor over the streets between the houses to be built, and he agreed to grant leases of the houses as they should be built; the grantees entered, paid rent, and proceeded to erect houses, &c., for which he obtained leases, and built a wall across one of the streets; held, that he was to be deemed in possession of the land on which the wall was built, and that the grantor could not maintain trespass for such erection. *Alexander v. Bonner*, 4 Bing. N. S. (c. r.) 799; and 6 Sc. 611.

48. In trespass for injury, by driving against the plaintiff whilst crossing the road; held, that any defence amounting to an allegation that the matter did not arise from any fault of the defendant, must be specially pleaded; *aliter*, in case for negligently driving; a foot-passenger has a right to cross a road, and a party driving along it is bound to use proper caution, and if the injury arises from his not having power to control his horse, by reins, &c. breaking, it is no ground of defence; said also, that the rule of the road, as regards foot-passengers, does not apply; as regards them, the carriage may go on which side



the driver pleases. *Cotterill v. Starkey*, 8 C. & P. (N. P.) 691.

49. In trespass, for assaulting and throwing boiling water on the plaintiff, and wetting and damaging clothes, &c., plea, as to the *assaulting* and wetting, and damaging &c., *son assault demesne*, and not guilty as to the residue, and verdict, with one farthing damages; held, that as the throwing the water on the plaintiff was a battery, as to which there was no justification on the record, so that the judge might have certified that the battery was proved, and not having done so, the plaintiff was entitled to no more costs than damages. *Pursell v. Horne*, 3 Nev. & P. (q. s.) 564.

50. Plea in trespass, for entering plaintiff's house and taking away goods, that they were not the house and goods of the plaintiff, but of the defendant; replication, that the defendant had demised the house and goods to the plaintiff from year to year, and that the defendant entered, &c. during the continuance of the demise, and issue on such demise, and the plaintiff obtained a verdict of 20s. damages; held, that he was entitled to full costs, notwithstanding the judge had certified under 43 Eliz. c. 6. *Thomas v. Davies*, 3 Nev. & P. (q. s.) 567.

51. In trespass, for breaking, &c., and taking the plaintiff's goods, plea the fraudulent removal of the goods by S. from the premises, to avoid distress for rent, and justifying the entry and seizure under 11 Geo. 2, c. 19, s. 1; held bad on demurrer, as the plea should have been confined to the breaking and entering into the house of plaintiff, the denial that the goods were the plaintiff's being only indirect and argumentative, and it being inconsistent with the right to seize under the statute, that they were at the time of seizure the goods of the plaintiff, and not of the tenant. *Fletcher v. Marillier*, 1 Perr. & Dav. (q. s.) 354.

52. Plea in trespass, justifying the entry and seizure of the plaintiff's goods under a *f. fa.*, replication admitting the issuing of the writ and warrant thereon, that the defendant committed, &c. *de injuria*, &c.; held, that the seizure was not thereby admitted, and that it was competent to the plaintiff to show on that issue, either that there had not been any seizure, or a merely colorable one; and, *sem*, it would be sufficient for him to have relied on his mere possession, without going on to establish his title to the possession. *Carnaby v. Welby*, 1 Perr. & Add. (q. s.) 98.

And see *Lucas v. Nockells*, 10 Bing. 157.

53. Plea, in trespass for entering plaintiff's house, and taking his goods, that the house was not the house of the plaintiff, nor the goods his, and on the trial, the jury found that certain parts of the goods only belonged to the plaintiff; held, that the issue as to the property in the goods was divisible, and the *postea* ordered to be amended, as to the goods found not to be his. *Routledge v. Abbott*, 3 Nev. & P. (q. s.) 560.

54. The power of the vestrymen of Marylebone,

under 35 Geo. 3, c. 72, to regulate stands for hackney-coaches, is not superseded by 1 & 2 Will. 4, c. 22, and a *cabriolet* standing for hire on one of the places prohibited by such regulations, held not within the exception in 57 Geo. 3, c. 29, and might therefore be seized by the proper officers. *Frost v. Williams*, 2 Nev. & P. (q. s.) 475; and 7 Ad. & Ell. 773.

55. Plea in trespass for entering plaintiff's chamber, that the defendant's wife was there, and that he entered to reclaim her, where the plaintiff unlawfully harbored her; held, that having separated himself from her by a deed of separation, it amounted to a license, and that whilst it stood without any notice of having revoked it, he could not enter into the house of a stranger for the purpose of reclaiming her; held also, that mere exclusive possession by the plaintiff of the house was sufficient to entitle the plaintiff to maintain the action. *Lewis v. Ponsford*, 8 C. & P. (N. P.) 607.

56. The plea, denying the close in which, &c., to be the plaintiff's, held to bring the title in issue within 22 & 23 Car., c. 9, s. 136, and the plaintiff succeeding entitled, although with only one farthing damages, to full costs. *Pugh v. Roberts*, 6 Dowl. (r. c.) 561.

57. Where the plaintiff recovers in trespass for false imprisonment, although less than 40s., he is entitled to full costs. *Booth v. Drake*, 6 Dowl. (r. c.) 564.

58. In trespass for assault and battery, plea, that the defendant was in possession of a dwelling-house, and that the plaintiff disturbed him, and entered into it, wherefore, &c., it appeared from the evidence that the defendant merely lodged in one room, the landlord keeping the key of the outer door; held, that the replication putting the whole plea in issue, the plea was not sustained by the evidence. *Monks v. Dykes*, 4 Mees. & W. (xx.) 567.

59. Plea in trespass, for breaking and entering plaintiff's house, and seizing goods, as to the breaking and entering, &c., leave and license, and not guilty as to the residue, the plaintiff having recovered damages 6d.; held, that it not appearing that the title was in issue, the judge had power to certify to deprive the plaintiff of costs. *Mills v. Stevens*, 6 Dowl. (r. c.) 593.

60. In trespass for breaking and entering plaintiff's close, and taking straw, to which there was the plea, 1st, not guilty; and, 2dly, that the straw was not the plaintiff's, on which issues were taken, and the first found for the plaintiff; held, that there being nothing on the record to show that the title came in question, the plaintiff was entitled to no more costs than damages. *Patrick v. Colerick*, 4 Mees. & W. (xx.) 527; and 7 Dowl. (r. c.) 201; overruling *Hughes v. Hughes*, 4 Ib. 532.

And see *Action; Attorney; Beer Acts; Costs; Distress; Justices; Pleading*, (c. L.); *Sheriff; Way*.



## TROVER.

1. Where in trover by assignees of an insolvent for five horses, harness, &c., one plea alleged that they were delivered to the insolvent by the defendant, on an agreement for lien thereon until the price paid; and it appeared that, of the five originally delivered, three had died, and others were substituted by the insolvent, who, upon his going to prison, sent an order for delivering the five to the defendant; the plaintiff having newly assigned that the conversion was of other horses, &c., than in the plea mentioned; held that, under this assignment, the plaintiff was entitled to prove the taking of horses, &c., not justified under the lien; and that the circumstances made out a sufficient *prima facie* case for a jury, that the transfer, as regarded the three horses, was voluntary. *Bolton v. Sherman*, 2 Mees. & W. (xx.) 395.

2. Where the sheriff seized and sold horses, the alleged joint property of the defendant and another, and which the jury found; and, in trover by the latter, the plea in substance alleged them to be the property of the defendant, and which was the issue raised; held that, upon the finding of the jury that they were joint property, the plaintiff was entitled to recover. *Farrer v. Beawick*, 1 Mees. & W. (xx.) 682; and 1 Tyr. & Gr. 1053.

3. The verdict ought to be the value of the property taken. Upon the issue, that the defendant did not convert, the judge refused to allow witnesses to be cross-examined as to the property belonging to another, by way of reducing the damages. *Finch v. Blount*, 7 C. & P. (n. r.) 478.

4. Special damage is recoverable in trover, if stated in the declaration, otherwise the value of the articles at the time of the conversion is the proper measure of damages. *Davis v. Oswell*, 7 C. & P. (n. r.) 804.

5. Where the evidence amounted to proof of actual conversion, held that, if it were done by the plaintiff's authority, it ought to be specially pleaded; and that, if it appeared that the plaintiff at the time had parted with the property in the goods, the defendant might avail himself of it under a plea, that the plaintiff was not possessed as in the declaration mentioned. *Vernon v. Shipton*, 2 Mees. & W. (xx.) 91.

6. Where in trover, upon the issue of no property in the plaintiff, the defendant having shown himself in possession for four years after a gift by a party to whom he was administrator; held that, having put in the letters of administration, evidence of declarations by his deceased testator were admissible against him. *Smith v. Smith*, 3 Bing. N. S. (c. r.) 29; and 3 Sc. 352.

7. Plea, in trover for a tree, that defendant was seized in fee of a close, and cut down the tree which he afterwards delivered to a party, who delivered it to the plaintiff, and that the defendant afterwards took it out of the plaintiff's possession, which was the conversion in the declaration mentioned; held, that such plea was good, although not confessing a conversion, since the

new rules. *Morant v. Siger*, 2 Mees. & W. (xx.) 95; and 5 Dowl. (r. c.) 319.

8. Where the pleas in trover raised questions on the right of lien on the Factors' Act, the court allowed pleas thereon to be joined with the pleas of not guilty, and that the plaintiffs were not lawfully possessed of the goods. *Jaulley v. Britton*, 4 Sc. (c. r.) 380.

9. Where in trover for goods seized in execution whilst in possession of a third party, under which they were sold to the defendant, held that upon a plea denying the plaintiff's possession, the defendant might show authority to sell by the plaintiff, and which might be presumed from his interfering with the execution creditor in the disposal of the goods, after knowledge of seizure, and no mention made of claim. *Pickard v. Sears*, 6 Ad. & Ell. (x. n.) 469.

10. Where C. in the usual course of dealing consigned a cargo of oats to B. and remitted bills which the latter accepted, but before the ship sailed C. became bankrupt, having sent the bill of lading indorsed in blank to F without communicating the transactions with B., and F. transmitted the bill of lading to B., with instructions to act for him, who paid the freight and took possession of the cargo as a security for his own acceptances for C., but which was afterwards taken under a foreign attachment by creditors of C.; held that there was no transfer of the property to B. nor lien, and that he could not maintain trover in respect thereof. *Bruce v. Wait*, 3 Mees. & W. (xx.) 15.

11. Fixtures, parcel of the freehold, although as against the landlord the tenant may have a right to remove them, cannot be deemed recoverable as goods and chattels in trover. *Mackintosh v. Trotter*, 3 Mees. & W. (xx.) 184.

And see *Minshall v. Lloyd*, 3 Mees. & W. 450.

12. Where in trover for a deed, upon the issue that the plaintiff was not possessed thereof, it appearing that the plaintiff having the legal title as mortgagee, had assented to its being delivered to the defendant to raise money for the discharge of a bill for which both were liable; held that the defendant being entitled to hold the papers in possession until the money advanced by the defendant was repaid, the plaintiff could not maintain the action. *Owen v. Knight*, 4 Bing. N. S. (c. r.) 54; 3 Sc. 307; and 6 Dowl. (r. c.) 244.

13. Plea in trover that one R. lawfully in possession, pledged the goods to the defendant; held bad on demurrer. *Jaulley v. Britten*, 4 Bing. N. S. (c. r.) 243.

14. Where the plaintiff, claiming to be the mortgagee of goods seized in execution, and about to be sold, stood by without any opposition or intimation of his right; held, that such conduct was to be submitted for the opinion of the jury, whether he had not ceased to be the owner. *Pickard v. Sears*, 2 Nev. & P. (q. n.) 488; and 5 C. 6 Ad. & Ell. 469.

And see *Heane v. Rogers*, 9 B. & C. 686; 4 M. & M. 468; and *Graves v. Key*, 3 B. & Ad. 318, n.



15. In trover for certain goods and fixtures, &c. alleging that the same came to the hands of two of several defendants, and that the said defendants converted, &c.; held, 1st, that the said defendants must, after the verdict, be taken to mean all the defendants; and, 2dly, that the word *fixtures* did not necessarily mean things affixed to the freehold, and that after the verdict, the court, if it could be taken in a sense to support the declaration, would do so. *Sherrin v. Rickie*, 7 Dowl. (P. C.) 335; and 5 Mees. & W. (ex.) 175.

16. In trover for goods against the assignees of a bankrupt, held, that the defence that the goods were at the time in the order and disposition of the bankrupt, ought to be specially pleaded; the property does not pass, but the assignees have, under the act, only a right of sale: the court (Exq.) afterwards granted a new trial, being of opinion that the evidence was admissible under the plea that the plaintiff was not possessed as of his own property. *Isaacs v. Belcher*, 8 C. & P. (N. P.) 714.

17. Where W., the owner of a chronometer, being about to proceed on a voyage, obtained from the defendants a loan upon a memorandum, that he thereby made over to them the instrument to be held until repayment, they allowing him the use of the instrument for the voyage; on his return, he placed it in the hands of B., and subsequently the plaintiff, an attorney, having a *fi. fa.* against W., obtained a note to B., for delivery over of the instrument, which B., in ignorance of the circumstances, agreed to hold for the plaintiff; held, in trover, that the possession of W. being consistent with the terms of the delivery, the property remained in the defendant until the condition of repayment was performed. *Reeves v. Capper*, 5 Bing. N. S. (C. P.) 136; and 6 Sc. 877.

18. The declaration in trover being general, the plaintiff must show what goods the defendant took into his possession, the value of which is the proper measure of damages. *Cook v. Hartle*, 8 C. & P. (N. P.) 368.

19. Where I., a merchant in Ireland, employed the plaintiffs as his factors at Liverpool, and shipped a full cargo of oats on board a boat, No. 604, and took a boat receipt or bill of lading from the master, acknowledging the receipt of the oats deliverable in Dublin in care for and to be shipped to the plaintiff in Liverpool; on the same day I. received from the master of another boat, No. 54, a like receipt, but no part of the cargo was shipped, although prepared for loading, and he wrote to the plaintiffs that he "had valued on them for £— against those oats," and inclosing the receipts, and they accordingly accepted the bills, and remitted it to I.; in the meantime the defendant, a creditor of I., pressing him for security, he consented to give an order on his agent in Dublin to deliver the cargo of No. 604; held that, on the acceptance of the bill, the plaintiffs acquired a complete title to the cargo of that boat, but that, as to the second cargo, there being nothing at the time on which the undertaking of the boat-master could operate, and the intended cargo being afterwards otherwise appropriated by I., the plaintiffs could only support trover for the

former cargo. *Bryant v. Nix*, 4 Mees. & W. (ex.) 775.

And see *Action; Arrest; Assumpsit; Attorney; Bankrupt; Bill; Contract; Factor; Highway; Pleading (C. L.); Ship; Stoppage in Transitu.*

## TRUSTEE.

1. Where a surviving trustee, who had failed to appoint new trustees of the estate, by his will devised all his real estates, according to the tenure and nature thereof, to the defendant, his heirs, &c. to and for his and their own use and benefit; held, that the trust estate passed thereby, and that the devise might be compelled to convey it to new trustees. *Bainbridge v. Lord Ashburton*, 2 Younge (ex. exq.) 347.

2. Where, upon the sale of an estate by the equitable owner, the party having the mere legal estate refused to convey, unless the *cestui que trust* of the proceeds (declared by a deed of even date) were made parties to the conveyance; held, that he could not justify such refusal; but, as he appeared to have acted *bona fide* under advice which misled him, the court would not charge him with costs of the suit occasioned by his refusal. *Angier v. Stannard*, 3 Myl. & K. (ex.) 566.

3. Where the testator gave an option to one of his three executors to become the purchaser of a particular estate, at a stated price, amongst others directed to be sold, and the other executors conveyed to him, and signed the receipt indorsed for the purchase-money; held that, upon the bankruptcy of their co-trustee, without having paid the money, they were liable. *Gregory v. Gregory*, 2 Younge (ex. exq.) 313.

4. Where, by various charges created on the trust-fund, the tenant for life had exposed them to responsibilities to third persons, the court, on the application of the trustees, discharged them, and appointed others, the costs to be paid out of the interest of the tenant for life. *Coventry v. Coventry*, 1 K. (ex.) 758.

5. Where a trustee, after having acted, declined to perform the trust without sufficient reason, and thereby rendered a suit necessary to obtain the appointment of another, the court refused to allow him his costs. *Howard v. Rhodes*, 1 K. (ex.) 581.

6. Where a party directed a sum of money to be carried to a joint account of herself and the plaintiff, as trustee for the plaintiff, and the bankers gave her a promissory note for the amount, expressing that it was given to her as trustee, and was so entered in their books, which note, after the death of the party, was received by her executors; held, that a trust was completely declared, and that the executors were trustees of the money received for the party in whose favor the trust was declared. *Wheatley v. Purr*, 1 K. (ex.) 551.

7. The heir of a mortgagee, out of the jurisdiction, held not to be a trustee within the meaning of the 8 sect. of 11 Geo. 4 & 1 Will. 4, c. 60;



and an order for the reconveyance of the mortgaged premises vested in him, refused. In re Dearden, 3 Myl. & K. (CH.) 508.

8. The case of *Garrard v. Lord Lauderdale*, 3 Sim. 1, affirmed 1 Russ. & M. (CH.) 451.

9. Where several trustees are implicated in a breach of trust, the bill to recover the trust-fund cannot be against some of them only, but all those who are living, and the representatives of such as are dead, must be made parties; and where part of the fund belongs to A. and part to B., and a suit is instituted by A. alleging the whole fund to have been misdealt with, the court will not give relief unless B., who is interested in the fund, be also made a party to the suit. *Munch v. Cookerell*, 8 Sim. (CH.) 219.

10. But where A. being entitled to a trust-fund assigned it to trustees on certain trusts of her settlement, under which B became entitled; the fund was never transferred, and the house in which it had been deposited by the original trustees, failed; in a suit against them to make them liable for the fund, held that the latter trustees were not necessary parties. *Id.*

11. Although a trustee, being a solicitor, may by agreement be entitled to some personal benefit for the discharge of the duties as trustee, the agreement for that purpose must be distinct; where by the terms of the deed, the expressions applied strictly only to disbursements and liabilities, held that it could not extend to remuneration, and that in taking the account against them the master was to allow only charges and expenses properly incurred and paid by them. *Moore v. Frowd*, 3 Myl. & Cr. (CH.) 45.

12. Where testator bequeathed the whole to his wife absolutely, "having a perfect confidence in her acting up to the views which I have communicated to her in the disposition after her decease;" upon a bill filed by two natural children alleging the request of the testator and the promise of the wife to give the whole after her decease to them; held, that if such allegations were established, a trust would have been created in favor of the plaintiffs, but that completely failing in proof, the bill dismissed with costs. *Podmore v. Gunning*, 7 Sim. (CH.) 644.

13. Where personal estate of one of two trustees had been distributed among legatees in ignorance of a claim against the estate in respect of breach of trust; held that the *cestui que trust* were still entitled to follow the estate in the hands of the surviving legatees and the personal representative of the trustee and legatees of his deceased legatees, and that without any inquiry, whether the plaintiffs knew of, or acquiesced in the breach of trust, or of an arrangement made between the trustees and parties interested in respect thereof. *March v. Russell*, 3 Myl. & Cr. (CH.) 31.

14. Where by one deed of settlement, a fund and estates of the wife were settled to her for life, remainder in trust for the children of the marriage, and by another deed the husband settled a rentcharge on his estates in trust for the wife for life; she, after her husband's death, ob-

tained by fraud and concealment of the settlement, the fund to be transferred to her, and assigned her life interest in her estates to a party with notice of the fraud; held that the rents of her estates and the rentcharge were liable to be applied in replacing the fund, and a receiver appointed. *Woodyatt v. Gresley*, 8 Sim. (CH.) 180.

15. Where one of two trustees refused to act, and went abroad, and the other acted solely in the trust, held that he was invested with the power to sell under the London Bridge Acts. *Tatham, ex parte*, 3 Younge & C. (xx. xq.) 67.

16. Where testator devised real and personal property to trustees for his children, as mentioned in certain schedules, and by the residuary clause gave all his residuary, personal, and real estates for them equally, but having omitted a freehold, by a codicil declaring his intention to have included it in one of the schedules, he directed it to pass as the other property mentioned in it, but such codicil was attested by one witness only; held, that as it could not pass thereby, it was not precluded from passing under the residuary clause, by reason of the difficulty of executing the trust, and that the legal estate passing to the trustees, they were entitled to recover the title-deeds from the defendant, the heir who claimed the estate. *Barclay v. Collett*, 4 Bing. N. S. (c. r.) 650; and 6 Sc. 408.

17. Upon a devise to trustees *inter alia* after the death of a party entitled for life to apply the rent for the testator's grandson only during minority, who attained 21 during the life of the tenant for life, and by a deed reciting the fact, and that it had become unnecessary for the trustees to act, but that, having the legal estate, they joined in the conveyance of the premises; held, that the deed was sufficient evidence of their having accepted and acted on the trust. *Urch v. Walker*, 3 Myl. & Cr. (CH.) 702.

18. Where a sum charged on West India estates by will became vested in a surviving trustee, become lunatic, but not found such by inquiry, held to be a case within 1 Will. 4, c. 60, and on the master's report, new trustees appointed, and a person appointed to assign the sums and interest to such trustees. *Welch, in re*, 3 Milne & Cr. (CH.) 292.

19. Where the defendants were surviving partners, and executors and guardians of their deceased partner, held that the *cestui que trusts* were not barred by the lapse of 30 years, nor by partial releases executed on insufficient knowledge of the partnership affairs and state of accounts, from calling for inquiry and account, and claiming a share in the profits arising from the estate of the deceased having been continued and used in the partnership, although during successive changes in the firm: *semble*, time is only a bar in cases of trust when there has been a direct and independent dealing between the trustees and *cestui que trusts*, and upon full information and examination of all the documents and evidence after that relation has terminated. *Wedderburn v. Wedderburn*, 2 Keene, (CH.) 722.



20. Where a trustee to whom the settlor conveyed property in India in trust to raise a sum and remit to England, permitted the trust fund to remain in his partner's hands, who, after his death, with the consent of the settlor, invested it in an East India Company's bill; held to be a breach of trust, and the fund never after being realized in this country, held that the estate of the trustee was liable to make good the trust-fund, affirming the judgment of the Vice Chancellor. *Bacon v. Clift*, 3 Milne & Cr. (Ch.) 294.

21. Trustees of lands devised subject to debts are empowered to mortgage the lands as a security for monies borrowed for the purposes of the will, and where they were authorized to sell and invest in the purchase of other estates, they were conveyed upon the trusts of the will; held, that they had the same power to mortgage the purchased as they had of the devised estates. *Ball v. Harris*, 8 Sim. (Ch.) 485.

22. So, where it is necessary to mortgage real estate for payment of debts, the court, under 11 Geo. 4, and 1 Will. 4, c. 47, s. 11, directs infant heirs to convey to the mortgagee. *Holmes v. Williams*, lb. 557.

23. Where, to a bill alleging misapplication of trust-funds, the answer stating that the funds so applied had been mistakenly included in the settlement, held to be a ground for inquiry, although no case made out by the bill, the master having executed the trust-deed. *Angell v. Dawson*, 3 Younge & C. (Ex. Eq.) 308.

24. Where the master had refused to assent to the conversion of the stock under 3 Geo. 4, c. 9, for the reduction of the Five per Cent., held that it was a proper subject for enquiry whether he acted in the exercise of a reasonable discretion in so dissenting. lb.

25. The court will charge a trustee with interest on a proper case, although not prayed by the bill, and may nevertheless give him costs, and the mere non-insertion of an item is not such a special case as to subject him to a higher interest than four per cent. *Woodhead v. Marriott*, 1 Coop. (Ch.) 62.

26. Upon the appointment of new trustees under an order of the court upon petition, all that is necessary for the person appointed to execute the conveyance is, to execute the tendered deed, and that it be expressed in the attestation clause that he had executed it in the place of the refusing trustee pursuant to the order. *Foley, ex parte*, 8 Sim. (Ch.) 395.

27. A trustee, by proving the will, undertakes the trusts, and if he stands by inactive and sees his co-trustee commit breaches of trust, will be liable, if any loss is incurred; but if the *cestui que trust* concur, the fund to which he may be entitled will be liable to compensate him. *Booth v. Booth*, 1 Beav. (Ch.) 125.

28. On reference of expenditure by a master, although not authorized by the terms of the will, the intention of the court is to ascertain whether it has been to the advantage of the objects of the trust. *Umblesby v. Kirk*, 1 Coop. (Ch. c.) 254.

29. Where it was expressly provided that the trustee should get in money due, and by the consent of the *cestui que trust* it was allowed to remain outstanding, but they were afterwards called upon to enforce the payment and to invest; held, that he was bound to do so without indemnity, and on a suit to compel the trusts to be carried into execution he was liable to pay costs. *Kirby v. Mash*, 3 Younge & C. (Ex. Eq.) 295.

30. The order made by the court for a surviving trustee to transfer stock under 11 Geo. 4, & 1 Will. 4, c. 60, s. 10, does not dispense with the necessity of a request, which must be made by the party. *Madge v. Riley*, 3 Younge & C. (Ex. Eq.) 425.

31. In a suit for the appointment of new trustees, a clause to enable the new ones to appoint others in their room, refused. *Brown v. Brown*, 3 Younge & C. (Ex. Eq.) 395.

32. Exchequer bills held not an investment within the meaning of "Government security." *Chaplin, ex parte*, 3 Younge & C. (Ex. Eq.) 397.

And see *Agent; Bank of England; Bankrupt; Charge; Charity; Corporation; Devise; Injunction; Mortgage; Partner; Power; Receiver; Resulting Trust; Savings Bank; Specific Performance; Will*.

## TURNPIKE.

1. An inquisition to assess the value of lands, taken by the trustees upon a jury impanelled under the 3 Geo. 4, c. 126, in the case of lessees separately interested, must ascertain the compensation to each, and should set out the notice given to the parties of the intention to impanel a jury, and where none appears, it will be void for want of showing jurisdiction; and a defect cannot be supplied by any subsequent proceedings of the trustees. Where the proceeding is under the 3 Geo. 4, c. 26, the *certiorari* is not taken away by the 4 Geo. 4, c. 95, s. 87. *R. v. Trustees of Norwich and Watton*, 1 Nev. & P. (K. B.) 32.

2. Acts continued until 1 June, 1839, 7 Will. 4 & 1 Vict. c. 11.

3. Where the commissioners discharged the clerk, the notice required by 4 Geo. 4, c. 95, ss. 39, 43, not having been given, although ordered at a meeting, the omission having been through the misconduct of the clerk himself; held irregular, and a *mandamus* granted to restore him; those sections being to be taken in conjunction. *R. v. Wrexham Trustees*, 5 Ad. & Ell. (K. B.) 581.

4. The waggons of a wharfinger carrying goods brought by a canal to the defendants, the consignees, and in return collecting goods to carry to the wharf, held not to be stage-waggons within the meaning of a proviso in a local turnpike act, that, *inter alia*, stage-waggons conveying goods for hire should pay toll every time of passing and repassing. *Semb.*, the description applies only to conveyances which carry goods,



&c. for hire from one fixed point to another. *R. v. Ruscoe*, 3 Nev. & P. (q. n.) 428.

5. Bones uncrushed, carried to the plaintiff's farm to be there crushed for the purpose of manure, held to be manure within the exemption from toll under 3 Geo. 4, c. 126, s. 32, and 5 & 6 Will. 4, c. 18, s. 1. *Batt v. Brown*, 8 C. & P. (n. r.) 244.

Turnpike Acts continued, by 2 & 3 Vict. c. 31.

### UNIVERSITY.

Fees on admission of, and provisions for applying the rules as to admission of persons who have graduated at the universities; also to those who have graduated at London or Durham; and entitling attorneys admitted in one court to practise in any other, regulated by 1 Vict. c. 56.

### USE AND OCCUPATION.

1. Where the agreement was to occupy at a future day, held that there must be some evidence of occupation to maintain the action of use and occupation. *Woolley v. Watling*, 7 C. & P. (n. r.) 610.

2. Where premises were demised for a term, at a certain rent, and the landlord agreed to enlarge the buildings, the tenant agreeing to pay £10 per cent. on such outlay; held, that it was to be deemed a collateral agreement, and not a contract running with the land, for which on the bankruptcy of the tenant his assignees were liable. *Lambert v. Norris*, 2 Mees. & W. (ex.) 333.

And see *Donellan v. Read*, 3 B. & Ad. 899.

3. Where the evidence in an action for use and occupation did not disclose any written agreement, held that the non-production of one, by which in fact the premises were held, was no ground of nonsuit. *Fry v. Chapman*, 5 Dowl. (r. c.) 265.

4. Where the only evidence of the plaintiffs' title as owners was, that one of them told the defendant, the tenant, that he had bought the reversion, on which the defendant wished him joy of the purchase; but upon afterwards sending to demand the rent, the defendant refused to pay, saying he had received notice to quit, and an action brought against him for the rent; held, that it was a question for the jury, if the conduct of the defendant amounted to an admission of the plaintiffs' title, so as to render him liable to them: the jury found for the defendant. *Stephens v. Lyan*, 8 C. & P. (n. r.) 389.

5. Debt for rent, for use and occupation, on a parol demise by the assignee of the reversion, held not maintainable as to the rent accruing for the occupation before the assignment: the proper remedy would have been for debt for rent on a

parol demise. *Mortimer v. Preedy*, 3 Mees. & W. (ex.) 602.

6. Where the defendant was tenant from year to year of part of premises which were destroyed by fire accidentally occurring in the middle of the quarter; held, that the defendant continued liable for rent until the tenancy duly put an end to, and that the plaintiff might recover the rent in an action for use and occupation, the act of non-repairing by the landlord not amounting to an eviction. *Izon v. Gorton*, 5 Bing. N. S. (c. r.) 501.

And see *Action; Bankrupt; Charity; Landlord; Mines; Pleading*, (c. l.)

### USURY.

1. Laws relating to usury, not to extend to certain bills of exchange and promissory notes. By 1 Vict. c. 80.

2. Where, by the terms of dealing between an English house and a foreign merchant, 6l. per cent. was to be paid on future balances, which by the foreign law was legal; held that the questions were, first, whether the contract was to be performed in England, and that it was a fit case for an issue to be tried by a jury as to the intention of the parties, and that if it was to be performed in England, that it was to be deemed an English contract; secondly, that, to constitute the agreement usurious, the jury were to be satisfied that the substance of the contract was that the interest was to be taken for the loan or forbearance of money. *Guillebert, ex parte*, 2 Deac. (n.) 509; and 3 Mont. & Ayr. 455.

3. Where, after a refusal to advance a sum on mortgage of leasehold premises, it was agreed that in consideration of £400 the borrower should grant two annuities of £20, to be issuing out of the premises; held, that as the money to be paid would clearly exceed five per cent. on the sum advanced, the transaction was usurious. *Chillingworth v. Chillingworth*, 8 Sim. (ca.) 404.

4. Where the inference to be drawn by the court from the facts stated was, that a loan was agreed upon and made upon the security of the deposit of a lease, and that the security of a note and warrant of attorney were added, for the purpose of legalising the demand of interest beyond five per cent.; held, that the transaction was not within 3 & 4 Will. 4, c. 98, s. 7, or 1 Vict. c. 30, those acts contemplating the case of interest taken upon or secured by a bill or note, as the real and bona fide ground of the debt. *Berrington v. Collins*, 5 Bing. N. S. (c. r.) 332.

And see *Bankrupt; Bills*.

### VAGRANTS.

Vagrant Act amended by 1 & 2 Vict. c. 38.



## VENDOR AND PURCHASER.

1. In *assumpsit* by the purchaser of leasehold premises, the declaration alleging the contract as for the sale of the premises free and clear from all incumbrances and *liabilities* whatsoever, and issue thereupon; held that, the premises being liable to be taken for the purposes of a local Act, the defendant was entitled to a verdict on that count. *Ballard v. Way*, 1 Mees. & W. (xx.) 520; and 1 Tyr. & Gr. 851.

2. Where, upon the sale by the defendant of wheat in the warehouse of his agent, he gave directions, and the wheat was transferred into the plaintiff's name; held, that the property passed thereby, and that the defendant could not give evidence that others were jointly interested with the plaintiff in the purchase. *Kieran v. Sanders*, 1 Nev. & P. (x. n.) 625.

3. So, where the goods were sold by the defendants (brokers) at their auction rooms, and an invoice delivered in their own names as sellers; held, that they could not afterwards offer evidence that they sold as agents of parties whom the plaintiff knew to be principals at the time of the sale. *Jones v. Littledale*, 1 Nev. & P. (x. n.) 677.

4. A purchaser under a decree, one of the conditions of sale being the payment of the money into court by a certain day, held liable to pay the costs of the order for that purpose, but entitled to the costs of reference of title to the master. *Camden v. Benson*, 1 K. (ch.) 671.

5. Where defendant was found to have purchased with notice of prior title under a settlement, and lost the benefit of his purchase by being evicted; held that, in an account of rents and profits, there being no fraud, he was not to be charged with rents which he might have received without his fault or neglect; and that such decree ought to contain a direction for just allowances; held also, that his admission, that he had been in the possession of the rents and profits since a certain time, did not preclude him from showing before the master that part of the rents had been paid by tenants to other parties. *Howell v. Howell*, 2 Myl. & Cr. (ch.) 478.

6. Where the vendor knows the purchase-money is trust-money, and suffers one of the trustees to retain part without the knowledge of the other co-trustees, or *cestui que trust*; held, that he cannot be permitted, as against them, to say that he had a lien on the estate for the unpaid part of the purchase money; held also, that the vendor having signed a receipt for the whole purchase-money, but allowed part to remain unpaid, and he continued in possession of the premises as tenant to the purchaser, such possession was not notice to a subsequent purchaser or incumbrancer of his lien on the estate for the part of the money unpaid. *White v. Wakefield*, 7 Sim. (ch.) 401.

7. Where the purchaser, for valuable consideration, claimed under a party who had obtained possession under a forged will, which no reasonable diligence could have discovered; held, that

the legal estate acquired from a trustee of a satisfied mortgage protected him as a purchaser for valuable consideration without notice; the protection is to be extended, not merely to cases in which the title of such purchaser is impeached by reason of a secret act done, but also to cases in which it is impeached by reason of the falsehood of a fact of title asserted by the vendor, or those under whom he claims, when such asserted title is clothed with possession, and the falsehood of the fact asserted could not have been detected by reasonable diligence. *Jones v. Powles*, 3 Myl. & K. (ch.) 581.

8. Where, upon the purchase, the vendor contracted in lieu of the consideration-money to accept an annuity, which was carried into effect by the bond of the vendee conditioned accordingly, and a receipt for the consideration of the purchase was indorsed upon the conveyance; held, that it was the case of a substitution, and not of a security for the price, and that the lien on the premises for the purchase-money was discharged; and affirmed on appeal. *Parrott v. Sweetland*, 3 Myl. & K. (ch.) 655.

9. Upon a condition of sale to deliver an abstract and deduce a good title; held, that the purchaser was entitled to have a good title deduced and *proved*, either by the production of the deeds professed to be abstracted, or by such other evidence as would satisfactorily prove the statement in the abstract to be correct, and that such right was not affected by marginal notes that certain deeds mentioned are not in the possession of the vendor. *Southby v. Hutt*, 2 Myl. & Cr. (ch.) 207.

And see *Dick v. Donald*, 1 . . S. 661.

10. Where the value is increased to the purchaser by the wearing of lives between the time of his entering into possession and payment of the purchase-money, *sembl.* he is liable to interest from that time. *Champernowne v. Brooke*, 3 Cl. & Fi. (r.) 4; and 9 Bli. N. S. 199.

11. Upon a settlement of an expectant reversion in trustees, with power to sell or exchange for lands in possession, and sale by them for an entire sum; the purchaser afterwards objected that no sale could be made until the reversion came into possession, and waived all other objections, being aware that the contract could not be performed unless the purchase-money were apportioned between the tenants for life; held, that he could not, upon a good title being declared, object to the apportionment, but that, if the parties could not agree, the apportionment must be made by the master. *Clark v. Seymour*, 7 Sim. (ch.) 67.

12. Where A., the tenant for life, under a settlement of estates in trust, under which the trustees had a power to sell at the request and by desire of the tenant for life, entered into a contract for sale absolutely, and the trustees afterwards refused to concur in the sale; held, first, that the contract was binding on A. if he were able to complete it; secondly, that the trustees had a discretion which the court could not control; and, lastly, that the purchaser was not entitled to have it specifically performed to the extent of



A's interest, by the conveyance of his life-interest and ultimate reversion, in default of issue of the marriage; the court will not execute a contract partially, which may affect the interests of parties entitled to the estate, subject to the limited interest of the vendor, or where the just amount of abatement, on mere grounds of disappointment, cannot be ascertained satisfactorily. *Thomas v. Deering*, 1 K. (ch.) 720.

13. Where a purchaser for valuable consideration submits to answer, he must answer fully. *Portarlington, Earl of, v. Soulbey*, 7 Sim. (ch.) 29.

14. Upon a devise of an estate upon trust by sale or mortgage to discharge a specific debt, and apply the residue for the benefit of the testator's children; the purchaser (son of the surviving trustee) discharged the debt, but left the remainder unpaid, and gave his bond as a security, and the estate was settled upon his marriage to the wife and issue, the settlement reciting the conveyance and the will; held, that it amounted to notice of the will, and was binding on the wife and children, although the settlement did not notice the will, and created a lien as against them on the estate for the residue of the purchase-money; held also, that a purchaser for valuable consideration under a marriage contract, must show that he had no notice at the time of the settlement, and not merely at the time of the marriage articles. *Davies v. Thomas*, 2 Younge (ex. eq.) 234.

15. Upon a bill to restrain the defendant from setting up an outstanding mortgage term which had been satisfied but not assigned, the plaintiff claiming as heir for default of appointment; held, that it was unnecessary to charge notice, and, if charged generally, evidence of particular facts and conversation might be proved; held also, that where the answer denied facts upon belief only, the court might act upon the testimony of one witness, although uncorroborated by circumstances, and although the answer was positive, and no other means of contradicting the fact. *Hughes v. Garner*, 2 Younge (ex. eq.) 328.

16. Where the personal representatives of a deceased partner agreed to sell his interest to the surviving one, stipulating to furnish at their own expense an abstract of their title to it; held, to mean the usual abstract of title, and not merely of their own title as administrators. *Morris v. Kearsley*, 2 Younge (ex. eq.) 139.

17. In *assumpsit* against an auctioneer to recover back the deposit paid on the sale of premises, of which the title had not been completed; held that, as it appeared that the defendant was in the character of stakeholder between the parties, he was not entitled to notice of the contract having been rescinded. *Duncan v. Cape*, 2 Mees. & W. (ex.) 244.

18. Where, in a declaration on a warranty of a horse sold to the plaintiff, which he had resold at an advanced price, and had returned upon his hands, there was no allegation that the increased price arose from improvement in the interval, by money laid out by the plaintiff; held, that the plaintiff could not recover for the mere loss of a good bargain, nor could he recover the expenses

of taking a veterinary surgeon's or counsel's opinion, or his attorney's charges, which were steps taken for his own safety in bringing the action. *Clare v. Maynard*, 1 Nev. & P. (ex. n.) 701; and 7 C. & P. 741.

And see *Walker v. Moore*, 10 B. & Cr. 416.

19. An auctioneer in the country, under circumstances of an insolvent estate, allowed to conduct the sale, to save the expense of sending the master's clerk. *Thompson v. Hodgson*, 2 Younge (ex. eq.) 311.

20. Biddings opened on the sale of mortgaged premises on an advance of £190 on £310. *Hutchinson, ex parte*, 2 M. & Ayr. (s.) 727.

21. Biddings opened on an advance of less than 4 per cent., under circumstances. *Cochrane v. Cochrane*, 2 Russ. & M. (ch.) 684.

22. The provision in 17 Geo. 3, c. 50, s. 8, for making void the contract of sale upon neglect or refusal by the purchaser to pay the auction duty, the object being to protect the revenue, held to be construed to avoid the contract only at the option of the vendor, and that the purchaser could not by his own wrong avoid his own contract. *Malins v. Freeman*, 4 Bing. N. S. (c. r.) 395.

23. The vendor held liable to the expense of the purchaser's solicitor going from place to place to compare the abstract with the deeds, and that he was not bound to send the abstract to an agent in a country town for that purpose. *Hughes v. Wynne*, 8 Sim. (ch.) 85.

24. Upon a sale, under a decree in a creditor's suit, two years after confirmed by the master, held that four years after it was too late to seek to set aside the sale on the ground of misdescription of quantity, and the creditor applying (the others repudiating) having the means of knowing the extent as well as value; and petition dismissed with costs. *Price v. North*, 2 Younge & C. (ex. eq.) 620.

25. Where an estate is sold under a decree, and upon reference of title the master reports against it; held that the purchaser is entitled to the costs of the payment out of the fund in court, and those consequent upon his becoming purchaser, and of investigating the title. *Att.-Gen. v. Newark Corp.*, 8 Sim. (ch.) 71.

26. Where a party entitled to an interest in 1,000*l.*, part of a sum directed by a testator to be invested, and which had been done in the Three Per Cents., advertised it for sale, describing it as "a reversion to 1,000*l.* principal, payable on a contingency, and part of—*l.* invested in the Three Per Cents.," and the plaintiff becoming the purchaser, the deed of assignment reciting the bequest described it as the sum of 1,000*l.* sterling, being one moiety of the legacy of 2,000*l.* bequeathed by the will; held that the purchaser was entitled to the interest in the legacy in its state of investment. *Lucas v. Bond*, 2 Keene, (ch.) 136.

27. Where the printed particulars of sale and plans fully set out roads, &c., but disclosed a right of footpath only by reference to a lease of other premises, which might be seen at the office,



and calculated to mislead bidders, who could not by ordinary vigilance discover that any such right existed, held to amount to such a misdescription as entitled the purchaser to rescind the contract; and the purchase of two lots having been included in one agreement for the sale at one aggregate price, and as the purchaser might have been led into the contract for both by the power he might obtain from unity of seisin of extinguishing rights of way, and rendering the whole more valuable, he was entitled to annul the contract as to both lots. *Dykes v. Blake*, 4 Bing. N. S. (C. F.) 463.

28. Where any substantial part of the property purporting to be sold turns out to have no existence, or cannot anywhere be found, or if the description be so exaggerated as to be quite beyond the truth, and the vendor not acting *bona fide* in giving it; held that the purchaser is entitled to rescind the contract, notwithstanding a clause that any mistake in the description shall not vitiate the contract, but be a ground of compensation. *Robinson v. Musgrove*, 2 M. & Rob. (N. F.) 92.

29. Where the solicitor of the vendor went to the purchaser, and, in the absence of his solicitor or any person to advise him, induced him to pay the purchase-money for an estate to which the title was not made out, and to execute deeds of covenant for the production of deeds (for other purchasers) which were not in his possession, which was disapproved of and protested against by the purchaser's solicitor when informed of it; held that the vendor could not insist on it as an acceptance of the title, and the court would place the parties in the same situation as they stood in previously to the transaction; and, under the circumstances, the court decreed the contract to be rescinded, and the deeds delivered up to be cancelled, the defendants to pay the costs of investigating the title and of the suit, including auction duty. *Berry v. Armistead*, 2 Keene, (C. F.) 221.

30. On a bill filed by a legatee, and a sale directed by the court of real estate, the purchaser, on a good title not being made, held entitled to recover the costs and expenses of investigating the title, and confirming the purchase, from the plaintiff, who might recover them in the suit. *Berry v. Johnson*, 2 Younge & C. (Ex. Ex.) 564.

31. Purchaser allowed, under circumstances, to pay the purchase-money into court, and be let into possession, without prejudice to any objection on the subsequent investigation of the title. *Marfell v. Rudge*, 2 Younge & C. (Ex. Ex.) 566.

32. A slight disorder, as *influenza*, at the time of sale of a horse, not diminishing the usefulness, and of which he ultimately recovered, held not to constitute a breach of warranty of soundness. *Bolden v. Brogden*, 2 M. & Rob. (N. F.) 113.

33. Declaration on a warrant of a horse, sound and quiet in harness, plea *non assumpsit*, "*modo et forma*," held, that proof of the warranty being, that the horse was sound and quiet in all respects, supported the declaration, and that upon the issue the defendant could not go into the fact of soundness. *Smith v. Parsons*, 8 C. & P. (N. F.) 199.

34. Where, after a previous negotiation and

trial, the defendant wrote to the plaintiff to say he would purchase his mare at — guineas, "of course warranted," which, not being attended to, he, by a second letter, desired the mare to be sent, with a receipt, including "sound and quiet in harness," on which the plaintiff wrote to say that he would send it, that it was warranted sound and quiet in double harness, never having been tried in single; he accordingly sent it to the place appointed, and left it, with injunctions not to be parted with unless the price was paid; but the defendant's son afterwards came and took her away without payment, and in the course of two days was sent back as unsound; held, that there was no evidence of a final contract, nor of a delivery according thereto, so as to entitle the plaintiff to recover. *Jordan v. Norton*, 4 Mees. & W. (Ex.) 155.

35. Where lands were devised, "upon trust to permit my son to become the purchaser, at a sum stated, at any time within three months after my decease; but should my son not complete such purchase within three months from my decease," then to sell the same by auction; the son within that time gave notice of his option to purchase, but no conveyance was executed, nor any part of the purchase-money paid within the three months; held, that he could not afterwards enforce his option. *Dawson v. Dawson*, 8 Sim. (C. F.) 346.

36. Where the purchaser had been in possession for 20 years, and the objections made from time to time to the title appeared to be rather excuses for not completing the purchase than serious; held, that the continuing for so long a time in possession was to be taken to be a waiver of the objections, and that he was to be considered as having accepted the title. *Hall v. Laver*, 3 Younge & C. (Ex. Ex.) 191.

37. Where, on an agreement for purchase of premises, a sum was to be paid down by way of deposit, and in part of the purchase-money, and it was stipulated that in default by either of completing the purchase, he should pay the other £1,000 liquidated damages; the purchaser having thrown up the contract, on the ground of the vendor being unable to complete it on the day stated, and sued the vendor for the penalty, and for the deposit as money had and received, but the defendant obtained the verdict, and afterwards sold the premises to another; held, first, that the former action having failed on the ground that it was prematurely brought, the plaintiff might sustain the second action; and, secondly, that in the absence of any specific promise, the question whether the deposit shall be forfeited depends on the intent of the parties, to be collected from the whole instrument; and that, in the principal case, as a particular forfeiture was stipulated, the vendee could not retain the deposit. *Palmer v. Temple*, 1 Perr. & Dav. (Q. B.) 379.

38. Where at the auction, premises were represented of good and substantial, although unfinished buildings, being in fact in so ruinous a state as only fit to be pulled down; held, that the sale was void, and the purchaser entitled to recover back the deposit. *Robinson v. Musgrove*, 8 C. & P. (N. F.) 469.

39. Where, upon the sale of a ship to A.



and B., in which A. was to be interested in one-third, and B. in two-thirds, and upon the execution of the bill of sale, although expressing that B. had paid two-thirds of the purchase-money, only one-third was actually paid, and A.'s acceptances given for the remainder, which were, from A. becoming bankrupt, dishonored; held, that B. remained liable for the payment of the unpaid purchase-money, notwithstanding the form of the bills given for the amount. *Lynn v. Chaters*, 2 Keene, (CH.) 521.

40. Where a party is either agent for vendor and purchaser, or is himself vendor and agent for the purchaser, whatever notice he may have will affect the purchaser; and where the latter takes a conveyance from a vendor, not having the title-deeds, he is to be taken as having notice of the claim of the party who has the possession; and *semble*, the lien of the vendor for the unpaid purchase-money may be assigned by parol to a third party. *Dryden v. Frost*, 3 Myl. & Cr. (CH.) 670.

41. In *assumpsit* to recover back the deposit paid by the plaintiff upon a contract for the purchase of an estate from the defendant, on the ground of his being unable to make a good title, it appeared that being devisee in remainder after his mother's death, and subject to a small annuity to his sister, in the conditions of sale it was stated that the sister claimed under a deed of assignment of the premises to her in trust, but which deed was alleged to be a forgery; and it was stipulated that the purchaser should not make any objection on account of the alleged indenture, and that part of the purchase-money might remain on mortgage as an indemnity; held that the plaintiff having purchased, with notice of the defect, and precluded himself from objecting at all to the supposed deed, he could not insist upon it as a defect in the title which he had agreed to take, and was therefore not entitled to recover back the deposit on that ground. *Corrall v. Cottell*, 4 Mees. & W. (EX.) 794; and a specific performance afterwards decreed, 3 Younge & C. (EX. EQ.) 413.

42. Where, upon a decree for a specific performance of the purchase of an estate, the Master was to ascertain the amount of what was due for principal, interest, and costs; and that, in default of payment by a certain day, the estate was to be sold, and in case of a deficiency, the defendant was to be personally charged therewith, he died before the day appointed, and a creditor's suit was instituted in the same court; held that, upon revivor, the vendor was not entitled to prove against the general estate, but to resort to his equitable lien; and *quare*, in case of deficiency, whether he would be entitled to prove for the whole debt or the difference only. *Rome v. Young*, 3 Younge & Cr. (EX. EQ.) 199.

43. Where the Master's report of the purchase was confirmed absolute, and the purchaser was ready with his money, but the abstract not fully delivered, the Lord Chancellor allowed it to be paid into the bank, to the credit of the cause, and invested, and the accumulating dividend invested in like manner, and the accountant-general

was to declare the trust thereof, subject to the further order of the court, without prejudice to any question as to the rents, &c., and interest on the purchase-money, the fund not to be transferred without notice to the purchaser. *Hindle v. Dakins*, 1 Coop. (CH. C.) 381.

44. The master having, on reference, found against the title, held that there must be an order for discharging the purchaser before the court will give effect to an order for resale. *Williams v. Ware*, 1 Coop. (CH. C.) 42.

45. Where on a dispute as to the quantity, the bill seeking performance did not offer to perform even as to the lesser quantity, the court refused to order the payment of the amount into court. *Benson v. Glastonbury Canal Company*, 1 Coop. (CH. C.) 41.

46. Upon a resale of property sold under a decree ordered, in case the purchaser should not pay the purchase-money into court within a stated time, that the purchaser to make good any deficiency, and pay the costs of all the proceedings. *Gray v. Gray*, 1 Beav. (CH.) 199.

47. A purchaser, for valuable consideration, ordered to produce his title-deeds, the recitals in which showed notice of the right and title of the wife of the vendor in a suit by her heir-at-law. *Neesom v. Clarkson*, 1 Coop. (CH. C.) 93.

48. Purchasers, protection of, against judgments, crown debts, *lis pendens* and *fiats* in bankruptcy, by 2 & 3 Vict. c. 11.

And see *Action*; *Action on the Case*; *Auction*; *Bankrupt*; *Covenant*; *Frauds, Stat. of*; *Landlord*; *Practice*, (c. L.); *Specific Performance*.

## VESTED INTERESTS.

Where a father conveyed leasehold estates to trustees until his son attained 21, when they were to convey to him, with power to apply the rents, &c., for his maintenance during minority; held to be a vested interest in the son, and that, upon his death under 21, the interest in the lease passed to his personal representative. *Stephens v. Frost*, 2 Younge (EX. EQ.) 297.

## VESTRY.

1. In an action of debt on bond, in the name of the vestry-clerk; plea, first, that the plaintiff was not vestry-clerk, and secondly, the performance of the condition, on which issues were taken; held, that the acting as such clerk was *prima facie* evidence of the appointment, and that a director of the vestry was a competent witness. *M'Gahey v. Alston*, 2 Mees. & W. (EX.) 206.

2. Where a parish, regulated as to rating and disbursements for parochial purposes by a local act, which regulated also the inspection of rates and books, afterwards adopted the provisions of the Vestry Act (1 & 2 Will. 4, c. 60); held that,



upon an application under the latter act, they could not be compelled to permit ratepayers to take copies of rates and disbursements kept under the directions of the local act. *R. v. St. Marylebone Vestrymen, &c.*, 6 Nev. & M. (x. v.) 600.

3. Where the accounts of trustees under a local act were directed to be audited, and allowed at the sessions; held, nevertheless, that they were compellable to produce them before the auditors of the parish accounts under the 1 & 2 Will. 4, c. 60, s. 34 (Vestry Act), but that a *mandamus* issued against them, ordering more than was warranted either by the grievance recited or by the provisions of the Vestry Act, was bad: wherever there is any thing in the shape of a return, counsel for the crown are entitled to begin. *R. v. St. Pancras Trustees*, 1 Nev. & P. 507.

4. Notice of vestries, proclamations of outlawry, and notices on Sundays, regulated by 1 Vict. c. 45.

And see *Bond*; *Church*; *Churchwardens*; *Mandamus*; *Witness*.

### VOLUNTARY DEED.

1. Where a party by deed assigned personal estate to trustees, in trust for himself for life, and afterwards to the use of his nephew and nieces, and he afterwards by will bequeathed the settled property to others; upon a bill against the executors to establish the deed and payment to the trustees, the court refused to interfere, but left the parties to their remedy on the deed. *Ward v. Auland*, 8 Sim. (ch.) 571; and affirmed by the Lord Chancellor, 1 Coop. (ch. c.) 146.

2. Where M., being in treaty for a purchase of lands of C., by ante-nuptial settlement, appointed that if the marriage should take effect, and C. be enabled to convey, that the same should be conveyed to the defendants, the trustees, to the uses of the settlement, with a proviso, that if C. should not be enabled to convey, that then no obligation should attach on M., his heirs, &c. to obtain a conveyance from any other person, or pay the value thereof to the trustees, nor should M. be precluded from purchasing the same for his own benefit; C. being unable to make a title, M., after the marriage, purchased the land from H., and conveyed them to the trustees to the uses of the settlement; he afterwards mortgaged the land to D., who assigned to the plaintiff; and held, that as against a purchaser for valuable consideration, the conveyance to the trustees was voluntary, and the plaintiff entitled to recover. *Doe d. Barnes v. Rowe*, 4 Bing. N. S. (c. r.) 737; and 6 Sc. 525.

And see *Insolvent*.

### WAGER.

1. Where, by the rules of a race-course, all

disputes were to be referred to and settled by two stewards named; held that, to make the sole award of one available, it must be clearly shown that both the disputing parties, and also the stakeholder, consented to submit to his authority; *semb.* also, after a race has been run, the stakes cannot be recovered back from the stakeholder, although not paid over, unless demanded previously to the race. *Marryat v. Broderick*, 2 Mees. & W. (xx.) 369; doubting *Eltham v. Kingsman*, 1 B. & Ald. 682.

2. In *assumpsit* for money had and received, to recover a share in a bet on a horse-race, won and received by the defendant, held that the illegality of the wager going to the consideration, could not be set up, on the general issue, as an answer to the action. *Martin v. Smith*, 4 Bing. N. S. (c. r.) 436.

3. A wager as to the event of the trial of a party on a criminal charge, held illegal, as against public policy. *Evans v. Jones*, 5 Mees. & W. (xx.) 77.

### WAREHOUSEMAN.

1. Plea, in trover, of a custom in the city of London for all warehousekeepers to have a general lien on all goods remaining in their warehouses, *for and in the name of* the merchants or others by whom they are employed, for balances due for expenses incurred about goods consigned from abroad; held bad in law, as highly prejudicial to foreign trade, and subjecting foreigners to liens for debts of their factors in respect of other goods. *Leuckhart v. Cooper*, 3 Bing. N. S. (c. r.) 99; and 3 Sc. 521.

And see *Wright v. Snell*, 5 B. & Ald. 350.

2. In case against a booking-office-keeper for loss by negligence in forwarding a box delivered for that purpose; held, that it was necessary for the plaintiff to give some evidence of the non-performance of the contract, and that merely showing that the box did not arrive at its destination was not enough. *Gilbart v. Dale*, 1 Nev. & P. (x. v.) 22.

### WARRANT OF ATTORNEY.

1. The affidavits in support of an application to set aside a warrant of attorney, held properly intitled in a cause. *Thompson v. Vaux*, 5 Dowl. (r. c.) 691.

2. An affidavit swearing to belief of the party being alive, from information, and not going on to swear that the party believed it to be true, held insufficient. *Reeder v. Whip*, 5 Dowl. (r. c.) 576.

3. Where the defendant was seen alive in New South Wales on the 1st of March, the application being made on the following 5th of November, judgment allowed to be entered. *Johnson v. Fry*, 5 Dowl. (r. c.) 215.



4. But proof of a check in the handwriting of the defendant, dated thirteen days before the application, held sufficient. *Jacobs v. Griffiths*, 5 Dowl. (P. C.) 577.

5. So, where the party was seen alive on the previous 30th of September. *Stock v. Willes*, 1b. 221.

6. Where the party in custody introduces a person as the attorney attending on his behalf, on the execution of a warrant of attorney, he cannot afterwards move to set it aside, on the ground that he was not a certificated one. *Cox v. Cannon*, 4 Bing. N. S. (C. P.) 453.

7. The nomination of an attorney by the plaintiff, and adoption by a defendant in custody on *mesne process*, held not a compliance with the rule Hil. 2 Will. 4, s. 72. *White v. Cameron*, 6 Dowl. (P. C.) 476.

8. Where the affidavit of execution of the warrant by a marksman, only stated it to have been duly executed, and not that it had been read over, &c., held insufficient. *James v. Harris*, 6 Dowl. (P. C.) 184.

9. Where the party attesting the execution on behalf of the defendant was the attorney of the plaintiff, the court set it aside; held, also, that the declaration prescribed by Reg. 2, Hil. 2 Will. 4, s. 72, need not be in writing, and that an attestation in the terms "witness H. K., attorney for the defendant, at his request," was sufficient; held, also, that a general authority to sign judgment as of Hil. term, did not render a judgment signed of a particular day in that term, irregular. *Todd v. Gompertz*, 6 Dowl. (P. C.) 296.

10. The rule of Hil. 2 Will. 4, s. 72, applying only to prisoners on *mesne process*, a party applying to set aside judgment signed on a warrant of attorney, must show that he is strictly within the terms of the rule, and it is not sufficient merely to show that he was a prisoner. *Lewis v. Gompertz*, 6 Dowl. (P. C.) 7.

11. Showing the party alive, by a letter dated abroad six weeks before, held sufficient. *Grantley v. Summers*, 6 Dowl. (P. C.) 478.

12. Warrants of attorney to prosecute or defend, need not be filed at any stage of the cause, Reg. Gen., 4 Bing. N. S. (C. P.) 365.

13. A warrant of attorney executed to two, held, that on the death of one the judgment might be entered up by the survivor in his own name. *Hind v. Kingston*, 6 Dowl. (P. C.) 523.

14. But where the warrant was given to the testator only, the court refused to allow judgment to be entered by the executor, although in the defeazance, it was stated that it might be done by the "executors and administrators." *Foster v. Claggett*, 6 Dowl. (P. C.) 524.

15. Where the defendant executed the warrant of attorney in the presence of the plaintiff's son, a clerk in the office of his attorney, and the execution attested by a person introduced for that purpose by the plaintiff's son, held insufficient. *Rice v. Linstead*, 6 Sc. (C. P.) 589.

16. An affidavit of the party having been seen alive 27 days since, held sufficient. *Powell v. Howard*, 6 Sc. (C. P.) 826.

And see *Insolvent*; *Prisoner*.

## WARRANTY.

See *Assumpsit*.

## WASTES.

Where a tenant annexes to his farm part of the waste, it enures to the benefit of the landlord. *Doe v. Murrell*, 8 C. & P. (N. P.) 135.

And see *Timber*.

## WATERCOURSE.

1. Where the owner of a mill-stream had kept an ancient opening into a ditch, closed for above 20 years; held, that the owner of the land adjoining the ditch could not justify the re-opening the communication; and that where the mill-owner, after having altered his wheel to one requiring a greater head of water, had subsequently discontinued it for 20 years, and resumed the use of his former wheel, he could not resume his right to the higher head of water. *Drewett v. Sheard*, 7 C. & P. (N. P.) 465.

2. The jury having found issues as to the right to water at all times, the judge will discharge them as to rights claimed on particular occasions. *Ib.*

3. Where two defendants were present at the time of opening the communication, claiming rights, and one afterwards committed an act, it was for the jury to say if the other was not concurring in the act when not present. *Ib.*

4. Where the plaintiff enjoyed a watercourse above 20 years ago, and about 22 years since some alteration was made in it, but about 19 years ago it was restored to its ancient course, held that the right was not destroyed by such interruption. *Hall v. Swift*, 4 Bing. N. S. (C. P.) 381.

5. In trespass, plea justifying a right to enter to remove hatches obstructing a watercourse to the defendant's mill, held that evidence of a former occupier of a mill having asked permission to use the water, was admissible, as of the exercise of a right by one and acquiescence by the other. *Wakeman v. West*, 8 C. & P. (N. P.) 105.

6. The paramount right of the public in a public navigable river extends to every part of the space between the banks, and a grant by the crown to erect a weir over part of it not then necessary to the navigation, must be taken to be subject to the necessities of the public when they may arise; the crown never had at common law a right to interfere with the channels of public rivers, nor before or since the passing of *Magna*



Charta any other right than that of preserving the right and restraining nuisances in derogation of it; but held, that the effect of 25 Edw. 3, st. 4, c. 4, was impliedly to legalize all weirs which had been set up before the time of Edw. 1, and that evidence showing the antiquity of the one in question was properly received. *Williams v. Wilcox*, 3 Nev. & P. (q. s.) 606.

7. In case for diversion of water from the plaintiff's mills, it appeared that certain mining adventurers had obtained a lease from the proprietors of the mine, lying near and benefited by a drain or sough constructed by them, (but under what right did not appear, but to be presumed to have been done rather by the custom of mining or licence from the owner of the soil), and that afterwards the father of the plaintiff had obtained a lease from the lord of the manor, also owner of the soil through which the sough flowed, and thereon erected cotton mills; subsequently, another company of adventurers began to construct on a lower level another sough, which, under an agreement with the proprietors of the first sough, and of other mines drained by it, they proceeded to extend, thereby reducing the quantity of water which would have passed along the first sough to the plaintiff's mills; held, that as the origin of the watercourse was in reference to the convenience of the mine owners, and its continuance only whilst that convenience required it, and from the nature of the case of a temporary character, no inference could be made of any intention to grant the use of the water in perpetuity, and that no such right was therefore acquired by the user, either by the presumption of a grant, or by force of the 2 & 3 Will. 4, c. 71. *Arkwright v. Gell*, 5 Mees. & W. (ex.) 203.

And see *Costs*; *Injunction*.

#### WATERMAN'S ACT.

The mayor and aldermen being enabled, by 7 & 8 Geo. 4, c. 65, s. 57 (Waterman's Act), to make bye-laws, &c. for the regulation of boats, vessels, and other craft, to be rowed or worked within the limits of the act, held that steam-boats were comprehended within it. *Tisdell v. Combe*, 3 Nev. & P. (q. s.) 29.

#### WAY.

1. In case for obstructing plaintiff's right of way, claimed under a lease of the premises from the defendant; held, that it was for the jury to find the state of the premises at the time of granting the lease, and for the court then to put a construction on the terms of the lease in respect of the way granted, and declarations of the parties before and after are inadmissible; where it is uncertain which of two ways is meant, parol evidence is admissible. Where the way granted lies over the land of third persons, and there is no other, the lessee is entitled to pass

across the grantor's land by the shortest way to the public highway, as a way of necessity; and where it is a private way, the grantor is bound to make it. *Osborn v. Wise*, 7 C. & P. (n. p.) 761.

2. In trespass, plea, a public right of way; the cause having been referred to an arbitrator, who was to direct what was to be done, he directed a verdict to be entered for the defendant, and that the plaintiff should erect a stile and foot-bridge in a place described; held that, it appearing to be on the land of third persons, the award was void, as not within the submission. *Turner v. Swainson*, 1 Mees. & W. (ex.) 572; and 1 Tyr. & Gr. 933.

3. Upon a plea of a public foot-way over plaintiff's close, held supported by evidence tending to establish a carriage-way, and the existence of a gate across not inconsistent with the reservation of keeping it to prevent cattle straying; held also, that long user, during the occupation of tenants, might be a ground for presuming the knowledge and acquiescence of the owner. *Davies v. Stephens*, 7 C. & P. (n. p.) 570.

4. In support of a plea of right of way, under 2 & 3 Will. 4, c. 71, s. 2, held that evidence of a user more than forty years back was admissible. *Lawson v. Langley*, 4 Ad. & Ell. (x. s.) 890.

5. In trespass *qu. d. freg.* plea, a right of way, replication that the defendant used the way under the plaintiff's leave and licence; held, that the plaintiff was bound to show a licence co-extensive with the right claimed by the plea, and admitted by the replication, and that it was not sustained by evidence of a limited one. *Colchester v. Roberts*, 4 Mees. & W. (ex.) 769.

6. Plea, justifying a right of way for all purposes, under 2 & 3 Will. 4, c. 71; replication denying such right; held, that the plaintiff might on such issue show a limited right for certain purposes only, without newly assigning, and that the purpose for which at the said time, &c. the way was used, was not within such limited right, and that in all such cases the question as to the extent of the right is for the jury. *Cowling v. Higginson*, 4 Mees. & W. (ex.) 245.

And see *Evidence*; *Trespass*.

#### WEIGHTS.

See *Corporation*.

#### WEST INDIA CONSIGNMENTS.

The consignee, although entitled to be paid the balance due to him out of the *corpus* of the estate, yet that it is only on a final settlement, and not pending the consigneeship; the court, therefore, refused to allow the balance to be paid out of the compensation awarded under 3 & 4 Will. 4, c. 73, whilst he continued to be consignee. *Farquharson v. Balfour*, 8 Sim. (ch.) 210.



## WEST INDIA ESTATES.

1. Upon the construction of 24 Geo. 2, c. 19 (Jamaica Act), and reference to the antecedent right; held, that the right to receive commission as attorney or agent of West India estates only exists where the agent is resident in the island, and has qualified himself to sustain the character of trustee; a party having no interest in one of the subjects of suit, being made a co-plaintiff, if the bill is sustainable only as to that subject, it must be dismissed. *Denton v. Davy*, 1 Moore (p. c.) 15.

2. But where a party was qualified to act in such trust, and ready, when called on, to act by his co-trustee; held, that he would be entitled to the commission, under the Colonial Act. *Grant v. Campbell*, lb. 43.

3. The commission can only arise on sales made and completed in the island, and not in this country. *Henekell v. Daly*, lb. 51.

## WILL.

[A] CONSTRUCTION OF—COMPETENCY OF TESTATOR—IMPERFECT PAPERS—CODICIL.

[B] REVOCATION—CANCELLATION—REPUBLICATION.

[C] PROBATE—COURT OF.

[A] CONSTRUCTION OF—COMPETENCY OF TESTATOR—IMPERFECT PAPERS—CODICIL.

1. Upon a gift of bank stock, in trust to A. B. for life, and of all testator's funded property, upon trust, to pay the dividends to E. (a natural child) for life, and from and after his decease for the issue of his body, whether male or female, and after the death of A. B., to pay the dividends of the Bank stock to E. for life, and after his death, for the benefit of the child or children of E., "in such manner as he had directed as to his funded property," and should E. die without issue male or female, then for such charitable or other purposes as his trustees should think fit, without being accountable to any person; and he gave the residue of his personal estate and effects, wines, plate, &c., to E.; held, that the ultimate trust of the Bank stock and funded property was not void as too remote, but was void for uncertainty, and that the residuary clause was general, and passed the Bank stock and funded property to the party claiming under E., the residuary legatee. *Ellis v. Selby*, 7 Sim. (ch.) 352; 5 C. 1 Myl. & Cr. 286.

2. A bequest upon trust to pay the interest to testatrix's two nieces for their lives, and after their deaths, to divide equally amongst their lawful issue, "or of such of them as should leave issue, equally *per stirpes*, and not *per capita*, and in default of such issue, then over; one of the nieces had seven children, five of whom survived her:

held, that the latter were entitled to the mother's moiety of the residue. *Cross v. Cross*, 7 Sim. (ch.) 201.

3. After a gift to A. and B. for their lives, and on their deaths to their children then living, who should attain 21, and in case the children of either should die under 21, then to the survivor of A. and B.; A. died, leaving a child, who attained 21; B. died without having had a child; and held, that the limitation over took effect, and that A.'s representative was entitled to B.'s moiety. *Aiton v. Brooks*, 7 Sim. (ch.) 204.

And see *Mackinnon v. Sewell*, 5 Sim. 78; and 2 Myl. & K. 202.

4. Upon a bequest to trustees of all the testator's freehold and leasehold lands and hereditaments, money, stock, goods, &c., and all other his real and personal estate on trust, to pay the rents, dividends, &c., to his daughter for life, and after her death to stand possessed of his said freehold and leasehold estates, money in the funds, and all other his said real and personal estate for the children of his daughter; and in default of such children, to pay the rents, dividends, &c., and all other the proceeds of his said stock, and other his said personal estate to his nephews for their lives, and after their deaths for their children; and in default of such children, he gave his freehold, &c., to a corporation in trust, to sell and convert into money, and to lend the same as directed in the will; held to be a general residuary bequest, and that the leaseholds and stock ought to be sold and invested in the 3 per cents., and an inquiry was directed whether turnpike securities were real and permanent. *Mills v. Mills*, 7 Sim. (ch.) 501.

5. Where testator directed the two trustees of his residuary estate to invest £4,000 in trust for his granddaughter for life, and afterwards for her children, and in failure of children, to fall into the residue; he afterwards, by a codicil, reciting that he had by his will given £4,000 5 per cents., standing in his name, in trust for his granddaughter, and that he was desirous that such trust should be executed by three persons, and appointed another to be a co-trustee and guardian of his granddaughter, jointly with those named in the will, and directed that they should transfer the said stock to her, free from all deductions; held that, as the codicil could not be construed literally as to the stock, but only with reference to the will, its effect was not to give the stock absolutely to the granddaughter, but only that the trusts created as to it by the will should be performed by three instead of two. *Barry v. Crundall*, 7 Sim. (ch.) 430.

6. Where the testator placed his children under the protection of trustees, with certain provisions, to be reduced if their mother should fix herself with them out of England, and the son, if he did not remain in England, to forfeit his legacy; the mother took her children during infancy, and remained four years in India, and the son, shortly after their return, obtained a commission, and joined his regiment in India; he returned, however, whilst under 21, on account of illness, remained three years, and then, having attained 21,



rejoined his regiment; held, that the term *fix* was to be construed as permanently residing, and that the same was meant by the testator in using the term *remain*; and that the annuities were neither liable to be reduced, nor the son's legacy forfeited. *Schnell v. Tyrrell*, 7 Sim. (ch.) 66.

7. Where the will devised certain estates and the residuary personal estate to K., and afterwards the testator by a codicil revoked the bequest to him, and devised the estates to T., subject to all the conditions stated in the will, and the meaning of the testator was clear that he meant substitution as well as revocation; held, that he used the word *estates* as comprising both real and personal estate; a codicil, written by the party himself, is not to be construed literally and technically, where upon the whole it appears that he meant to use terms in a different sense. *Read v. Backhouse*, 2 Russ. & M. (ch.) 546.

8. Where the testator appointed a fund to his son, to be paid after the death of his wife, if he should then have attained 21, and if he should die under 21, and after the death of the wife, then he gave the fund to his brother; and in case the wife should survive the son and brother, then he gave it to the brother's daughters then living; the son attained 21, and died in the lifetime of the wife, as did also the brother; held, that the representatives of the son, and not the daughters of the brother, were entitled. *Clutterbuck v. Edwards*, 2 Russ. & M. (ch.) 577, affirming the judgment below.

9. Where the testator by his will gave £3,000 to B. for life, with remainder over, and £6,000 to S. for life, with remainder over, and, after small annuities to two servants, the residue of his personal estate to H., and by a codicil he left B. an equal share with S. and H., with limitations over to his wife and children, and S. to have an equal share with H.; held, that the effect was to entitle S. to one-third share of the personal estate, subject to the limitations created as to the legacy given by the will. *Cookson v. Hancock*, 1 K. (ch.) 817.

10. Where in former wills a legacy had been given, and instructions marked by her solicitor for increasing it, but in preparing the new will the legacy was wholly omitted, the intention being clear, the court holding it an omission, not an ambiguity, admitted the allegation, and being fully proved, pronounced for the legacy. *Castell v. Tagg*, 1 Curt. (PRER.) 298.

11. Where circumstances had arisen, rendering it natural, and the intentions been clearly expressed to alter former dispositions, a paper headed, "Head of instructions to my solicitor, J. L., to add to my will the following codicil," concluding, "This is my last will and codicil;" subscribed and wholly in the testator's handwriting, and indorsed, "Memorandum to J. L. Will.—11 Oct. 1834;" and the testator died in the following February; held, that it was intended to be an operative instrument until a new and more formal instrument was prepared from it, and probate thereof decreed. *Torre v. Castle*, 1 Curt. (PRER.) 303.

12. In the case of an informal paper, there must be strong proof that the deceased did intend it to operate as a will. *Id.*

13. Legatee of a bond, which after the will and shortly previous to the suicide of the testator, had been cancelled on a conveyance of the estate held as a collateral security, decreed entitled to have the bond replaced; the transaction being one of doubtful sanity and fraudulent exercise of influence. On the question of sanity, facts adduced as indications of sanity are to be considered as whether inconsistent with or satisfactorily explaining indications of insanity produced by the opposite side on which the onus lies. *Steed v. Calley*, 1 K. (ch.) 620.

14. Where the attesting witnesses to the will of a party imbecile, gave strong evidence of incapacity, and stated merely that the signatures were theirs, but that they did not know they were attesting a will, the court pronounced against the will. *Starnes v. Marten*, 1 Curt. (PRER.) 294.

15. Where the will, to which the codicil was described and said to be part of his will, was not forthcoming, but could not be dependent on the will, as containing dispositions in favor of persons unknown to the testator at the time of the will, the court pronounced for the codicil, as containing the last will of the deceased. *Tagart & another v. Hooper & another*, 1 Curt. (PRER.) 289.

16. Where the attestation clause stated the execution of the witnesses to have been in the presence of the testator, and of each other, and one of the witnesses called proved that one was not present, although the signature was his handwriting; held, not a due execution within the statute. *Doe v. Lewis*, 7 C. & P. (N. P.) 574.

17. Where the testator (not an illiterate person) executed a codicil by putting his mark instead of signing, held sufficient to satisfy the Statute of Frauds. *Taylor v. Denning*, 3 Nev. & P. (Q. B.) 229.

18. Bequest of a fund to testator's daughter absolutely on her attaining 21, and the interest to be expended for her maintenance, &c.; and in the event of her dying under 21, then the fund to go to his brother's children; and the testator afterwards directed that if his daughter were to be married, that she should enjoy the interest for her life, and the principal afterwards go to her children; held that the latter direction applied only to the case of her marrying under 21, and that having attained 21 before marriage, she took the fund absolutely. *Williams v. Huskinson*, 3 Younge & C. (xx. xq.) 80.

19. Bequest of residue to a female, to be paid at 25; and providing that in the event of marriage before that time, it should be put in settlement, but there was no gift over; held, that on attaining 21, the legatee was entitled to the income. *Grant v. Grant*, 3 Younge & C. (xx. xq.) 171.

20. Where a testator gave "the amount of the bond from J. H." held that the legatees were entitled to the arrear of interest upon the bond as well as to the principal. *Harcourt v. Morgan*, 2 Keene, (ch.) 274.

21. Bequest of a sum in trust to pay the inter-



est to the testator's daughter for life, and after her death, in case of her having no children, for all and every the child of B. and C. who should attain 21; held that all the children born before the eldest attained 21, although after the testator's death, were entitled. *Clarke v. Clarke*, 8 Sim. (ch.) 59.

22. Where a copyhold message and tene-ments, with the furniture and effects therein, were devised to trustees in trust, in terms as to the enjoyment applicable only to the real estate, and omitting any notice of the furniture, held that the devisees took no beneficial interest therein; held, also, that a devise to such persons as should be the testator's partners or disponees of the business was valid, and passed the interest to parties to whom in his lifetime he had disposed of the concern. The testatrix also indorsed a note for £—, and enclosed it in a letter to S. S., expressing that she gave it to S. S. for her sole use and benefit, to enable her to present any portion to either branch of her family, as she might consider most prudent; and in the event of her death she empowered S. S. to dispose of it by will or deed, to those or either branch of the family she might consider most deserving; held to constitute a trust, but the objects too undefined for the court to execute it, and that the fund therefore formed part of the general personal estate. *Stubbs v. Sargon*, 2 Keene, (ch.) 255.

23. Where a testatrix, after giving several small legacies, included all her remaining real and personal estate in one general devise in trust, to keep and retain the same in the state in which it should be at the time of her death, as long as he should think fit, or to sell and dispose of the whole or any part thereof, to invest the proceeds and charge the stock, &c., out of which certain annuities were to be paid, and from and after satisfaction thereof to stand possessed of all her said personal and real estate, and the rents, interest, dividends, &c., in trust for certain parties, in equal shares, as tenants in common, and for their respective heirs, &c., according to the different natures and qualities thereof; held that the property was not by such devise to be considered as converted out and out, but that the trustee had a discretionary authority to sell or not, and that, until exercised, the property remained in the state it was at the death of the testatrix; held, also, that the trustee having submitted to act as the court should direct, and a sale having been ordered, but the master reported against a sale, and none had taken place, the case was left as it stood under the will. *Polley v. Seymour*, 2 Younge & C. (ex. ex.) 708.

24. On a gift of lands absolutely, although accompanied with words of recommendation that in case of marriage the party should execute a settlement of the estate for herself and the children of the marriage; held, that she might execute an absolute conveyance. *Payne, ex parte*, 2 Younge & C. (ex. ex.) 636.

25. Upon a bequest of dividends of stock to testator's brother and three sisters, and after their decease, the shares to their children respectively, if any, with benefit of survivorship, and after the death of the survivor of the children of his brother

or sisters, the fund to be distributed according to the Statute of Distributions; held, that it being clear he meant only to give an interest for life, the capital was undisposed of, and passed to the testator's next of kin, living at his death. *Cooke v. Bowler*, 2 Keene, (ch.) 54.

26. Where the testatrix bequeathed to her niece all her pictures and coins (excepting those of the two last reigns,) in and about her dwelling-house, and all the residue of her estate, real and personal, (except as afterwards given,) to grandchildren, and directed that from and after the day of her interment, all the property over which she had any disposing power in and about her dwelling-house should belong to her niece (except what she had otherwise given); hoards of money, in guineas, sovereigns, notes of the Bank of England, promissory and country notes, and a mortgage security, were afterwards found in the house: held, that the niece was entitled to the money and bank notes, but not to the country bank promissory notes, or mortgage. *Brooke v. Turner*, 7 Sim. (ch.) 671.

27. Where a testator, after an absolute gift of all his property to his wife, afterwards, by an imperfect testamentary paper, gave the whole to others in trust, to pay her the interest for life, and after her death to purposes after-mentioned, and he then gave certain legacies and annuities, directing, as to one annuity, that after the death of the annuitant, it should be paid to his residuary legatee, but he did not name any; by a subsequent testamentary paper, he gave legacies and annuities to those before named, and also to others: the Ecclesiastical Court having admitted all the papers to probate, held that they were to be taken together as the will, and that the absolute gift was not revoked, except so far as necessary to provide for the legacies and annuities, and that the latter were not cumulative. *Brine v. Fisher*, 7 Sim. (ch.) 549.

28. Where the testatrix, whose property consisted chiefly of stock in the funds, after giving several pecuniary legacies, gave "all which might remain of her money" to the inhabitants of "T. row" after payment of her lawful debts and legacies; held, that the parties found by the master to be such inhabitants were entitled to the residue of the testator's general personal estate after such payment. *Rogers v. Thomas*, 2 Keene, (ch.) 8.

29. So, where after the like legacies, the testatrix bequeathed "whatever remained of money" to the five children of D.; held, that those words referred to the general residuary personal estate. *Dowson v. Gaskoin*, 2 Keene, (ch.) 14.

30. The case of *Doe d. Tatham v. Wright*, affirmed in error in Dom. Pr.; *dis. Gurney and Bolland*, B. B., *Park*, J.; 4 Bing. N. S. (c. r.) 489; and 2 Nev. & P. (q. n.) 305.

31. The case of *Cookson v. Hancock*, (1 Keene, 817,) affirmed, 2 Myl. & Cr. (ch.) 606.

32. Where the deceased was of great age, deaf, and almost blind, and the will prepared from a paper given by a party, the solicitor, and appointed executor of the will, as the presumed instructions, and from which the draft was prepared, without any previous instructions shown to



have been given by the deceased, held insufficient to say that it was the will of a party capable of originating the disposition of his property. *Sankey v. Lilley*, 1 Curt. (P&R) 397.

33. Where a testator domiciled in Holland, bequeathed the interest of certain funds to members of his family named, and in like manner, "the male children of the above-named men," held, to be construed as to entitle descendants claiming through males only. *Bernal v. Bernal*, 3 Myl. & Cr. (Ch.) 559; and 1 Coop. (Ch.) 55.

34. So, a limitation to the eldest "male lineal descendant," held not to include males claiming in part through a female. *Oddie v. Woodford*, 3 Myl. & Cr. (Ch.) 584.

35. Where after a clear gift to children, whether they died in the lifetime of the widow or not, the testator added, "and in case all my said children shall happen to die in the lifetime of my said wife, or under 21, without leaving issue, then over;" held, that the word *or* was to be read *and*, and that the children having attained 21, were absolutely entitled. *Myles v. Dyer*, 8 Sim. (Ch.) 330.

36. So, where it was to be taken from the language of the will altogether that the testator adverted as much to the children of a daughter who had deceased in his lifetime, leaving issue; held that the latter were entitled to a share of the residue. *Giles v. Giles*, 8 Sim. (Ch.) 360.

37. Where the incapacity of the testator as well upon the face of the will as upon affidavits was clear, administration granted as in case of intestacy, but the will ordered to be deposited in the registry. *Bourget in the goods of*, 1 Curt. (P&R) 501.

38. But where the will was regular on the face of it and not sounding to folly, the court refused, on mere *ex parte* affidavits of anterior unsoundness and consent of parties to pronounce against it. *Watts, in the goods of*, lb. 59.

39. Where the capacity of the testator to do a simple independent act, was satisfactory, but the terms of a codicil *in extremis*, so vague and inconclusive, and irreconcilable with the clearly expressed intentions in the will that the court could not pronounce for the former without defeating the latter, the validity pronounced against notwithstanding a contemporaneous codicil, clear and unequivocal, established on the ground of capacity. *Reynolds v. Thrupp*, 1 Curt. (P&R) 568.

40. Bequest to executors, in trust to divide between his son D. and the children of his son R.; held to be divisible *per capita*. *Williams v. Yates*, 1 Coop. (Ch. C.) 177.

41. Where a will concluded in the terms "I guess there will be found sufficient at my banker's to defray and discharge my debts, which I do hereby desire E. M. to do, and keep the residue for his own use and pleasure; held to amount to a gift of the general residuary personal estate to E. M. *Boys v. Morgan*, 3 Myl. & Cr. (Ch.) 661.

42. Where the testator gave 11 canal shares,

in trust, until his 11 grandchildren, then living, if sons, should attain 23, or, if daughters, at the same age, or on marriage with consent, to be then transferred, and the dividends in the meantime applied for maintenance; he then directed his trustees to invest a sufficient sum in Parliamentary securities to raise three annuities of 100*l.*, the first to be applied to maintenance of his grandchildren (the children of his daughter H. deceased) until the youngest should attain 23, and then the principal to be paid and divided equally amongst them; the other annuities he directed to be paid to his other two daughters, C. and W., for their lives, and the capitals respectively after their decease amongst all his grandchildren, children of H., C., and W., equally as tenants in common; and he gave all the residue in like manner amongst such grandchildren; the will also provided that the shares should vest in grandchildren at 23, and in the event of any dying under that age, the share to go equally amongst the survivors; at the death of the testator there were five children of H., of whom only three attained 23, and one, J. H., died after attaining that age, but before the fund became divisible and payable; held, first, upon the whole intention apparent on the will, that J. H.'s interest vested at 23, and that he was entitled to a portion of the share of a sister dying under age, and whom he survived, but not of the share of a brother dying under age, but whom he pre-deceased; and in like manner to an original share in the residue, and of a portion of the share of the residue of the grandchildren who died before him, but not of the share of those who died after him; secondly, that the limitations over after the deaths of his two daughters, of the capital of their annuities, was void, as too remote, and that the capital fell into the residue; and, lastly, that the words, "survivor or survivors," referred, in their usual sense, to survivors in each class of grandchildren. *Cromek v. Lamb*, 3 Younge & Cr. (xx. xq.) 565.

43. Where the interest and dividends are alone given until a particular period, and the principal is not sooner to be taken out of the fund, the intermediate gift of the interest or dividends will not vest the principal. lb.

And see 1 Rep. Leg. 500.

44. Where upon a question of a devise of copyhold, the testator, having duly executed a will to pass such, on one occasion being irritated against the devisee, threw the will upon the fire, whence it was rescued by the devisee, at which, when informed of it, the testator expressed his displeasure; the envelope was partially burned, but the will itself not at all; and the devisee retained possession of it until after the decease of the testator; held, that in a case to which the Statute of Frauds did not apply, the testator's power of revocation was not limited by a necessity for an express declaration to revoke, but that any equivalent word or words, and expressions, would be sufficient for that purpose; and that the jury was warranted, from circumstances in evidence, in finding that the facts amounted to a revocation, and the mere knowledge of the continuance in *specie* of the will intended to be destroyed, unaccompanied with any wish to restore its efficacy, but, on the contrary, displeased



ure at its rescue from the flames, did not constitute such acquiescence in its continuance as would amount to a revocation of the previous revocation. *Doe v. Harris*, 8 Ad. & Ell. (q. s.) 1.

45. Where the testator gave to his brother J. an annuity of 300*l.*, and to each of his nephews 150*l.* for their lives; if either of the nephews died, the other to have the 300*l.* per annum; and if J. died without issue the nephews to inherit from him, and assigning as the reason why he had only left the interest of the fund, that if they died without issue the fund might go to his three cousins, he directed his legatees to be paid within 12 months, and then added, "it is to be understood I leave it to them and their heirs;" held, upon the whole construction of the will, J. was only entitled to a life interest in the annual sum given, and not to any interest in the capital sum invested to produce the annuity. *Ferard v. Griffin*, 2 Keene, (ch.) 615.

46. Where the testator having three establishments gave one at A. to the plaintiff, and "all his carriage horses, implements, and live and dead stock in and about the house and premises at A.," and also "his household goods and furniture, plate, linen, china, liquors, brewing vessels, and likewise his watches and personal ornaments;" held, that the latter words were to be construed in the general sense expressed, and not merely to include such property at A.; held also, that under a general bequest of all and every my books in and about my house at A., the MSS. of the testator, a physician, and the journal of his attendances on a royal patient, would pass; but *quare*, whether under the term "personal ornaments," a gold pencil-case, toothpick, lipsalve-box, and eyeglass, would pass: *semb.*, a pocket-book and case of instruments would not; and *quare* as to a bust. *Willis v. Curtois*, 1 Beav. (ch.) 189.

47. Where a testator directed his trustees to pay the interest, &c. of his residuary estate to his daughter for life, and after her death, to pay the interest, &c. unto and between his two grandchildren during their respective lives, in equal shares, and after their decease, to pay and transfer the principal unto and between all and every the child and children of his said grandchildren, in equal shares; and the events were, that after the daughter's death, one of the grandchildren died, leaving children; held, that the whole of the dividends, interest, and monies being payable to the surviving grandchild during his life, and the mass of property divisible among the children who might survive the parents, *per capita*, it was inconsistent with a tenancy in common of the parents, &c. *Pearce v. Edmeades*, 3 Younge & C. (ex. ex.) 246.

And see *Malcolm v. Martin*, 3 Bro. (c. c.) 50.

48. Where the testator directed that the residue might be employed in any manner his executors should think proper; held, that they were not liable for not investing in three per cent. consols, as in ordinary cases. *Dickinson v. Player*, 1 Coop. (ch. c.) 178.

49. On a bequest of — *l.* amongst the children of the testator's daughter as should be living at the time the eldest child should attain the age of

24, and the issue of such as should be then dead, to be equally divided *per stirpes*, and not *per capita*, but without interest in the meantime; the daughter at the testator's death, had three children, of the respective ages of 13, 12, and 9: held, that the intention being that only those children of his daughter should take who should be alive when the eldest child for the time being should attain 24, the bequest was void for remoteness. *Dodd v. Wake*, 8 Sim. (ch.) 615.

50. On a gift of residue in trust for the wife for life, and after her death to divide amongst all his children who might be then living, the shares of such as should then have attained 21 to be paid within three months after the wife's decease, and the shares of the others on attaining 21, "or to the survivors of them, in case of the death of any of them in his wife's lifetime, and without leaving issue, provided that if any should die in the wife's lifetime, and have left issue, such issue should have their parent's share;" one of the children, living at the date of the will, died in the testator's lifetime, leaving issue; held, that such issue were entitled to share the residue. *Smith v. Smith*, 8 Sim. (ch.) 353; overruling *Thornhill v. Thornhill*, 4 Madd. 377.

51. Devise in trust during the lives of E. H. and her five daughters, for raising an annuity for E. H. and after her death upon the like trusts for her said daughters, and the survivors, and while more than one living, in equal shares; E. H. at the date of the will and death of the testator had five sons and only one daughter: held, that the daughter alone was entitled to the annuity. *Selsey, Lord v. Lord Lake*, 1 Beav. (ch.) 151.

52. Where, by the terms of the will, the trustees were, after the decease of the testator's children, to receive and take the rents, &c. and to pay and divide the same equally and unto all his surviving grandchildren who should then be living, and upon the youngest attaining 21, to divide amongst all such of his said grandchildren, or the child of any as might be dead, leaving lawful issue; held, that it applied only to those grandchildren to whom he had given the rents, &c., viz. those living at the death of the survivor of the children, and that the children of a grandchild not living at the death of such survivor took no interest whatever. *Smith v. Farr*, 3 Younge & C. (ex. ex.) 328.

53. Bequest of funds in trust to pay the interest for the support of testator's sister for life, the unapplied surplus to accumulate for the benefit of the persons entitled to the same after her death; he then gave the fund equally among her children, and if she should die without issue, certain portions to individuals, and the remainder to J. H.; and held, that J. H. was entitled to the whole of the accumulations. *Woodhead v. Marriott*, 1 Coop. (ch. c.) 62.

And see *Baron and Feme; Debts; Marriage Settlement; Power*.

#### [B] REVOCATION—CANCELLATION—REPUBLICATION.

1. Where a testatrix devised to a trustee and



his heirs, estates, upon the trust and confidence that he would receive the rents, and pay the same to S. for life, and after her decease convey the estates to such uses as S. should appoint; S. died in the lifetime of the testatrix: held, first, that the events did not operate as an implied revocation of the will; secondly, that the legal estate being vested in the trustee, the devise did not lapse; and lastly, that as the trust could not cease until the conveyance by the trustee, the legal estate remained in him, and that the lessor of the plaintiff claiming as heir-at-law, could not recover in ejectment. *Doe d. Shelley v. Edlin*, 1 Nev. & P. (x. s.) 582.

2. Where the testator having contracted for the purchase of an estate, by a codicil reciting the contract, devised the estate, and the legal estate was subsequently conveyed to him and his heirs, with the usual usua to bar dower; held, that the estate being modified in a manner different from that in which it stood at the time of making the will, it amounted to a revocation. *Bullin v. Fletcher*, 2 Myl. & Cr. (cn.) 432; affirming the judgment below, 1 Keene, 369. But now see 1 Vict. c. 26, s. 23.

3. Where testator, revoking a former gift, directed such a sum to be invested as would produce £40 per annum, to be paid to his daughter, and at her death the fund to be transferred to his residuary legatees, and he gave £100 absolutely to his daughter; by a subsequent codicil he revoked the sum of £1,200 given to his daughter for life, and in lieu thereof gave her £500 absolute; held to be a revocation of the annuity, which was, in fact, the only bequest to the daughter for life. *Pilcher v. Hole*, 7 Sim. (cn.) 208.

4. To effect a cancellation, "by burning the same," there must be a burning of some part of the instrument itself; held, that the burning a part of the cover was insufficient to effect a revocation, although the destruction was prevented by the fraud of the devisee. *Doe v. Harris*, 1 Nev. & P. (x. s.) 405.

5. A codicil substituting a new trustee in the place of one deceased, for the purposes of the will, held not to operate as a republication of the will, and to pass after-acquired estates; reversing the decision of the Master of the Rolls. *Hughes v. Turner*, 3 Myl. & K. (cn.) 666.

6. Repeal of 32 Hen. 8, c. 1; 34 & 35 Hen. 8, c. 5; 10 Car. 1, sess. 2, c. 2, (l.); ss. 5, 6. 12. 19, 20, 21 of 29 Car. 2, c. 3; 7 Will. 3, c. 12; s. 14 of 4 & 5 Anne, c. 16; 6 Anne, c. 10; s. 9 of 14 Geo. 2, c. 20; 25 Geo. 2, c. 6, (except as to colonies), and c. 11, and 55 Geo. 3, c. 192; and new provisions relating thereto: by 1 Vict. c. 26.

7. Where A., a testator, having the legal estate in leaseholds in him, and being beneficially entitled to one-third in right of his late wife, and to another third for his own life, under the will of a party whose executor he was, with remainder to his children as he should appoint absolutely, by his will gave one-third to a daughter for life, with remainder to her children, and another third in like manner to another daughter, and subsequently joined in a deed of partition with his co-tenant in common, whereby the leaseholds

were assigned in trust, as to one-third in trust for A., as administrator of his late wife, and as to another third in trust for B., as executor of B., and as to the remaining third in trust for the other tenant in common; held, not a revocation of A.'s will. *Woodhouse v. Okhill*, 5 Sim. (cn.) 115.

8. Where a will, traced to the testator's possession, is not forthcoming at his decease, the presumption is that he has destroyed it, and must prevail, unless there be evidence to repel it by raising a higher probability to the contrary, and the *onus* lies on the party propounding the revoked will. *Welch v. Phillips*, 1 Moore, (r. c.) 299, (reversing the judgment below.)

9. Where the testator gave a legacy to his sister, the wife of E. B., or to such persons as E. B. should appoint, to the intent that the same might be for the separate use of E. B., and the receipt of the said E. B. to be a sufficient, and the name "E. B." was afterwards drawn through with a pen, held not to amount to a revocation. *Martins v. Gardiner*, 8 Sim. (cn.) 73.

10. Where the *animus revocandi* was clear, and the deceased had requested a friend to write to the executor in whose custody the will was, to destroy it, and it was accordingly forwarded to him, but did not arrive until after death; held to amount to a revocation reduced into writing in the deceased's lifetime, and satisfying the Statute of Frauds. *Walcott v. Ochterlony*, 1 Curt. (FRER.) 580.

11. Revocation of a will by marriage, and the birth of a child, (previous to the 1 Vict., c. 26,) held to take place in consequence of a principle of law, independently of any question of intention of the testator himself, and consequently that no evidence is admissible to rebut the presumption of law; nor can the circumstance of after-acquired property descending upon the child have any effect. *Marston v. Roe*, 2 Nev. & P. (q. s.) 504; affirming the judgment below, 8 Ad. & Ell. 14.

12. Where the testator in a fit of displeasure threw his will, contained in an envelope, into the fire, but it was secretly withdrawn, and no part of the will itself burnt, of which he was afterwards aware, and expressed great annoyance, and an intention to make a new will instead thereof; held, in ejectment, by the heir for copyhold premises, that although, to satisfy the Statute of Frauds, there must have been a burning of the instrument to some extent to effect a revocation as to a devise of freehold, yet in the case of property not within the statute, it being a case of revocation at common law, it was a question of intention, evidence of which might be found in an imperfect act, or mere attempt, and that it was the province of a jury to say whether the facts proved amounted to a revocation. *Doe v. Harris*, 2 Nev. & P. (q. s.) 615.

And see S. C. 1 Nev. & P. 405.

#### [C] PROBATE—COURT OF.

1. Probate by one executor enures to all; and



where the validity is disputed and proceedings taken for revoking the letters, the court will protect the property by injunction and a receiver, pending the litigation in the Ecclesiastical Court. *Watkins v. Brent*, 7 Sim. (CH.) 512; and 1 Myl. & Cr. 97.

2. Where a *feme covert*, having a power to appoint by will, executed it, and appointed executors, and she was possessed at the time of her death, of monies in her banker's hands, being savings out of the fund; the question whether the latter passed being one not competent for the court to determine, it granted probate to the executors, limited to the settled property, and all accumulations over which the deceased had a disposing power, in order to give the parties an opportunity of making their claims elsewhere. *Ledyard and another v. Garland*, 1 Curt. (PRER.) 236.

3. Where a draft will had been decreed probate, and that of a former will recalled, the executors being the same in each; held, that the legatees under the former were bound by the sentence, unless it clearly appeared that there was fraud or collusion between the executors and the legatees under the latter will, or that the former were prejudiced by the course in which the suit had been conducted. *Hayle v. Hasted & Pierson*, 1 Curt. (PRER.) 236.

4. Where probate of papers had been decreed in a cause, on a proxy of consent by all the parties interested; held conclusive, unless such proxy were shown to have been obtained by undue means or imposition on them. *Watson & another v. Brent*, 1 Curt. (PRER.) 264.

The cases of *Goblet v. Beechey*, 3 Sim. 24, overruled by Lord Chancellor, 2 Russ. & M. (CH.) 624; *Miles v. Langley*, 1 Russ. & M. (CH.) 39; affirmed on appeal. *Ib.* 626.

5. Where British-born subjects for many years resident in a Danish colony, whilst there, made a joint will, of joint property, as they might by the foreign law; they afterwards became domiciled in this country, and the husband by will bequeathed money vested in a colonial mortgage to the wife, who having survived him, by her will disposed of the fund; the separate wills were proved in the Prerogative Court, and afterwards the joint will was proved in the colony, and the funds disposed of by a "Court of Dealing," constituted of parties interested; held, that the separate will of the wife prevailed over the joint will, which was invalid by the law of this country, and that the court was at liberty to declare the proceedings in the foreign court fraudulent and void. *Price v. Dewhurst*, 8 Sim. (CH.) 279.

6. Where the deceased had executed a will, under a power, in favor of her husband, who died in her lifetime, and she dying without any next of kin, administration was prayed by the nominee of the crown; the court in the absence of the settlement, or any copy of it, rejected the application. *Monday, in the goods of*, 1 Curt. (PRER.) 590.

7. Where no party could be found to make the usual affidavit as to the deceased's handwriting,

all parties consenting, the affidavit dispensed with, competent persons deposing as to their belief from comparison. *Carey, in the goods of*, 1 Curt. (PRER.) 592.

8. The court admitted allegations of parol declaration of a testator, to rebut the presumption of revocation of the will by the subsequent marriage of the testator, and birth of a child. *Fox v. Marston*, 1 Curt. (PRER.) 496. *Sed vid. supr.* [B.] 11.

9. The judgment in *Stubbs v. Sargon*, 2 Keene, 255, affirmed by the Lord Chancellor. 3 Myl. & Cr. (CH.) 507.

And see *Administration; Baron and Feme; Legacy*.

## WITNESS.

[A] COMPETENCY.

[B] ATTENDANCE OF—EXAMINATION OF—COMMISSION FOR.

[A] COMPETENCY.

1. In ejectment, where the lessor of plaintiff sought to make out his title as heir of T. B., held that a son of an elder brother of T. B., as having no immediate interest in the suit, nor able to avail himself of the verdict, was a competent witness. *Doe v. Clarke*, 3 Bing. N. S. (c. r.) 421; and 4 Sc. 203.

2. In an action on a bond by a surety to a building society, a witness was called who had originally been a shareholder, and signed the deed, but afterwards became the secretary, with a salary, although he had released all claims on the trustees, having an interest to enlarge the funds, held that he was properly rejected. *Rigby v. Walthew*, 5 Dowl. (r. c.) 527.

3. Where a party to a joint and several note, on which the plaintiff sued the other party, having received one moiety from the former, but, at the time, there was also due one year's interest on the whole sum; held that, being liable to contribute *pro tanto*, he had a direct interest, and was an incompetent witness to prove the illegality of the note. *Slegg v. Phillips*, 6 Nev. & M. (X. B.) 360; and 4 Ad. & Ell. 852.

4. Since the 3 & 4 Will. 4, c. 42, in case for injury by negligent driving by the defendant's servant, the latter is a competent witness for defendant, without a release, his name being indorsed on the record. *Yeomans v. Leigh*, 2 Mees. & W. (XX.) 419. *S. P. Pickles v. Hollings*, 1 M. & Rob. (N. P.) 46d.

5. So, a party under whom the defendant justifies in trespass. *Crevey v. Bowman*, *Ib.* 496.

6. Where A., one of two partners, on entering the partnership, borrowed a sum of C., and gave her his note, which, after the dissolution, was indorsed to B., the continuing partner, and by him set off against a demand arising out of the part-



nership; held, that B.'s liability to C. being independent of the result of the action between the partners, C. was a competent witness for B. to prove the loan and transfer of the note to him. *Hatcher v. Seaton*, 2 Mees. & W. (x.) 47.

7. In trover for goods which had been fraudulently obtained from the plaintiff by a party, held that he might be called as a witness for the plaintiff. *Triebner v. Soddy*, 7 C. & P. (n. r.) 718.

8. In trover by bankrupt against his assignee, to try the validity of the fiat; held, that the official assignee was a competent witness for the defendant, in support of the bankruptcy. *Giles v. Smith*, 1 M. & Rob. (n. r.) 443.

9. On an issue directed by a court of equity as to the validity of a *modus*; held, that a party having a direct interest in establishing it was incompetent, and that the objection was not removed by the stat. 2 & 3 Will. 4, c. 42, s. 26, 27, which did not apply to the case of decrees in equity. *Stewart v. Barnes*, 1 M. & Rob. (n. r.) 472.

10. In case for infringing a patent, held, that the purchaser of a license to use it, was a competent witness for the plaintiff. *De Rosne v. Fairie*, 1 M. & Rob. (n. r.) 457.

11. A rate-payer, although interested in the borough fund, under 5 & 6 Will. 4, c. 76 (Municip. Corp.), held not an incompetent witness in a suit by the assignee of a corporation lease. *Doe v. Maple*, 3 Bing. N. S. (c. r.) 832.

12. In case, for libel on the plaintiff as hundred constable, purporting to be a memorial from the vestry of P., the vestry-clerk being called to produce the vestry books; held, that he could not refuse on the ground that he might thereby criminate himself. *Bradshaw v. Murphy*, 7 C. & P. (n. r.) 612.

13. Where a legatee of a specific chattel sold it, and the plaintiff, claiming to be the owner, brought *assumpsit* for the price, as money had and received; held, that the executor and residuary legatee was a competent witness to prove the property in the testator at the time of his decease. *Bowman v. Willie*, 3 Bing. N. S. (c. r.) 669; and 4 Sc. 387.

14. Where, by a rule of a dramatic society, all damages recovered by any member for infringements of their rights were, after payment of costs of suit, to go to the common funds of the society, held, that no member was a competent witness for another, although the action was on the party's own behalf, and the society in no way liable to the attorney for costs. *Planche v. Braham*, 8 C. & P. (n. r.) 68.

15. So, in trespass for entering house and damaging goods; plea, alleging the property in another by whose commands he committed the trespasses, held that such party was not a competent witness, and being liable to indemnify the defendant, it constituted an interest which could not be removed by indorsing the *postea*. *Green v. Warburton*, 2 M. & Rob. (n. r.) 105.

16. Where B., a partner and acting director,

procured shares in a joint stock company for a party not a partner, and received the purchase-money, but the party afterwards refused to accept the transfer of the shares and to pay the calls, alleging that he had been induced to purchase the shares by false representations, and fraudulent concealment as to the solvency of the company; held, that on an issue to try the truth or falsehood of those allegations, partners of the company were not incompetent witnesses for B. *Syme v. Brown*, 3 Cl. & Fi. (r.) 412.

17. The estate of a deceased party being liable to the reasonable expenses of the funeral, and not beyond, held, that a residuary legatee was an incompetent witness to fix the whole charge of the undertaker's bill on the defendant, who ordered it. *Green v. Salmon*, 3 Nev. & P. (q. s.) 338.

18. In trespass, the issue being whether the plaintiff or a party under whom the defendant claimed was entitled, held that such party was a competent witness for the defendant, as the verdict would not change the possession; *alter* in ejectment. *Rees v. Walters*, 3 Mees. & W. (x.) 527.

19. In ejectment for a parish house, held, that since the 54 Geo. 3, c. 170, s. 9, a parishioner having valuable property was a competent witness. *Doe v. Murrell*, 8 C. & P. (n. r.) 134.

20. Where a witness on the *voire dire* says he is released, if the release be in court, the insufficiency of the stamp may be objected to as invalid, but if it be not in court, he may be examined without producing it. *Quarterman v. Cox*, 8 C. & P. (n. r.) 97.

21. Where upon the retirement of one partner, A., the continuing one, B., admitted another, C., and upon the latter partnership being dissolved, B. became bankrupt; held, that B. was not a competent witness to prove an agreement by B. and C., to indemnify A. against the partnership debts of A. and B., as tending to exonerate himself. *Warren v. Taylor*, 8 Sim. (ch.) 599; and 1 Coop. (ch. c.) 174. And such agreement founded on a purchase of an interest in the concern was not a mere guarantee within the Statute of Frauds.

22. In case against a broker employed by the plaintiff to sell seed, for delivering it without payment; held, that the lighterman and ledgerman employed by the defendant in transhipping the seed, being himself liable to the plaintiff, if he did so without authority, was an incompetent witness to prove acts of the plaintiff sanctioning the delivery. *Boorman v. Browne*, 1 Ferr. & Dav. (q. s.) 364.

And see *Morish v. Foote*, 8 Taunt. 454.

23. In *assumpsit*, for clothes supplied to the defendant's servant; held, that the servant was a competent witness for the plaintiff, on endorsing his name on the record. *Robinson v. Ferreday*, 8 C. & P. (n. r.) 752.

24. Where the officer sold the goods taken in execution, after notice of the bankruptcy, and paid over the proceeds; held, that in an action



against the sheriff for money had, &c., the officer being substantially the defendant in the action, was not a competent witness. *Broom v. Bradley*, 8 C. & P. (N. P.) 500.

25. In case for obstruction of an easement, a former joint owner in fee with the plaintiff, who had conveyed all her interest in the moiety to the plaintiff, with a covenant for title; held, not a competent witness for the plaintiff, nor rendered so by indorsement under 3 & 4 Will. 4, c. 42, ss. 26, 27. *Steers v. Carwardine*, 8 C. & P. (N. P.) 570.

26. In an action on a charter-party, a joint-owner with the plaintiff, although not a registered one, held not a competent witness for the plaintiff without cross-releases. *Jackson v. Galloway*, 8 C. & P. (N. P.) 480.

27. Where an overseer was called to prove the notice of appeal; held, that he was properly rejected, none of the statutes rendering him (a party to the appeal) competent, and there being no distinction as to mere preliminary matters. *Reg. v. Bath Recorder, &c.*, 1 Perr. & Dav. (Q. B.) 460.

28. Rated inhabitants held admissible to prove that the premises sought to be recovered in ejectment by parish officers, is parish property. *Doe v. Adderley*, 3 Nev. & P. (Q. B.) 629; *S. P. Doe v. Bowles*, 1b. 632; overruling *Oxenden v. Palmer*, 2 B. & Ad. 236.

And see *Meredith v. Gilpin*, 6 Pri. 146.

29. Where a witness on the *voire dire* stated that, as the plaintiff's agent, he had employed the former attorney in the case, since deceased, that he had not been released, and no demand been made on him; held, that it not being shown that the witness had clearly made himself liable to the deceased attorney, nor under what circumstances the papers in the case had been transferred by his representatives to the present attorney, nor that the witness was in any way liable to him, and it being equally probable that the lien of the former one had been satisfied, the facts were not sufficient to warrant the rejection of the witness. *Shipton v. Thornton*, 1 Perr. & Dav. (Q. B.) 216.

And see *Bankrupt; Bill; Corporation; Covenant; Ecclesiastical Court; Habeas Corpus; Insolvent; Marriage; Ship; Trespass; Vestry*.

#### [B] ATTENDANCE OF—EXAMINATION OF—COMMISSION FOR.

1. In an action against a witness for not attending pursuant to his *subpoena*; on the issue, whether a reasonable sum for his expenses had been paid or tendered, it appearing that he had received a guinea on being served with a *subpoena* on the other side, and being asked if he would be satisfied with 1s., he consented to take it; held to be an admission that 1s. was a reasonable sum. *Betteley v. M'Leod*, 3 Bing. N. S. (C. P.) 405; 4 Sc. 131; and 5 Dowl. (P. C.) 481.

2. The affidavit for an attachment against a

witness for not obeying the *subpoena* must state that the party was a material witness. *Tinley v. Porter*, 5 Dowl. (P. C.) 744.

3. The affidavit to ground an attachment for not obeying a *subpoena* must state the showing the writ at the time of the service, and the party may avail himself of the defect appearing on the affidavit for the motion used against him. *Gorden v. Cresswell*, 2 Mees. & W. (Ex.) 319; and 5 Dowl. (P. C.) 461.

4. It is not necessary to state the names of the intended examiners on applying for a rule for a commission, as it may be done when the rule is discussed. *Fearon v. White*, 5 Dowl. (P. C.) 713.

5. The commission for examination of witnesses in India under 13 Geo. 3, c. 63, s. 44, ought to recite the pleadings at length. *Murray v. Lawford*, 7 Sim. (Ch.) 139.

6. A commission to examine witnesses directed to the members of the Court of Commerce at Hamburg without the usual clause requiring the commissioners to be sworn, allowed. (*Littledale, J. dub.*) *Clay v. Stephenson*, 3 Ad. & Ell. (N. B.) 807.

7. To entitle the examinations of witnesses, taken under a judge's order, to be read by either party, it must be shown that they are abroad, and the statement in their own depositions is not sufficient. *Proctor v. Lainson*, 7 C. & P. (N. P.) 630.

8. The statement of a subscribing witness, not produced, of his place of residence, is inadmissible, nor mere hearsay evidence of his having gone abroad. *Doe v. Powell*, 7 C. & P. (N. P.) 617.

9. Where the father of the witness proved his having enlisted in a regiment, which, upon inquiry at the War-office, he was told had sailed for India; held sufficient to let in proof of his handwriting. *Wyatt v. Bateman*, 7 C. & P. (N. P.) 586.

10. Where the witness refreshes his memory by referring to a book, it must be produced. *Howard v. Canfield*, 5 Dowl. (P. C.) 417.

11. Evidence of statements made by a witness on other occasions relevant to the matter in issue, and inconsistent with his testimony on the trial, are always admissible, whether parol or written; in the former case he must be asked whether he ever said, &c., to a party named, or other circumstance sufficient to fix the occasion; in the latter the writing must be put in his hand, and he may be asked if it is his handwriting; if he admits the conversation or writing, no other evidence of it need be given. *Crowley v. Page*, 7 C. & P. (N. P.) 789.

12. Where three out of four defendants suffered judgment by default, held that one of them might be subpoenaed to produce a deed. *Colley v. Smith*, 4 Bing. N. S. (C. P.) 265; and 6 Dowl. (P. C.) 399.

13. Where a paper is put into a witness's hand, and he is cross-examined upon it, which entirely fails, the opposite counsel is not entitled to look at it. *R. v. Duncombe*, 8 C. & P. (N. P.) 369.



14. Where a witness, called to a particular point, on cross-examination gives a different account, the party calling him is entitled, on re-examination, to examine him as to facts tending to show that he had been induced to betray that party. *Dunn v. Aslett*, 2 M. & Rob. (N. P.) 122.

15. Where the plaintiff in an action for a malicious arrest, had been examined on an indictment for perjury against a witness in the original action, and on the cross-examination of a witness in the second action, a part of his statement on the trial of the indictment had been got out; held, that upon the re-examination of the witness, only so much of the remainder of the plaintiff's statement could be inquired into as tended to qualify or explain the statement elicited on the cross-examination. *Prince v. Samo*, 3 Nev. & P. (Q. B.) 139; questioning the doctrine laid down in *1 Stark. Ev.* 180.

16. Where the attorney, not expecting the cause to come on, allowed a witness to depart until the next day, and in the meantime the cause was called on and disposed of, held that the witness could not be deemed guilty of contempt to found an attachment. *Furrah v. Keat*, 6 Dowl. (P. C.) 470.

17. Where after a witness for the plaintiff had been examined, it was proposed to prove that he was the real plaintiff on the record; held, that such evidence was properly rejected, as the objection ought to have been taken on the *voir dire*. *Dewdney v. Palmer*, 7 Dowl. (P. C.) 177; and 4 Mees. & W. (EX.) 664.

18. The situation in which a witness stands with respect to either party, gives no right to cross-examine, unless the witness shows himself an unwilling one, nor can evidence be given for the sole purpose of discrediting him, though others may be called to prove the facts denied, and so incidentally to discredit the witness. *R. v. Ball*, 8 C. & P. (N. P.) 745.

19. A rule to examine on interrogatories a witness alleged to be confined to her bed by infirmity, refused, without the affidavit of a surgeon stating the nature of the complaint, and belief that the witness would never be able to attend the trial. *Davis v. Lowndes*, 7 Dowl. (P. C.) 101.

20. In case against a witness for not attending with documents, &c., pursuant to his *subpoena*, at the assizes, alleged to have been holden on the

31st March; held, that the action was maintainable, although the writ was not served until the 2d April, the cause not being tried until the 6th; held also, upon general demurrer, that the averment that the defendant could and might have appeared and given material evidence, &c on the trial, was equivalent to an averment that the trial took place at the time and place mentioned in the *subpoena*, although the want of an express averment might have been bad on special demurrer; held also, that the allegation that such documents were material evidence for the plaintiff, and that by reason of the defendant's non-attendance the plaintiff was nonsuited, amounted to a sufficient averment that the plaintiff had a good cause of action. *Davis v. Lovell*, 7 Dowl. (P. C.) 178; and 4 Mees. & W. (EX.) 678.

And see *Mullett v. Hunt*, 1 Cr. & Mees. 752.

21. Costs of the attendance of a member of the firm, (being the attorneys of the plaintiff,) as a witness, allowed. *Butler v. Hobson*, 5 Bing. N. S. (C. P.) 128; and 7 Dowl. (P. C.) 157.

And see *Attorney; Costs; Practice*, (C. L.)

## WRIT OF RIGHT.

1. The demandant is bound to allege in his count, as well as prove, a seisin in his ancestor within 60 years. *Dumday dem. Hughes ten.*, 3 Bing. N. S. (C. P.) 434; and 4 Sc. 209.

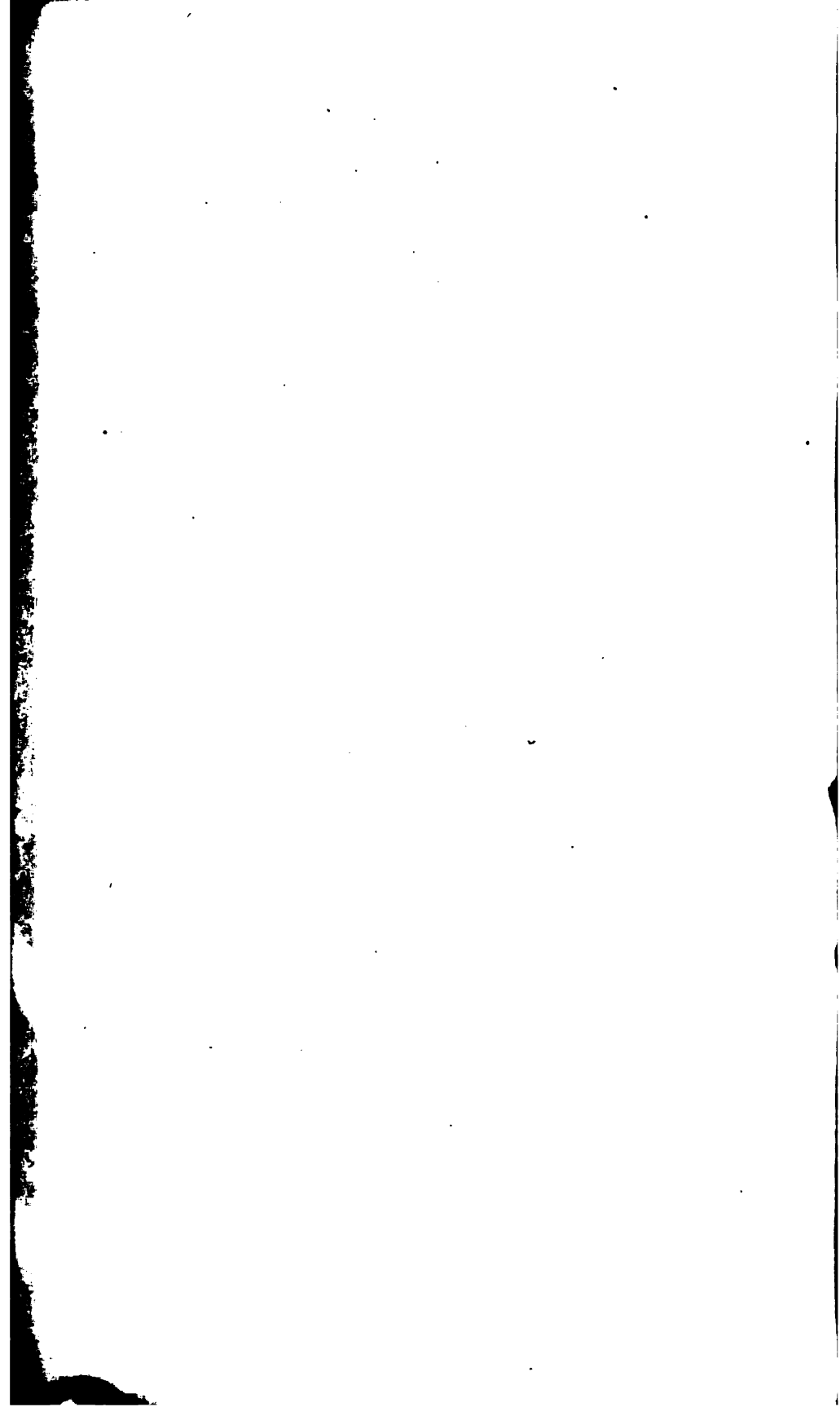
2. Where the tenant succeeded on demurrer to the count, held that no issue having been joined on the *mise*, final judgment could not be signed, and therefore reversed on error. *Rishton v. Nesbitt*, 6 Ad. & Ell. (X. B.) 103.

3. The Court refused to change the *venue* in a writ of right, upon affidavit merely that the tenant possessed great estates and influence in the county. *Davies dem.*, Lloyd ten., 4 Bing. N. S. (C. P.) 711; and 6 Sc. 435.

4. Where the parentage is to be made out on the paternal side of the ancestors of the demandant, the course is to go first to the more remote, and exhaust that before going to the less: held also, that where claiming as heir, he may make out his claim at any time, unless barred by any statutory limitation. *Davies v. Lowndes*, 5 Bing. N. S. (C. P.) 161; S. C. 1 Bing. N. S. 597, A. D. 1835; and 6 Sc. 738.











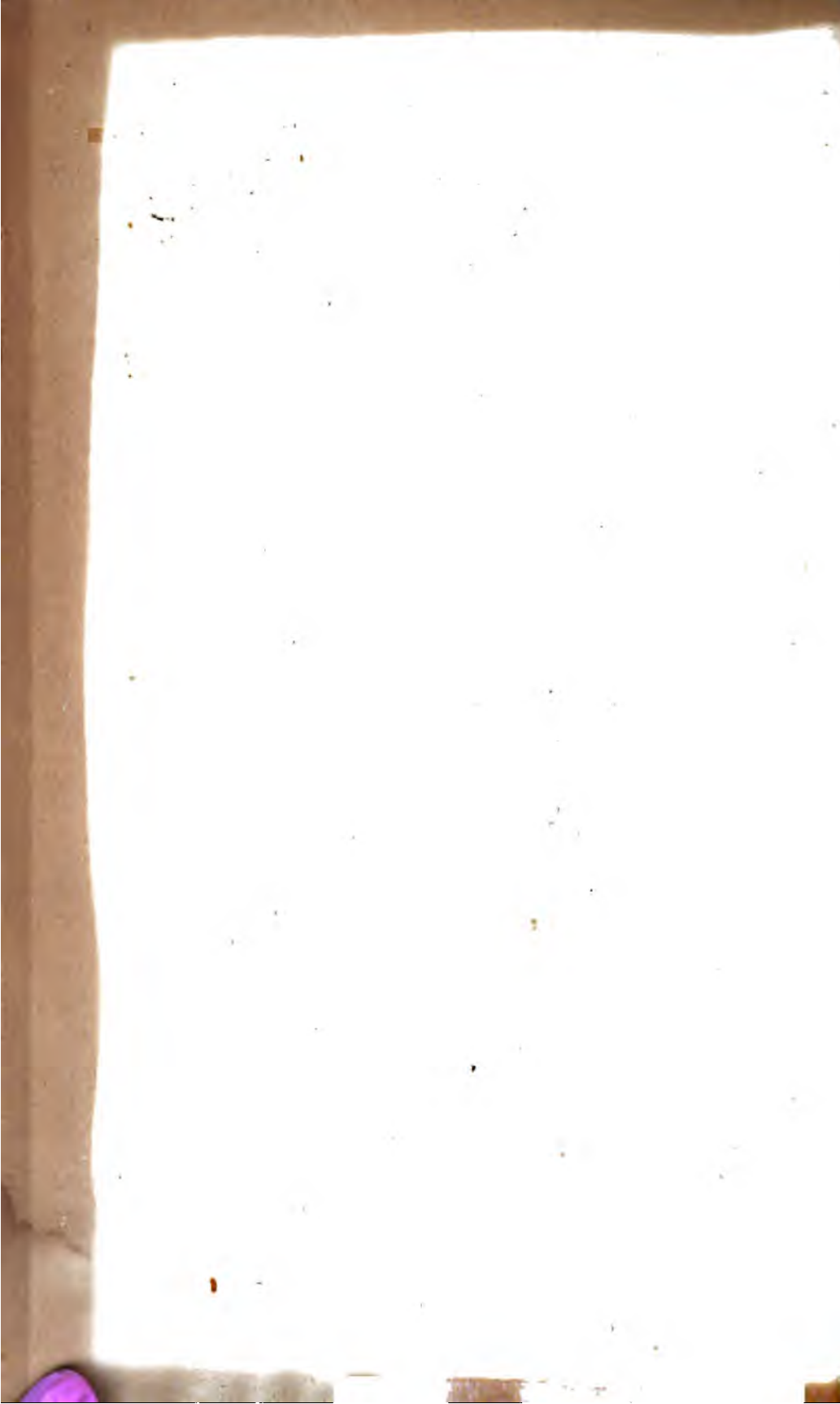














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